
SOUTH AFRICA / JUDGMENT

Media24 (Pty) Ltd v Novus Holdings Limited (LM012Apr16) [2017] ZACT 52 (22 August 2017) [2017] ZACT 52

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andreas Wessels, Mondo Mazwai

CASE / FILE NUMBER

LM012Apr16

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM012Apr16

In the matter between:

Media24 (Pty) Ltd

Primary Acquiring Firm

and

Novus Holdings Limited

Primary Target Firm

Panel

: Norman Manoim (Presiding Member)

: Andreas Wessels (Tribunal Member)

: Mondo Mazwai (Tribunal Member)

Heard on

: 2 August 2017

Order Issued on : 3 August 2017

Reasons

Issued on : 22 August 2017

Reasons

for Decision

Approval

- [1] On 2 August 2017, the Competition Tribunal ("Tribunal") conditionally approved the transaction between Media24 (Pty) Ltd ("Media24") and Novus Holdings Limited ("Novus").
[1]
- [2] The reasons for approving the transaction follow.

Background

- [3] The present merger has already been implemented. The acquiring firm Media24 has already acquired control over Novus. However in terms of the proposed conditions it will effectively relinquish control. In these reasons we explain this unusual situation.
- [4] In 2000 Media24 first acquired a joint controlling interest in two companies Paarl Media Holdings (Pty) Ltd ("Paarl Media") and Paarl Coldset (Pty) Ltd ("Paarl Coldset") - the predecessors of the current target firm from the Relief Family.[2] Lambert Retief was retained as the managing director of the firm and his rights were reflected in a management agreement drawn up at the time. Over time Retiers involvement diminished and it appeared that he wished to restructure the family interest.
- [5] Thus in 2014 Media24 and the Retief interests entered into a further transaction which was notified to the Commission as a large merger in terms of which Media24 would now acquire sole control over Paarl Media and Paarl Coldset.
- [6] The Commission investigated the transaction and recommended that it be approved unconditionally. Prior to the Tribunal hearing the transaction, Caxton and CTP Publishers and Printers Limited ("Caxton") sought to intervene in the merger hearing. Caxton was granted leave by the Tribunal to intervene on 18 August 2014. Some five days later, the merging parties abandoned the transaction. We will refer to this as the abandoned transaction.
- [7] Following in time from the abandoned transaction, the Paarl Media Group, now rebranded as Novus, announced their intention to list their shares on the Johannesburg Stock Exchange ("JSE"). In terms of the JSE listing conditions the merging parties had to implement an agreement with Retief referred to as the "Restated

Management Agreement".[3] Caxton, brought an application to the Tribunal to require that the transaction be notified as a merger prior to implementation. Caxton argued that the Restated Management Agreement, constituted a merger because it involved Media24 acquiring sole control over Novus. The Tribunal held that the Restated Management Agreement did not constitute a change in control and hence the transaction was not a merger.[4] However, this was overturned on appeal[5] and the Competition Appeal Court ("CAC") directed the transaction to be notified in terms of section 12(a) of the Competition Act.[6]

[8] The current transaction before us is as a result of that CAC order. However, the transaction itself has already been implemented and Novus is listed on the JSE. During the course of the Commission's investigation of the current merger two significant

developments took place. Mr. Retief passed away in January 2017. This has implications for whether the Restated Management Agreement is still in existence insofar as it gives Media24 certain residual rights. Second, Media24 offered to divest part of its holdings in Novus; from 66.5% to 19%. This has implications for whether Media24 has now, at this level of shareholding, relinquished control over Novus, or as the merging parties put it "de-merged".

[9] On 7 June 2017, Caxton sought to intervene in this merger hearing. Certain of Caxton's concerns were met by the merging parties offering undertakings, inter alia in respect of the Restated Management Agreement and a printing contract. The remaining issues raised by Caxton related to the issue of the identity of the ultimate controllers of Media24. The Tribunal denied the intervention largely because the divestiture conditions had removed the control issue from consideration.[7]

Approach to the consideration

[10] The divestment condition means that Media24's shareholding in Novus goes from a majority to a minority stake. Thus de jure Media24 would no longer exercise control over Novus. However, it is possible notwithstanding this that it may still at 19% exercise de facto control. We consider this issue on two approaches. First, on the assumption that it might still retain de facto control, we consider whether the merger has raised any competition or public interest concerns and second, we consider whether the divestiture leads to Media24 relinquishing de facto control.

Parties to transaction

Primary acquiring firm

[11] The primary acquiring firm is Media24 which is ultimately controlled by Naspers Limited (collectively referred to as "the Naspers Group").

[12] The Naspers Group is active in various diverse markets ranging from e-commerce and pay-television. Relevant to this transaction are the Group's activities in print media which includes publishing, printing and distribution of newspapers, magazines and books.

Primary target firm

[13] The primary target firm, Novus is a public company whose shares are listed on the JSE. As a result of the listing and at the time of the hearing, Novus was held and controlled by Media24 with 66.5% shareholding.

[14] Novus is a commercial printing operation which provides printing services ranging from newspapers to books.

The transaction and proposed conditions

[15] As stated above this transaction involves an already implemented transaction whereby Media24, following implementation of the Restated Management Agreement, has acquired sole control of Novus. The salient difference is that in the notification of this merger the merging parties proposed to divest control over Novus.

[16] The following list summarises the divestment condition as well as other relevant conditions as they were approved in this merger.[8]

[16.1] Following approval, Media24 will divest its shares in Novus to not more than 19% which will take place through an unbundling process. ("the Divestment Condition"). The Divestment Condition would result in Media24 divesting its shares to existing shareholders of Novus which are not related to the Naspers group. The effect of the divestment condition would be that the shareholding in Novus would be widely held post implementation of the transaction.

[16.2] Following the unbundling of shares, the Restated Management Agreement will terminate and printing contracts between

the merging parties will be terminable on six months' notice by Media24. ("the Print Contract Condition")

[16.3] The Restated Management Agreement concluded on 23 February 2015 will terminate ("the Restated Management Agreement Condition")

[16.4] Naspers will not appoint any members to the executive committee or board of directors of Novus. Media24 would still retain the right to nominate a person to the Novus board of directors provided that person is not employed at an operational level within the publishing division of Media24 ("the Information Exchange Condition")

Impact on competition

[17] In its investigation, the Commission identified two potential concerns; input foreclosure and information exchange. The input

foreclosure concern relates to whether Media24 retains some residual control over Novus. The information concern arises independently of the issue of control.

Information exchange

[18] The concern here is that if Media24 can appoint directors to the board of Novus these directors will have access to confidential business information relating to publications which are rivals to Media24 publications. Since this information would otherwise not be in the public domain it would enable Media24 to take advantage and formulate strategies to thwart competitors. Media24 was willing to undertake that it would not appoint any person who was an operational person in Media24 to the board of Novus. It also undertook to remove any existing appointee to the operational committees in Novus. Although Media24 was asked why it should not extend this undertaking to non- operational persons as well it was reluctant to do so. It explained that given the size of its investment, even at 19%, it was entitled to minimize its risk by retaining the right to nominate directors to the board of Novus. Even so they could only successfully get their nominee appointed if they had the support of other shareholders. Nevertheless the identified risk of information sharing would be minimised if non-operational persons were appointed. In any event Media24 argued customer specific information was not the type of information that a board member on the Novus board would be provided with.

[19] We are satisfied that the condition constitutes a reasonable compromise between the information sharing concern which is now

minimised and the legitimate interest of Media24 to safeguard its investment.

Input foreclosure

[20] In addition to information exchange the Commission also identified input foreclosure concerns as Media24 is a publishing house which publishes newspapers, magazines and books and therefore requires printing services. These services are offered by Novus where Novus would also provide printing services to competitors of Media24. The Commission evaluated whether the merged entity post-transaction would have the ability and incentive to foreclose printing services to its competitors.

[21] The Commission identified a number of markets implicated by the merger; (i) the national market for gravure and heat-set printing[9] and (ii) the regional markets for cold- set printing[10] in the Western Cape, Eastern Cape and Kwa-Zulu Natal and Inland

markets.

[22] The only one in which raised a potential concern was the Eastern Cape market for cold-set printing, where Novus has a 45 - 55% market share. Cold-set printing forms a significant cost and input into the publishing of newspapers and a foreclosure strategy could be detrimental to a competing newspapers ability to compete with Media24. As barriers to entry are high it is also unlikely that any new entrants may emerge in the event that a foreclosure strategy is adopted. As with other markets, the Commission investigated whether competitors of Novus could absorb any capacity if Novus were to adopt an input foreclosure strategy. It found that in the Eastern Cape market, TMG, a competitor to Novus, was running at full capacity and would not be

able to absorb any shortfalls. Novus would thus have the ability to foreclose. On whether Media24 would have an incentive to foreclose, an acquisition of sole control by Media24 would increase Media24's incentive to foreclose. This is because foreclosure strategies could be more profitable as Media24 could forego printing revenues from competing newspapers to generate far more profitable advertising revenues on its own newspapers if competitors were foreclosed.[11]

[23] The Commission accepts that because of the divestiture the concerns about foreclosure have been resolved. The remaining shareholders are unlikely to let a 19% shareholder foreclose the main business of Novus to benefit Media24.

[24] However even if for some reason Media24 could still achieve this form of control at 19%, the merging parties explained why foreclosure was unlikely even without the divestiture.

[25] They point out that the independent publications for which Novus currently prints are mostly fortnightly, monthly, quarterly and annual publications and as such do not compete with the weekly publications which Media24 publishes in that region. Furthermore,

these independent publications are published at a relatively low frequency and have far smaller volumes that can be easily accommodated at other third party printers, even those located in neighboring regions.

[26] There is also no evidence that Media24 had engaged in any foreclosure strategies to date despite being a joint controller of Novus and being deemed to have acquired sole control since the restructuring arrangement took place.

De facto control

[27] Once we accept that Media24 has reduced its shareholding to 19%, we consider whether Media24 could exercise vestiges of de facto control over Novus. This de facto control could potentially be exercised in one of the two following ways; through contract by means of the print contracts or if it still existed the Restated Management Agreement; through voting power if at 19% Media24 would still have a simple voting majority at general meetings due to shareholder apathy.

(i) Print contracts

[28] At the time of Novus' listing an exclusive printing contract was in force between it and Media24 where Novus would print all of Media24's newspapers and magazines. Given how significant the print contract is to the revenues of Novus, concerns were raised by Caxton in its intervention application that the printing contract would allow Media24 to control Novus.

[29] This concern is, however, remedied by the Print Contract Condition as the printing contracts will become terminable on six months' notice by Media24.

[30] We find this condition addresses potential concerns raised by Caxton. In fact, it may have a pro-competitive effect as Media24 would have the opportunity to print with other printing houses as the contract is no longer evergreen.[12]

(ii) Restated Management Agreement

[31] We considered whether Media24 could exercise de facto control over Novus through the Restated Management Agreement ("RMA")[13], by appointing directors to Novus' board or Executive Committee.[14] This concern has been remedied by the merging parties undertaking to terminate the RMA and remove Media24's contractual right to appoint members to Novus' board and Executive Committee. We agree that this condition remedies any concerns of Media24's residual control.

(iii) Annual General Meeting

[32] We also considered whether, even at 19%, Media24 would retain a degree of control in circumstances where shareholder turnout at annual general meetings ("AGMs") is low enough to allow Media24 to determine the outcome of resolutions. These concerns were addressed by the merging parties who provided information on historical voting patterns at Novus' AGMs.

[33] Over the past two years the average shareholder representation at AGMs has been 90.26%. [15] On average, at least 70.93% of all public shareholders (excluding Media24) have been represented at Novus' AGMs. The merging parties, however, note that these figures represent voter turnout at a time when Media24 was the majority shareholder and could determine the outcome of all resolutions, even if all shareholders were present. Therefore, the merging parties contend that shareholder representation is likely to increase post-unbundling, given that Media24 will no longer be able to determine the outcome of resolutions on its own. Furthermore, because remaining shareholders will have a greater ability to influence the outcomes of resolutions they will have more incentive to attend. Media24 also submitted that after the unbundling most of the shares will go to institutional shareholders which typically attend general meetings.

[34] Based on all these facts Media24's divestment of this shareholding to 19% will, as the most probable scenario, lead to it forfeiting not only de jure control but de facto control as well.

Conclusion on control

[35] We find that the Divestment Condition is in effect a de-merger resulting in Media24 no longer controlling Novus de jure. The conditions to this merger significantly reduce Media24's potential to exercise vestiges of control over Novus through mechanics of agreements or general meetings. Even if we were to assume that Media24 could exercise de facto control, which we think highly unlikely, we find that the reduction of shareholding to 19% is a compelling reason to believe that its incentive and ability to foreclose is drastically reduced.

Public interest

- [36] The Commission raised concerns that any input foreclosure would lead to a negative effect on small businesses in the area as community newspapers who print with Novus have indicated that the cost of doing business would increase if they were foreclosed from the market. These community newspapers are largely owned by historically disadvantaged persons in the Eastern Cape, a province with large-scale unemployment.
- [37] Given our assessment of the proposed conditions and our conclusions regarding potential foreclosure these concerns fall away.
- [38] The Commission has also noted the positive effect the transaction will have on shareholders of the Media24 Welkom Yizane share scheme, a B-BBEE share scheme, as it will result in positive economic benefits accruing to those shareholders.
- [39] The merger will not have any effect on employment.

Conclusion

- [40] In light of the de-merger and after considering the submissions made by the Commission and the merging parties we approve this transaction subject to conditions as they remedy any potential competition concerns.

22 August 2017

Date

Mr Norman Manoim

Mr Andreas Wessels and Ms Mondo Mazwai concurring

Tribunal Researchers: Aneesa Ravat and Hayley Lyle

For the merging parties: Paul Cleland of Werksmans Attorneys

For the Commission: Romeo Kariga

ANNEXUREA

In the large merger between:

MEDIA24 PROPRIETARY LIMITED

NOVUS HOLDINGS LIMITED

Case no. LM012Apr16

CONDITIONS

1 DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings -

1.1 “Act” means the Competition Act, No. 89 of 1998 (as amended);

1.2 “Approval Data” means the date on which the Competition Tribunal issues its order, and/or Its Merger Clearance Certificate, approving the Merger;

1.3 “Business Day” means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;

1.4 “Commission” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act;

1.5 “Commission Rules” means the Rules for the Conduct of Proceedings in the Competition Commission;

1.6 “Conditions” means the divestment condition and other conditions set out in this “Annexure B”;

1.7 “Divestment” means the divestment by Media24 of the majority of its shareholding in Novus such that, after the divestment, the Naspers Group's shareholding in Novus does not exceed 19% of the ordinary issued share capital of Novus (net of Novus Treasury Shares) and such that the Naspers Group will not have the ability to control Novus, which Divestment will be implemented by way of the Unbundling;

1.8 “Media24” means the primary acquiring firm, Media24 Proprietary Limited (an indirect subsidiary of Naspers Limited) and includes Media24's direct and indirect subsidiaries except that, for the purposes of these Conditions, this excludes Novus;

1.9 “Merger” means the acquisition by Media24 of sole control over Novus which occurred pursuant to the implementation of the Restated Management Agreement of Novus on or about 31 March 2015, as determined by the Novus Judgment;

1.10 “Merging Parties” means Media24 and Novus;

1.11 “Naspers” means Naspers Limited;

1.12 “Naspers Group” means Naspers Limited and its subsidiaries;

1.13 “Naspers Related Parties” means Naspers Beleggings Limited, Keeromstraat 30 Beleggings Limited, Intelprop Proprietary Limited, Naspers Share Incentive Trust, MIH Holdings Share Trust, MIH Mauritius Ltd Share Trust and Naspers Restricted Stock Plan Trust, being entities that would, by virtue of their shareholding in Naspers, be entitled to receive Unbundled Shares;

1.14 “Novus” means the primary target firm, Novus Holdings Limited, and its subsidiaries;

1.15 “Novus Judgment” means the

judgment

and order of the Competition Appeal Court Issued on 25 November 2015 In Caxton and CTP Publishers and Printers Limited v Medla24 Proprietary Limited and others (Case No. 136/CAC/Mar2015);

1.16 “Novus Shares” means the ordinary issued share capital of Novus, being all the Issued shares In the capital of Novus, It being recorded that Novus has Issued only one class of ordinary shares and has not issued any other class of shares;

1.17 “Tribunal Rules” means the Rules for the Conduct of Proceedings in the Competition Tribunal;

1.18 “Novus Treasury Shares” means Novus Shares held by or on behalf of Novus employees and/or executives;

1.19 “Restated Management Agreement” means the management agreement entered into by Medla24 and Novus signed on 23 February 2015;

1.21 "Unbundling" means the distributions to be effected by Media24 and by Naspers, referred to in paragraph 3.1.2 below, in order to give effect to the Divestment.

2 RECORDAL

2.1 Pursuant to the Novus Judgment, the Merging Parties were required to notify the Merger to the Commission.

2.2 Medla24 does not wish to acquire or retain sole control over Novus and, accordingly, Medla24 proposed the Divestment as a merger condition whereby Medla24 will divest Itself of the ability to control Novus by any of the means set out in section 12 of the Act.

2.3 Further, the Commission Is of the view that Divestment alleviates any competition or public interest concerns that have been Identified during the Investigation period.

2.4 These Conditions Impose the Divestment as a condition to the approval of the Merger.

3 CONDITIONS TO THE APPROVAL OFTHEMERGER

3.1 Divestment

3.1.1 Media24 will implement the Divestment within forty business days after the approval of the amendmen1 of the Memorandum by the ClPC as per clause 3.1.6.2 below.

3.1.2 The Divestment will be implemented through -

3.1.2.1 the distribution by Media24 of the Unbundled Shares to Naspers, by way of a distribution in specie; and

3.1.2.2 immediately thereafter, the distribution by Naspers of the Unbundled Shares to Its shareholders. by way of a distribution in specie,

such that, after these distributions, Media24 Will retain a maximum of 19% of the Novus Shares (net of Novus Treasury Shares), being that shareholding of Media24 which Is excluded from the Unbundling ("Residual Novus Shares").

3.1.3 To facilitate the distribution of the Unbundled Shares as a distribution In specie Naspers will subscribe for a different class of shares In Media24 at a subscription price not less than the value of the Unbundled Shares (calculated using the volume weighted average price of the Unbundled Shares for a period preceding the subscription to be determined by Naspers and Media24) ("Subscription Proceeds").

3.1.4 After the Unbundling, the Residual Novus Shares will-

3.1.4.1 be the only shareholding held by Media24 In Novus; and

3.1.4.2 comprise all the shares held by the Naspers Group in Novus.

3.1.5 It Is recorded that -

3.1.5.1 Naspers's shares are widely dispersed amongst public shareholders;

3.1.5.2 the Naspers shareholders will be entitled to participate in the Unbundling pro rata according to their economic entitlement to receive distributions by Naspers: and

3.1.5.3 accordingly, the Naspers N shareholders will be entitled to receive, in aggregate, 99.96% of the Unbundled Shares and the Naspers A shareholders will be entitled to receive, in aggregate, 0.04% of the Unbundled Shares.

3.1.6 Media24 will -

3.1.6.1 within 20 business days of the Approval Date, lodge with the Companies and Intellectual Property Commission ("CIPC") such amendments to the Memoranda of Incorporation ("MOIs") as are required to give effect to the Divestment; and

3.1.6.2 within 40 business days after approval by CIPC of the amendments to the MOIs, Implement the Divestment.

3.1.7 In addition -

3.1.7.1 after the Divestment has been completed, Media24 will make a cash distribution which will ultimately be paid (net of taxes) to the

Welkom Yizani shareholders of an amount equal to 15% of the Subscription Proceeds,

which equates to Welkom Yizani's percentage shareholding In Media24;

3.1.7.2 the Naspers Related Parties (other than the Naspers Share Incentive Trust) will, within three weeks following the Divestment, dispose of the Unbundled Shares received by them pursuant to the Divestment, provided that they may, even prior to the Divestment, dispose of their rights to the Unbundled Shares they stand to acquire by virtue of the Divestment; and

3.1.7.3 the Naspers Share Incentive Trust shall dispose of the Unbundled Shares It receives pursuant to the Divestment within three weeks of It having amended Its trust deed to allow for such disposal, having regard to the fact that the trust deed of the Naspers Share Incentive Trust in its current form does not permit of such disposal. Until such disposal is completed, the Naspers Share Incentive Trust shall not exercise any votes In respect of the Unbundled Shares In question.

3.1.8 If Media24 becomes aware of any circumstance beyond Its control which may delay the Implementation of the Divestment, Media24 will Inform the Commission of the reasons for the delay and get the Commission's consent for a new date for the implementation of the Divestment.

3.2 Print Contracts between Media24 and Novus Notwithstanding anything to the contrary contained in any agreement between the Merging Parties, with effect on and as from the Unbundling, the Restated Management Agreement will terminate and, accordingly, the printing contracts In force between the Merging Parties will be terminable on six months' notice by Media24.

3.3 Management of Novus

Notwithstanding anything to the contrary contained in any agreement between the Merging Parties, with effect on and as from the Unbundling:

3.3.1 the Restated Management Agreement concluded on 23 February 2015 will terminate and be of no further force or effect;

[1] The conditions to this merger are attached hereto marked Annexure A.

[2] Paarl Media Group (Pty) Ltd ("Paarl Media Group"), the holding company of Paarl Media Holdings (Pty) Ltd and Paarl Coldset (Pty) Ltd, was rebranded as Novus Holdings Limited in

2015. Novus is the target firm of the current transaction.

[3] In terms of the Restated Management Agreement Media24 would have sole control over the Paarl Media Group.

[4] Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others OTH225Mar15.

[5] Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others 136/CAC/ March2015.

[5] Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others

136/CAC/March2015.

[6] Act no. 89 of 1998.

[7] Our reasons for this decision are set out in Caxton and CTP Publishers and Printers Ltd vs Media24 (Pty) Ltd; Novus Holdings Ltd; Competition Commission LM012Apr16/INT039May17.

[8] The merging parties and the Commission agreed to these conditions. These conditions as they were approved also included concerns raised by Caxton during its intervention application.

[9] Heat - set printing is traditionally used for the printing of magazines.

[10] Cold - set printing is traditionally used for the printing of newspapers.

[11] The Commission identified four local newspapers, Izimvo Zabantu, Ingqanga Nentsibazayo, Township Times and Skwara News, which compete for advertising revenue with a number of Media24 owned newspapers in the Eastern Cape.

[12] In the intervention application Caxton submitted that the print contract condition should also require the merging parties to

provide the Commission with a copy any new printing contract concluded between them within 5 years of the unbundling. Caxton alleged that this would enable the Commission to monitor that the conclusion of any new print contract during this period will not confer control upon Media24. We agree with the merging parties that this would be an unnecessary expansion of the condition, especially given that any new print contract would be negotiated at a time when Novus has a majority of independent directors on its board and Media24, a 19% shareholder negotiating a printing contract on a customer supplier basis, would thus have no ability to dictate any provisions

that would give it control.

[13] This is the Restated Management agreement implemented after listing. There was an old management agreement in force before this time but it is unnecessary to take that any further.

[14] In its intervention application, Caxton raised the concern that the RMA is not clear on what happens to the Board and Exco if Media24 does not hold 50% of the shares. It was concerned that nowhere in the RMA would there be a right for the restated management to be terminated by Media24 if the shareholding drops below 50% and therefore that because terminated on Unbundling Media24 will not be permitted to appoint directors to Board of Novus or its Exco.

[15] This has meant that Media24's 66.5% voting rights equated to 73.67% of the votes capable of being cast at AGMs, with public shareholders accounting on average for 23.76%.

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