

SOUTH AFRICA / JUDGMENT

Competition Commission v Media 24 Proprietary Limited (CR154Oct11/REM144Sep15) [2016] ZACT 86; [2016] 2 CPLR 968 (CT) (6 September 2016) [2016] ZACT 86

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Merle Holden

CASE / FILE NUMBER

CR154Oct11/REM144Sep15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR154Oct11/REM144Sep15

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

MEDIA 24 PROPRIETARY LIMITED

Respondent

Panel

: Norman Manoim (Presiding Member)

: Yasmin Carrim (Tribunal Member)

: Merle Holden (Tribunal Member)

Heard on

: 4 April, 7 April and 8 April 2016

Reasons

Issued on : 6 September 2016

Reasons

for Decision

[1] On 8 September 2015 we found that Media 24 Proprietary Limited ("Media24") had contravened section 8(c) of the Competition Act, Act 89 of 1998 ("the Act"). Our reasons for doing so were set out in that decision which, to avoid confusion, we will refer to as the "Merits Decision". [1]

[2] The essence of the Merits Decision was that Media24, had used one of its titles, Forum, as a fighting brand, to engage in predatory pricing and thus drive out a rival publication, Gold Net News ("GNN") from the market, which once accomplished re-established the dominant position of its other title, Vista. (Note Media24 closed down Forum some 10 months after GNN had exited the market.)

[3] The Merits Decision did not deal with the issue of an appropriate remedy. This is because both parties wished us to decide the merits first.

[4] However the Merits Decision disposed of one possible competent remedy, because the finding was made in terms of section 8(c) of the Act, and not 8(d) (iv). An administrative penalty cannot be imposed on a respondent for a first time contravention of section 8(c). Since it is common cause that Media24 has not previously contravened the Act, an administrative penalty is not competent.[2]

[5] This does not mean that other remedies cannot be imposed and that is the question that these reasons address.

Procedure Followed

[6] Prior to the oral hearing on remedies we requested both the Commission and Media24 to make written submissions on an appropriate

set of remedies. This was to see if a consensus could be reached.

[7] Both agreed that a declaratory order was appropriate so we need not consider this issue further. The declaration is set in paragraph 1.1 of our order.

[8] That was as far as the consensus went. Since there was a disagreement on a range of issues we decided that a further hearing

devoted to remedies would be necessary.

What were the differences in approach?

[9] The Commission in addition to the declaratory order seeks the imposition of an interdict on Media24 from publishing a further title in the Goldfields area for six years ("the Interdict Remedy") and requires it to sponsor the entry of a new rival in the amount of R 10 million ("the Investment Remedy").

[10] Media24 rejects both the Interdict Remedy and the Investment Remedy as proposals for remedies as we go on to discuss. In turn it offers what it terms a "Goodwill Gesture Remedy" which involves funding entrepreneurial training for would-be journalists in the amount of R 945 000.[3] The Commission considered this remedy inadequate.

[11] During the course of the remedies hearing we canvassed views of the parties on another type of remedy. This remedy involved requiring other business entities in the Naspers group, to which Media24 belongs, to provide credit for printing and distribution services to rivals of Vista, on certain terms and conditions. Its object was to lower barriers to entry in this market.

Our approach

[12] In order to decide on an appropriate remedy, we have to determine whether competition has been restored to the market. This

is the first dispute of fact we have to determine and what we go on to consider in PART A of this decision. If we find that competition

has not been restored, then a restorative remedy is appropriate. If a restorative remedy is appropriate the next question is what form it should take? We consider this latter question in PART B of this decision.

PART A:

HAS COMPETITION BEEN RESTORED TO THE MARKET?

[13] The first dispute of fact is whether competition has since been restored to the Gold Fields market. In the Merits Decision we found that:

"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. "[4]

[14] However the remedies hearing took place in April 2016. The market evidence informing the merits finding, related to circumstances as they were in 2009 i.e. seven years earlier. Media24 maintains that in this period the market has since returned to competition, thus making a restorative remedy unnecessary, something the Commission seeks to refute.

(i) Legal test: who bears the evidential burden?

[15] Ordinarily we would decide the merits and the remedy at the same time following a single hearing. In this case, as noted, at the request of both parties, the issue of remedies was left to a later hearing. The time between the end of the hearing of evidence on the merits and the beginning of the hearing on remedies was approximately 20 months.

[16] If we had heard both the merits and remedies at the same time once the Commission had discharged the onus of proving anticompetitive effects in respect of the merits, it is obvious that it would not have had to again repeat this process for the purpose of proposing a remedy.

[17] Should the fact that there has been a time lag between the decision on the merits and the hearing on remedies make any difference to the Commission's position? The Commission argued that it should not. Once the Tribunal has made its finding on the merits, absent evidence to the contrary led by Media24, the findings of fact the Tribunal made in the Merits Decision, still apply.
[5]

[18] For its part, Media24 has avoided tackling this issue head on, instead relying on the argument that the Commission has an overall onus to prove its case.

[19] In our view the argument of the Commission on this point is correct. Once the Tribunal has made a factual finding on the merits that the prohibited practice has led to a lessening of competition in the market those factual issues do not need to be reconsidered for the purpose of imposing a remedy. However if the hearing on remedies and the merits do not take place at the same time, the Tribunal has a discretion to hear evidence as to whether market circumstances has since changed. Since seven years have elapsed since the last evidence was heard on market circumstances we have decided to consider whether market circumstances have changed. However Media24 as the respondent bears the evidential burden to show that competition has since been restored to the market place. This is not an unfair shifting of the burden because the respondent in this case is best placed to lead this evidence.

(ii) The factual issues

[20] Given this finding we start off considering what evidence was presented by Media24 to establish that competition had returned to the Goldfields market.

[21] In its written submission Media24 alleged that the market was characterised by vibrant competition from a number of players the most significant of which was a new entrant that had entered the market since our Merits Decision. This entrant is a weekly publication known as The Media News.

[22] At the first pre-hearing to regulate the remedies process Media24 indicated that it was considering calling

the owner of The Media News, Mr Enrico Pantene as its witness. The arrangement was that if after interviewing him Media24 decided not to call him, they would inform the Commission, which could then decide if it wanted to call him. At that stage the Commission was not aware of the existence of The Media News.

[23] Media24 subsequently indicated that it had decided not to call Pantene. The Commission contacted him and then obtained a witness statement from him as we discuss later.[6]

[24] Media24 ultimately elected not to call any other factual witness even though it was entitled to do so. We draw the inference that had it been able to adduce evidence that Vista was losing market share or having to lower prices to levels prevalent before GNN's exit they would have called a witness to attest to this.

[25] We say this for the following reason.

[26] We know from the merits hearing that Media24 staff report regularly and comprehensively, to both the Bloemfontein office and Head Office on the fortunes of their publications including reflecting on the competitive environment. None of this evidence, which would have been very useful, was forthcoming in the remedies hearing. In any event even if the reporting culture had changed from what it was during the complaint period, one would have expected one of Vista's staff to be able to attest to the state of competition in the market and its effect on Vista. No witness would be better placed to do this than someone working for Media24.

[27] Instead of this possible evidence, it chose to rely on a report submitted by its economists, Genesis. The economists also did not rely on any evidence that had emanated from Media24 other than spread sheets used in an exercise to compare common advertisers. Instead they conducted research on other publications distributed in the Goldfields area in terms of the following criteria; print order, advertising rates, pagination (i.e. number of pages), distribution footprint, language and where known, and the details of who the publisher was.

[28] The source of this information was based on research conducted at libraries and publicly available information. Since the Commission did not contest the data in this survey we will assume that it is correct.

[29] The other source was an advertising overlap comparison. They selected various publications in the Goldfields area and compared how much their advertising overlapped with that of Vista. A table was prepared setting out the overlaps in percentages. [7]

[30] Based on this, Genesis advanced two propositions; first, that there had been new competitive entry into the market since the exit of GNN and Forum. Second that weekly community papers which had been in the market at the time of the closures of the latter two were still in the market.[8]

[31] Mention was made of the entry of various new papers. Of these, they considered The Media News to be the most significant. Of the others mentioned, one was a Media24 publication, which has since come and gone, as we discuss more fully later in the section on the interdict, while two, The Article and Kasi are very recent entrants.

[32] The Article is an English language publication which entered the market in January

2016. The Article's advertising rates are half those of Vista's and this is not surprising as its distribution is one third of the latter's size. Its typical pagination is 8 pages compared to Vista's typical pagination which ranges from 32-48 pages.[9] As part of its report, Genesis performed an exercise to gauge which publications shared common advertising with Vista and if so what percentage of advertising overlapped. The thesis behind this was that the greater the overlap the more likely the publication exerted any competitive pressure on Vista.

[33] However in respect of The Article, Genesis' advertising overlap exercise

suggested that Article rated the lowest with a 3.7% overlap with Vista, when compared with the 8 others it had selected in this

sample. On these facts The Article can hardly be regarded as a significant competitive threat to Vista.

[34] The next new entrant is Kasi. It too compares modestly with Vista. Kasi, is a weekly publication published in Bloemfontein with its target market identified as black readers.[10] It has a typical pagination of 8 pages and its advertising overlap with Vista is 7.9%.[11] It is further differentiated in terms of language. Whilst having some English content. its other main language is Sotho. Vista on the other hand uses English and Afrikaans content.

[35] Dumelang News entered earlier, in 2012. But we are told very little about it despite it having been in the market for four years. Presumably Media24 with its presence in the market could say a bit more about it than what the economists have derived from libraries, but it did not do so.

[36] Dumelang News is based in Mangaung (Bloemfontein) so the extent of its presence in the Goldfields area is not clear. Its advertising rates are higher than those of Vista's despite having a lower print order. Its advertising customer base is described as mainly emanating from government and Genesis does not include it in its advertising overlap scenario. On these facts, it too does not appear to be a viable competitor. Without going into lengthy detail and assuming Genesis' provided information is correct, the remaining competitors do not appear to be viable competitors to Vista. This is because they are either distinguishable in terms of content, geography, language format or frequency or are minor players who do not appear to constitute a suitable alternative to Vista.

[37] In contrast to the desk research presented by Media24 as evidence, the Commission presented three witness statements and viva voce evidence from two of these witnesses. Granted all these witnesses were from The Media News, but as it was considered the most likely successor to GNN as the closest competitor to Vista in the market, their evidence was highly relevant.

[38] Pantene the founder of The Media News, as noted, gave the Commission his witness statement, but then, despite being subpoenaed

did not arrive to testify. No explanation was given for his absence. Nevertheless, since both sides sought to rely on his witness

statement, admittedly different portions of it, we will also rely on portions of it, to the extent it has not been contested or where it has, to the extent it has been confirmed by those who gave viva voce

evidence .[12]

[39] Pantene's evidence is relevant to two aspects. First; the difficulty of entering the market and second, once having entered, in sustaining a publication in the face of competition and a sceptical customer base.

[40] Media24 relied on the fact of his paper's entry and his claim that his initial print order was 50 000.[13] This, it said showed the market was susceptible to new

entrants and the fact that Pantene had entered and as at date of our hearings was still there, was proof of this.

[41] However read as a whole Pantene's statement reveals ambition without fruition. Pantene entered the market

despite having no experience in the media industry but with his general business experience. It appears that his business

strategy was premised on getting government advertising as the mainstay of the publication. The promised advertising did not materialise. Despite an initial print order of 50 000, an order larger than that of Vista's 35 000, The Media News soon experienced

decline, both in print order and advertising.

[42] The Commission suggested that the decline was due to the exclusionary strategies employed by Media24, whilst the latter suggested that it was due to a number of bad strategic calls made by Pantene.[14]

[43] However unlike Media24 and despite not having the evidential burden, the Commission called the only viva voce evidence. The Commission's evidence covered two themes. That entry into the Goldfields market while possible, was proving unsuccessful and second that Media24 had again engaged in a predatory strategy, using another paper as a fighting brand. We deal with this latter point later when we discuss the interdict.

[44] The Commission called as viva voce witnesses Ms Anneline Kruger and Ms Lorette Douglas, the former a current employee and the latter an erstwhile one, of The Media News. Both had been engaged in selling advertising for The Media News.

[45] Their evidence was consistent on the following aspects:

- that Media News was a declining force and had struggled in the market;
- that to gain acceptance in the market, advertisers had to believe a publication was likely to last; and
- that Vista did not have many viable competitors.

[46] Although Kruger and Douglas were cross-examined their version on these issues was not discredited.

[47] Neither was sanguine on the prospects of The Media News. Kruger's evidence which was the stronger on this point was that

Media24 could not last on its current finances

[48] In cross-examination counsel for Media24 suggested to Kruger that there was no basis to her assertion, and that Pantene was still, as per his witness statement, wanting the paper to succeed.

[15] Her response to this was Pantene was: "... a little bit idealistic..."[16]

[49] It was then put to her that she did not have personal knowledge of the paper's finances and was thus in no position to comment on its prospects. Her response to this was that she did not need access to the finances to come to her conclusion. As she put it: "I don't do the finances, but yes, I can see what's going on around me clearly."[17]

[50] Although Pantene's witness statement does contain paragraphs evidencing his determination to continue he puts up no

facts for why he might later be expected to succeed. Indeed the facts he does put up, point to the paper's difficulties. Inter alia he stated in his witness statement that:

- When he started, the print order was 50 000 but had dropped to 15 000.
- Although the paper attracted advertisers initially they have since returned to Vista or stopped advertising with The Media News.
- He had to heavily discount rates. He mentions his half page rate going from R 2850 to as low as R 1000.
- The pagination decreased from 16-20 pages to 8 pages by November 2015.
- Late payment to the printer, which demanded upfront payment, had resulted in delays in printing.

- Although he had budgeted for initial losses in the first year, actual losses were more than double this amount and the profitability of the paper was declining, not improving. [18]

[51] There is little doubt that The Media News, the strongest candidate put forward as evidence of new competitive entry, is a troubled publication. Despite its ambitious start by an entrepreneurial owner it has stumbled in the market place and lost

credibility with advertisers which is the lifeblood of sustained entry for a newspaper that needs to survive on this revenue for its income.

Conclusion

on facts

[52] We conclude that Media24 bears the evidential burden to establish that the market had since the exit of Forum and GNN, been

restored to competition. We find that it has failed to do so. The Commission, despite not having the evidential burden, has led

sufficient evidence to suggest that market conditions have not materially changed since 2009 and that despite evidence of some

entry, this has not challenged the dominant position and market power of Vista. The competitive position of the market remains as it was when we gave our decision on the merits. Therefore consideration of a remedy to restore competition is justified. We go on to do this in the next section.

PART B

WHAT TYPE OF RESORATIVE REMEDY SHOULD BE IMPOSED?

[53] We now turn to discuss the three proposed remedies, the Interdict Remedy and the Investment Remedy proposed by the Commission and the "Credit Guarantee Remedy" which we have adopted and refined in our order. We have not made any comment on the alternative remedy proposed by Media24, the Goodwill Gesture Remedy. The Commission was correct in its criticism of its inadequacy. The remedy was of all proposed the least likely to restore competition to the market and was remarkably meagre.[19] Given that it is not contained in Media24's latest submission it appears to no longer be persisted with and no further comment on it is necessary.

(i) Interdict remedy

[54] The Commission has proposed an interdict as a component part of the three remedies it proposes.[20] The remedy as now formulated reads as follows:

"Save in the event that the Commission consents to it doing so, Media24 is prohibited for a period of six years from publishing more than one community newspaper in English or Afrikaans in the Goldfields market..."[21]

[55] It views this remedy as complementary to the Investment Remedy, which we discuss later. Media24 opposes the interdict on both legal and factual grounds.

[56] The Commission had proposed an interdict from the outset when it filed its initial submission. [22] It pointed out, correctly, that since Forum, the vehicle through which the predation strategy had been carried out, had been closed down there was no point in granting any interdictory relief against it. However it still maintained that an interdict was appropriate against Media24 to prevent it from launching a similar fighting brand whilst Vista was still in the market.

[57] Initially, the Commission had not based its case for an interdict on allegations that the fighting brand strategy had re-occurred. Rather the argument was that an interdict was necessary to protect a new entrant from a repetition of the unlawful conduct whilst it gained market traction.

[58] After consulting with Pantene, the Commission bolstered this aspect of its case by alleging that it had now got evidence that Media24 was, post 2009, again a recidivist.

[59] Pantene's evidence (we only have his witness statement on this point; recall he did not present himself to testify viva voce) was that following the establishment of The Media News it had immediate success and that " Vista was intimidated by this and the competition that it posed. "[23]

[60] The Media News, he claimed had much lower advertising rates than those of Vista.

[61] He then mentions that Media24 introduced a new paper in the market called The Express which was about the same length as The Media News, eight pages.[24] His suspicion (in fairness he doesn't claim absolute certainty on this point) was that The Express entered the market after The Media News had entered. The Express, he alleged, charged much lower rates than did The Media News.[25]

[62] He also alleged that Vista then began to charge lower rates - at least this is the inference we are expected to draw from what he observes - because certain advertisers who had previously advertised with him, because they could not afford to advertise with Vista were now advertising with Vista.[26]

[63] The suggestion of Vista lowering its rates to advertisers who advertised in The Media News is then taken up by Kruger and Douglas who each mention specific examples.

[64] In its cross-examination of these two witnesses, Media24's counsel presented spread sheets emanating from Vista's records which, prima facie, suggested that these customers had not been charged the lower rates these witnesses alleged that they had been as told by customers concerned. The witnesses of course could not comment on the accuracy of the Media24 spread sheets nor could they do more than repeat what they had been told by customers. This aspect of the evidence is thus left unresolved.

[65] However it is not clear what the Commission sought to achieve by this evidence concerning Vista's pricing conduct during this period. If it was alleged that Vista's pricing was itself predatory, then the interdict, which applies only to prohibiting a new entrant from Media24, does not remedy this. If the conduct was a combination of the two

- i.e. Media24 using both Vista as a price cutter in conjunction with a new predatory fighting brand in the form of the Goldfields Express, then again the remedy was inadequate as it does not apply to Vista nor was any theory put up that Vista was indeed pricing unlawfully. It was it seemed a throwback to the targeted pricing theory that had originally been put up in the complaint referral which we had struck out prior to the commencement of the merits case for lack of particularity.[27]

[66] This takes care of the evidence concerning Vista's pricing conduct. What remains for us to consider is the more pertinent

evidence used to support the basis for the Interdict Remedy. Whether the entry of Goldfields Express was evidence of recidivism by Media24 i.e. was Media24 reintroducing a fighting brand into the market to eliminate The Media News?

[67] Media24 alleges that Goldfields Express entered the market in October 2013 a year before The Media News had entered.[28] The Commission does not contest this fact and we must accept that it is correct. This would suggest that Pantene's theory of it being introduced as a predatory vehicle to counter his paper is incorrect. Why would the predatory vehicle have been introduced before the entry of its prey?

[68] Goldfields Express according to Media24 was closed in September 2015.[29] The Commission, but not any of its witnesses, suggested in argument that Goldfields Express was closed down in the same month that the Tribunal handed down its decision on the merits. But this point is speculative. There is no evidence to indicate that there is any connection between the two events.

[69] Media24 did not lead any oral evidence concerning Goldfields Express. The most we have is Exhibit A which comprises a few pages of an edition dated October 2013, evidencing it preceding the entry of The Media News (early November 2014) and a business plan for the paper. The business plan was introduced to suggest that the publication was intended to be differentiated from Vista because its focus was on " ... a strong township community editorial [w ith]content in English"[30]

[70] Admittedly Media24 did not lead any evidence about why Goldfields Express was opened in 2013 and why it was then closed in

2015; but it does not bear the onus to prove that The Interdict Remedy is an appropriate remedy, the Commission does. The Commission's case is that Media24 has been a recidivist in the Goldfields area, by repeating the strategy of using a fighting brand even after these proceedings had been launched and hence an interdict remedy was necessary.

[71] As Pantene's evidence on this aspect cannot be relied on; and absent any other evidence the paper was pricing below some predatory measure of cost or whether it was indeed a competitor of The Media News; the Commission had no other evidence of recidivism.

[72] In the absence of evidence of recidivism the question is whether the Interdict Remedy can be justified simply on the facts of the case on the merits. The only remaining justification for the interdict then would be that it is necessarily ancillary to the restorative remedy proposed by the Commission i.e. its logic would be that in order to ensure that new entry is successful, Media24 has to have one hand tied behind its back to protect a new competitor while it finds its way in the market place. However even the justification for that case has not been made out.

[73] The danger with the speculative nature of the proposed interdict is that it is a supply limiting, not a supply increasing type of remedy which may serve to harm consumers by denying them choice, without necessarily having a demonstrable benefit in ensuring the entry of an effective competitor.

[74] The logical interdict would be one that prohibits Media24 from introducing a fighting brand into the market. That is the conduct found unlawful, not the conduct of publishing another title similar to Vista. However the Commission is aware that such a remedy would be ineffectual given the history of the litigation of this case. If the interdict was to prohibit a fighting brand, it would require the same evidence as that of a new complaint referral, except that if it succeeded on the merits it would have a penalty as a remedy. However the declaratory order and the consequences for a repeat contravention of section 8(c), discussed earlier, serve the same deterrent purpose and would require the same evidential burden.

[75] For this reason no doubt the Commission sought an interdict in the form that it did. To enforce the interdict it would only have to prove that Media24 had published the title in question in the Goldfields area. It would not have to prove the publication was a fighting brand. However, whilst this is understandable, this remedy is overbroad, as it does not restrict merely unlawful conduct in its sweep, but lawful conduct as well. As mentioned above, in terms of the interdict as framed by the Commission, lawful pro-competitive supply increasing conduct is condemned at the same time as unlawful conduct.

[76] In our view the interdict is not an appropriate remedy on these facts. The declaratory order and the fact that for a repeat

contravention Media24 would face the possibility of an administrative penalty even if the finding is made under section 8(c) of the Act, constitute a sufficient disincentive for Media24 to repeat the conduct found in the merits case to have contravened the Act.

(ii) The Investment Remedy

[77] The Commission also proposed an investment remedy on the following terms: Media24 would be required to fund a new entrant into the Goldfields market to the amount of R10 million. The funding money would be paid to the Media Diversity Development Agency ("MDDA") a government fund that funds new media. The MDDA would decide on an appropriate candidate

and would administer the funds. The amount had been calculated based on the budget a hypothetical new entrant would require over three years as start-up capital. Three years was regarded as the time a new entrant would need to enter the market and a print order of 25000 was considered the necessary size for a publication that would constitute an effective competitor to Vista. Vista has a print order at present of approximately 35 000 and its pagination ranges from 32 to 48.[31]

[78] This remedy was given the most attention during the hearing with no consensus emerging between the two parties on any of the issues.

[79] In summary disagreement arose in the following areas:

- A legal debate over whether the subsidy amounted to a disguised penalty. Media24 argued that if a penalty was not a competent remedy neither could the Tribunal order it to pay a subsidy to rivals. A subsidy and a penalty it argued, were two sides of the same coin.
- Policy arguments over the principle of the subsidy. Genesis argued that subsidies distort competition, because they work to the disadvantage of other competitors which don't receive the subsidy and thereby distort market mechanisms. For instance with the cushion of a subsidy the recipient might charge lower rates for advertising not based on superior efficiency. Genesis relied on European competition policy arguments that oppose state subsidies.
- The methodology of calculating the subsidy. Genesis argued that if a subsidy was to be ordered it should exclude certain costs such as sunk costs.[32]
- Disputes over methodology naturally led to a dispute over the size of the subsidy. Unsurprisingly the Commission set this figure higher than Media24 did. It initially set this amount at R 15 million it was then revised down after the Commission adopted a change in its methodology for calculating what costs were appropriate to sponsor. The revised figure then went down to R 8 million rand. However by the time of final argument the Commission had come back up to a figure of R 10 million.[33] Genesis, whilst still arguing that a subsidy was inappropriate, said that if it was decided to order one, their final amount submitted at the hearing should be set at R3 362 449.[34]
- Media24 was opposed to the fund being administered by the MDDA. It did not advance any reasons for this.

[80] We do not believe that the Investment Remedy is appropriate. Our reasons turn on a simple point which we consider below and we therefore do not need to consider the other arguments raised by Media24.

[81] The rationale for the remedy is to restore competition to the market that was lost through the exit of GNN as a result of the unlawful predation strategy perpetrated by Media24.[35]

[82] We have no criticism of this rationale given our earlier finding that competition has not been restored to the market. The question is whether the fund will be effective in doing so?

[83] If it is we can then consider the other objections that have been raised by Media24.

[84] In our view it will not be an effective remedy. The problem with the fund remedy is that there is very little certainty that the recipient will use the funding to compete effectively with Vista. The draft terms do not require that it does. The closest they do this is in paragraph 4 which states "the purpose of the fund is to establish or increase competition in the Goldfields community newspapers market."[36]

[85] Second, although the fund is not restricted to one recipient it has been designed for one recipient. The careful calculation of the budget only presupposes a single entrant.

[86] This makes the fund remedy very risky. What guarantee is there that the recipient will be successful, compete directly with Media24 as opposed to differentiating itself from it or that it will not use the subsidy up and then exit? There is no existing candidate suggested for the recipient and this is left to the discretion of the MDDA, despite the laying down of certain guidelines. The hit and miss quality of this remedy (despite the Commission's hard work, it has to be acknowledged, in working out a carefully considered budget for it over three years) suggests that the cost benefit of it, make it inappropriate to achieving its stated objective.

[87] For this reason we have decided not to grant this remedy and opted to impose the credit guarantee remedy, as discussed below. In making this decision we have not taken a view on the legal argument (that the subsidy amounted to a disguised penalty or the other policy objections relating to a subsidy.

(iii) Credit Guarantee Remedy

[88] The Credit Guarantee Remedy was offered by Media24 as a response to a query from the Tribunal about a possible remedy as an alternative to the Investment Remedy discussed above.

[89] We first discuss the rationale for this remedy by explaining the high barriers to entry community newspapers faced. We then go on to discuss the specifics of this remedy. During the course of the merits hearing as well as the remedies hearing, one of the major barriers to entry or existence in the market for a community newspaper was that typically it was not part of a vertically integrated group, like Vista is in respect of Naspers and Media24, which give it access, in-house, to printing and distribution.

[90] As mentioned earlier, during the course of the remedies hearing the Tribunal enquired if a remedy could be crafted to deal with the major barriers to entry in the community newspaper market viz. funding the costs of printing and distribution.

[91] Let us first consider distribution. This is the third biggest nominal expense of a community newspaper, after printing and salaries. Although third, distribution if it is to be efficient, has an opportunity cost far higher than its accounting cost. Both Mr Hans Steyl during the merits hearing and Douglas during the merits hearing indicated how much the reputation of the paper was undermined if distribution was inefficient. Lack of proper distribution in Welkom had led Steyl to choose Media24's logistics and distribution division On the Dot. Pantene says in his witness statement that he had tried to use On the Dot for distribution and they had given him a quote but they never reverted to him thereafter. [37] Kruger recalls Pantene having had conversations with On the Dot on three occasions in her presence and although she was not aware of whether a quotation was given she supports his version that On the Dot never came back to him to her knowledge. [38]

[92] The Media News had tried its own distribution solution and from testimony of Pantene this was not successful. Ms Kruger described in her testimony the difficulty The Media News was having with its distribution. It had used two distribution firms and then was relying on one of its employees to do the job.

"MS KRUGER: No, its quite impossible for one man to run a team for the whole of the Goldfields, it's not humanly possible at all."

ADV NORTON: So you are still getting complaints about distribution?

MS KRUGER: Yes, that's correct. "[39]

She linked its distribution problems to the loss of advertising.

"ADV NORTON: And this was the time when several of your regular advertisers were starting to reduce their advertising in Media News?

MS KRUGER: Yes, they did, mostly because of distribution, not anything else."

[93] As noted earlier the biggest expense for a community newspaper are its printing costs which constitute roughly 35 - 45% of its costs.[40] Pantene in his witness statement described how The Media News had to use Paarl Coldset for its printing and that Paarl "...dictates very onerous and non-negotiable terms such as payment upfront for print

orders.

"[41] He points out that while Paarl Coldset demands upfront payment many of The Media News, advertisers don't pay or pay late. This meant that cash flow problems "... has resulted in delays in the printing of The Media News, which in turn damages the reputation of the newspaper. [42]

[94] Douglas mentioned that The Media News had on one occasion not been published as scheduled for a particular week. When advertisers had queried why, she blamed the printers. This was not true. The reason was that the paper did not have enough money to pay for the printing upfront.[43]

[95] In order to win over advertisers who can pay, a newspaper needs to have credibility. As Ms Douglas put it from her experience

advertisers don't trust anyone new.

"You know you get a lot of fly-by-nights, they call it ..." and

"You know you would tell them I'm going to deliver 25 000 copies, but I mean I had no proof. So they are used to the Vista. They've known it for years. They know it come out on a Thursday and they like that comfort zone. They don't like getting ... so its very difficult to sell. "[44]

[96] The reason community newspapers cannot match Media24's efficiencies in printing and distribution is that they do not have the cash flow to secure these services on a reliable or consistent basis. As Douglas testified, a paper needs to have the cash flow to pay for printing which has to be paid for upfront, but advertisers only pay later, once they see their adverts are in the paper.[45] The same problem applies in respect of distribution.

[97] The Credit Guarantee Remedy is an attempt to address these problems. We explain why.

[98] Media24's parent company, Naspers, owns printing works in Bloemfontein through its subsidiary Paarl Coldset, the nearest

printer for Welkom customers and where Vista is printed. It also now prints The Media News.

[99] In terms of the credit remedy, Media24 undertakes to provide credit for a community newspaper for a period of 90 days if they print with Paarl Post Web in Bloemfontein. The same credit guarantee is extended to the newspaper if it uses On the Dot - a Media24 business, for distribution. We know from both the evidence of Steyl in the merits hearing (who after lack of success with other distributors turned to On the Dot) and Pantene in the present hearing (who wanted to, but for some reason was unsuccessful in procuring On the Dot's services) that this company is the most efficient and reliable newspaper distributor in the Goldfields area.

[100] Thus a major barrier to entry - the cash flow squeeze -is eliminated, because a publication no longer has to pay printers and distributors from its reserves. With a period of credit a publication has a window period to collect its advertising revenues for that edition, before it has to pay for printing and distribution. Second, both these companies have a good reputation in the market for reliability and quality. These are services that typically new entrants or smaller publications have struggled to secure.

[101] Media24 indicated that they were willing to offer up such a remedy and after the hearing sent a proposed draft.

[102] We have made some changes to the draft remedy as originally proposed by Media24.

[103] Media24 restricted this offer to only two 'selected' publications who were either currently in the market or were new entrants. There are two problems with this formulation. First, it is not clear from the draft who will do the selection. Second, if either or both failed there is no provision for whether the offer would be extended to others.[46]

[104] The order we have imposed is designed to avoid these difficulties.

[105] First, it does not limit the offer to two publications. Rather, it is available to any publication that meets the criteria laid down in paragraph 1 of Annexure A to the order. We have however limited the time period for acceptance of the offer. The Media24 draft did not provide for a time period for acceptance of the offer, so as we understand it, the offer lapsed once there had been two acceptances.

[106] Second, it obviates the need for any person to be designated to perform the selection of those who can benefit from the remedy. This is an important difference for us and distinguishes this remedy from the problems associated with the Investment Remedy that we discussed earlier. Under the Credit Guarantee remedy the market, not a designated third party, will pick the winners, while the potential candidates are not limited in number. Whilst of course there is no guarantee even under this remedy that an effective competitor will re-emerge to contest the market against Vista, it makes it more probable than under either the Investment Remedy or the limited Credit Guarantee Remedy proposed by Media24. The criteria for funding however limits the potential candidate publications, in terms of content, print order and pagination, to those most likely to constitute competition for Vista. Thus although we have not confined the number of candidate publications who can accept the offer, it is not a free for all. If a candidate does not meet the criteria it can be refused. Nor if a publication meets the criteria does it get the offer for free - it gets credit for 90 days. If it does not pay within the stipulated 90 days, the offer ceases. This too disciplines acceptance of the offer to candidates more likely to succeed.

[107] We have provided that the Credit Guarantee Remedy remains available to a publication for three years from time of acceptance. This is the same period provided for by Media24 in their draft. Both the Commission and Genesis used a period of three years as the subsidy period, when they did their budget projections for the costing of the Investment Remedy. The Commission justified its choice of the time period required on the basis of a Media24 document which states that it takes an average of three years for a new publication to become profitable.[47] This period seems reasonable. We point out that during the Merits hearing, Mr Jan Malherbe, the erstwhile chief executive of Media24 had testified that starting a newspaper is "...a long-term battle ... [which] is not a sprint. It is a marathon."[48]

[108] The Commission had opposed this remedy, at least in the form originally proposed by Media24 in its draft. Some of the changes we have imposed we believe will meet some of its concerns. The Commission however still favours its Investment Remedy but we differ with it in this respect.[49]

[109] The remedy also avoids some of the other problems associated with the Investment Remedy. It avoids the subsidy problem. Second, it is not disproportionately harmful to Media24. In fact as a group its sister companies may benefit from increased business. At worst Media24 may be owed money for a failed entrant if the publication cannot pay its bills.

[110] Apart from these changes the remedy is largely on the lines proposed by Media24. We have however added in provisions for

providing for the advertising of the remedy and for enforcement.

[111] We have required that the remedy be advertised widely so that would be entrants and existing publications are aware of it. The remedy cannot be effective unless those in the market or who wish to enter are made aware of it throughout the offer period.

CONCLUSION

[112] We have found that despite the lapse in time between the merits hearing and the remedies hearing, competition has not been restored to the market. Therefore a remedy to restore competition is appropriate.

[113] An interdict is not appropriate on these facts. The Investment Remedy is unlikely to prove effective. We have therefore imposed the Credit Guarantee Remedy (as amended by ourselves) in conjunction with a declaratory order as the appropriate relief in this case.

[114] In our order set out below, the declaration covers the period from January 2004 to February 2009. However in our Merits Decision we found that the contravention period was from January 2004 to April 2009 i.e. two months longer. The reason for this difference is that the Commission persists with the complaint period it had defined in its referral, which had the February end date, while in the Merits Decision we extended the period to April, because on the evidence that was when GNN exited the market. This discrepancy was not picked up during the remedies hearing and the terms of the declaration viz. the February end date was common cause between the Commission and Media24. We therefore accept what has been agreed to between the parties, and leave the period ending in February. (See paragraph 1.1 of the order.)

[115] Not much turns on this change to the end date, as an administrative penalty is not competent, making duration irrelevant.

Duration might be relevant to a civil claim, if one is ever brought, but its likely effect is again trivial.

[116] Our remedy in this matter is set out in the order below.

ORDER

1.1 It is declared that Media24's pricing conduct in the market for advertising in community newspapers in the Goldfields area of South Africa ("the Goldfields market") during the period January 2004 to February 2009 constituted a contravention of section 8(c) of the Competition Act, Act 89 of 1998 ("the Declaratory Order").

1.2 Media24 shall ensure that from one month of the date of this order, all publications which are current participants or new entrants in the Goldfields market (the beneficiaries) shall be entitled to credit terms with (a) Media24's associated company Paarl Coldset Proprietary Limited; and (b) Media24's distribution business On The Dot ("the service providers"), ("the credit terms"), on the conditions set out in Annexure A to this Order ("the Credit Order").

1.3 Media24 shall cause to be published in two newspapers (published in English/Afrikaans and Sesotho) circulating in the Goldfields area a notice of this Order as well as an explanation of the credit terms which it is obliged to offer in terms thereof. This notice shall be published no less than fifteen days after the date of this Order and thereafter on the first anniversary of the Order.

1.4 Within a period of seven days as from the dates of publication of the said notice in 1.3 above, Media24 must deliver a copy of the said notice to every one of the existing publications in the Goldfields area.

1.5 Within three months of the date of this Order and three months of the first anniversary of the Order, Media24 shall provide the Commission with proof of its compliance with the obligations set out in 1.3 and 1.4 above.

ANNEXURE A

1. Any publisher of a community newspaper which is a current participant

or potential new entrant in the Goldfields market and whose content is predominantly in English and Afrikaans and contains general

community news, shall be entitled to the credit terms as set out in 2 below. This offer shall be kept open for a period of 25 months from the date of this Order.

2. The credit terms -

(a) shall be 90-day terms from date of invoice;

(b) shall apply to the following services to be provided by the credit

providers in respect of each of the beneficiaries at a price consistent with their ordinary commercial price:

(i) printing (by Paarl Coldset Proprietary Limited) of a weekly community newspaper in tabloid format to a maximum of 24 pages, with a maximum print order of 30 000 copies;

(ii) door-to-door distribution (by OnTheDot) within the Mathjabeng Municipality of a weekly community newspaper in tabloid format to a maximum of 24 pages, and with a maximum print order of 30 000 copies;

- (c) shall apply to a pro-rata portion of invoices in the event that the page numbers or the print order exceed the maxima set out above;
- (d) shall be provided for three years (36 months) from the date of the first use of the service on these terms. At the end of this period, the service providers will offer services to the beneficiaries on

terms consistent with their ordinary commercial terms;

- (e) shall be terminated in respect of a beneficiary upon (i) default by a beneficiary in respect of any of its obligations to either of the service providers; or (ii) the beneficiary's exit from the market.

3. A beneficiary shall be entitled to the credit terms even if it chooses to utilise only one of the services referred to above.

4. Any publisher who has reason to believe that Media24 has not complied with these conditions may refer their complaint to the Competition Commission at the following address ccsa@compcom.co.za

06 September 2016

DATE

Mr Norman Manoim

Ms Yasmin Carrim and Prof Merle Holden concurring

Tribunal Researcher: Derrick Bowles and Aneesa Raval

For the Commission: Rafik Shana S.C. assisted by Gavin Marriott, instructed by Gildenhuys Malatji for the Commission

For Media24: David Unterhalter S.C., Michelle Norton S.C. and Zaytoen Cornelissen instructed by Werksmans Attorneys.

[1] The Competition Commission of South Africa and Media 24 Limited CT case no: 013938/CR1540ct11.

[2] See s 59(1)(b) of the Act. For a penalty to be imposed in terms of s B(c) the Act requires the conduct to be "... substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice. "Under s 8(d) however a penalty may be imposed for the first contravention.

- [3] This amount, originating from the respondents remedies proposal dated 15 February 2016, comprises a once-off cash injection of R40 000 and training of R17 500 per month for six months per publisher of which there are nine publishers in total.
- [4] See Merits decision paragraph 612.
- [5] See page 11 para 22 of the Commission's

Submissions

as to Remedy. See also its oral submissions, transcript pages 113 and 276.

- [6] Commission's record from page 50-55.
- [7] See Genesis report page 5, page 106 of the trial bundle.
- [8] Media24 heads of argument version one, pages 11-12.
- [9] Annex M1 of the Respondents submission on publications in the Goldfields Area found at page 41 and 42 of the trial bundle.
- [10] Annex M1 of the Respondent's submission on publications in the Goldfields Area found at page 43 of the trial bundle and page 5 of the Genesis Report found at page 108 of the trial bundle.
- [11] Ibid Annex M1.
- [12] As the Commission pointed out in argument in terms of s 55(3) of the Act the Tribunal's discretion to accept evidence is wider than that of a court.
- [13] Pantene witness statement paragraph 11 Commission's record page 50.
- [14] As examples of bad strategic calls, he had started off calling the paper Mafia News before changing it to The Media News. He had also chosen to publish over the weekend instead of at the end of the working week which as we heard in the merits hearing was the best day for local advertising, a community newspaper's primary revenue.
- [15] See transcript page 82.
- [16] See transcript page 83.
- [17] See transcript page 83.
- [18] See Pantene witness statement paragraphs
- 11. 18, 24, 33 and 34.6, record pages 50- 55.
- [19] Supra Footnote 3.
- [20] The three are the Interdict, the Declaratory Order and the Investment Remedy.

- [21] In the Commission's initial submission there was no time limit. The six year limitation is an addition introduced in their heads of argument. So also was a definition of the Goldfields market, (See Annexure H2 to the Commission's heads of argument). The Commission defines the Goldfields market as "the areas encompassing Welkom, Odendaalsrus, AllanRidge, Riebeeckstad, Theunissen, Ventersburg, Thabong, Meloding, Kutluanong and Phomolong."
- [22] Filed on 9 November 2015.
- [23] Pantene witness statement, paragraph 25 page 53.
- [24] In fact the paper was called the Goldfields Express". Pantene in his witness statement referred to it as "The Express".
- [25] Pantene witness statement paragraphs 27-28 record page 53.
- [26] Pantene witness statement, *ibid*, paragraph 29.
- [27] See The Competition Commission and Media 24 (Pty) Limited 016824 and para 51 of the Merits decision.
- [28] See Media24 supplementary heads paragraph 49.
- [29] See page 114 of the trial bundle.
- [30] Exhibit A page 8. This was put to Douglas in cross examination who seemed agreeable with the proposition. Also see Transcript page 28.
- [31] Annex M1 of the Respondents submission on publications in the Goldfields Area found at page 41 of the trial bundle.
- [32] A sunk cost is a cost that has already been incurred and thus cannot be recovered. A sunk cost differs from future costs that a business may face, such as decisions about inventory purchase costs or product pricing. Sunk costs (past costs) are excluded from future business decisions, because the cost will be the same regardless of the outcome of a decision. See footnote 55 of the Merits Decision.
- [33] See transcript page 154 and paragraph 3.2 of the Draft order which is Exhibit H2. The Commission attributed these changes to an attempt to narrow the dispute with Genesis Media24's consulting economist. The move to R 10 million was because the Commission adopted the Genesis methodology. However it soon became clear that it had omitted certain costs it believes should have been included to cover office rental, auditing fees and certain miscellaneous expenses and hence the fund quantum was revised upwards.
- [34] See Respondent's supplementary heads of argument, page 40. Genesis in their report initially calculated the following figures per 2 model scenarios they created; Scenario A R 1 652 265 and Scenario B R 718 677, page 114 and 119 of the trial bundle respectively.

- [35] In its draft order the Commission states; "The purpose of the fund is to establish or increase competition in the Goldfields community newspaper market." See Exhibit H2 paragraph 4.
- [36] Page 6 of the Trial bundle.
- [37] Pantene witness statement paragraph 15 record page 51.
- [38] Transcript page 81.
- [39] Transcript page 83.
- [40] In Exhibits H1 and Annexure H1.1 we use year 3 of both the Commission's and Media24's budget estimates as both have the same size print order in that year. Taking both figures rounded up we get this range.
- [41] "Pantene witness statement paragraph 34.4 record page 55.
- [42] Ibid paragraph 34.6.
- [43] Douglas ibid page 64 paragraphs 17-18.
- [44] Transcript page 11.
- [45] Transcript page 12.
- [46] See paragraph 3.2 of their draft.
- [47] This document was produced during the merits case in response to a summons from the Commission. See Page 299- 303 of the Merits Decision.
- [48] Page 1450 of the transcript for the Merits Hearing.
- [49] See letter from the Commission's attorneys forwarded after the conclusion of the hearing on 14 April 2016. The Commission's central argument was that the remedy does not overcome the major barrier to entry which it argues are sunk costs. Printing and distribution costs it argues cover only 50% of the total cost of a newspaper.

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