IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Case No: 136/CAC/March 2015

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS	**Appellant**
And	
MEDIA 24 PROPRIETARY LIMITED	**First Respondent**
NOVUS HOLDING LIMITED	**Second Respondent**
ADBAIT PROPRIETARY LIMITED	**Third Respondent**
LAMBERT PHILIPS RETIEF	**Fourth Respondent**
THE COMPETITION COMMISSION	**Fifth Respondent**

JUDGMENT DELIVERED ON 25 NOVEMBER 2015

BOQWANA AJA (DAVIS JP and ROGERS AJA concurring)

Introduction

[1] On 10 March 2015, the appellant ('Caxton') brought an urgent application before the Competition Tribunal ('the Tribunal') seeking an order that the first to fourth respondents ('the respondents') notify the competition authorities of the acquisition, by the first respondent ('Media 24'), of sole control of the second

respondent ('Novus'), which would arise if a restated management agreement ('new agreement') concluded between the fourth respondent ('Retief'), Novus and Media 24 on 23 February 2015 was brought into effect or otherwise implemented. The new agreement, which was in substitution of a management agreement dated 6 October 2008 ('old agreement'), was to be effective upon the listing of Novus on the JSE Limited ('JSE') which was scheduled to take place on 26 March 2015.

[2] Caxton also sought an order prohibiting the respondents from taking any further steps to implement the acquisition of sole control by Media 24 over Novus; bringing into effect or otherwise implementing the new agreement; and entering into any other transaction or arrangement in which the operational management control of Novus that was enjoyed by Retief was relinquished or transferred to any other party, until such time as the Tribunal or this Court has approved the merger.

[3] The application was heard by the Tribunal on 20 March 2015 and dismissed on 23 March 2015 with no order as to costs. Reasons for the dismissal were provided on 17 April 2015.

[4] Novus has listed on the JSE. As a result the appellant seeks an order for the notification of the merger and costs of the appeal.

The Tribunal's decision

[5] The Tribunal adopted the approach that the transaction set out in the new agreement did not constitute a merger (as defined in the Competition Act 89 of 1998 ('the Act')). While it found that Media 24 and Retief held joint control over Novus' business affairs under the old agreement, it concluded that Retief had not in fact exercised his power of control under that agreement. He and Media 24 simply paid lip service to it. Accordingly, his powers of control were not materially diminished by the 2015 new agreement. It went on to hold that:

> 'Mr Retief's small economic interest in Novus, his status as a non-executive director, and his imminent retirement, all point it to being unlikely for him to be able to constrain Media 24 in any meaningful way. In the absence of facts in support of any of the potential indicators of Mr Retief exercising control powers as discussed above,

> we are constrained to conclude that both Media 24 and Mr Retief have been paying lip service to the Management Agreement.
>
> We find therefore that the 2015 agreement does not limit Mr Retief's powers any more than the 2008 agreement. Whilst the change in mechanisms in the respective agreements dilutes Mr Retief's influence to some degree, this dilution is so insignificant that it neither amounts to a relinquishing of any type of joint control power that he previously had or the acquisition of sole control by Media 24.Since we cannot conclude on the facts before us that the restated agreement constitutes a merger, we find that Caxton has not established a clear right...'

[6] Caxton contends that the Tribunal's decision was wrongly premised. It argues that the control that Retief possessed under the old agreement was of the kind described in s 12(2)(g) of the Act which merely requires a person to have the ability to materially influence the policy of the firm (as conferred on him contractually). In its view whether he in fact exercised that power (in practice) did not matter.

Factual background

Novus' Group structure

[7] Novus was formerly known as Paarl Media Group (Pty) Ltd ('PMG'). It is a member of the Naspers group, the biggest publisher in South Africa. Prior to the implementation of the transaction now under consideration Media 24, a subsidiary of Naspers Ltd, held all the shares in PMG. Certain of the businesses owned by PMG's operating subsidiaries, including the printing business, were originally owned by Retief. Media 24 acquired a majority shareholding in Retief's PMG businesses and merged its own printing business with his. This made PMG and its subsidiaries ('the PMG Group') the largest printing business in the country.

[8] Since October 2008, the heatset business[1] of the PMG Group was held in a subsidiary company called Paarl Media Holdings (Pty) Ltd ('PMH') with its

[1] Process employed in producing publication such as magazines.

coldset printing business[2] housed in another subsidiary, Paarl Coldset (Pty) Ltd ('PCS'). Retief family entities (initially family trusts, later a company called Adbait (Pty) Ltd ('Adbait')) retained a small shareholding in these two subsidiaries.

[9] Caxton, as a publishing and printing company, considers itself a competitor of both Media 24 and Novus.

The old agreement

[10] The 2008 restructuring gave rise to a need for an entrenched continued 'operational independence' between the PMG Group's printing businesses and Media 24's publishing businesses. On 6 October 2008 Retief, the Retief family entities[3], the PMG Group and Media 24 concluded a management agreement in terms of which Retief was appointed as non-executive chairman of the PMG Group. His powers of control were set out in clause 3.4 of this agreement.

[11] It is common cause that Novus was jointly controlled by Media 24 and Retief, for the purposes of s 12(2) of the Act. I deal with these provisions later in the judgment.

[12] Clause 3.4 of the agreement provided the following:

> ' 3.4 Notwithstanding the Shareholders Agreements insofar as it may be applicable but subject to the fiduciary duties of the members of the Board and that Retief discharges his duties in compliance with the Act [the Companies Act, No 61 of 1973] and the laws in relation to directors and chairmen of companies, it is hereby agreed that:
>
> 3.4.1 Retief shall, in consultation with Exco, have authority to appoint and dismiss the CEO as well as the Chief Financial Officer of the Group, provided that Exco shall be entitled to request Retief to initiate a dismissal process of the CEO on reasonable grounds and provided further that where the matter concerns the CEO he/she shall be excluded from the deliberations of Exco;

[2] Process employed in producing publication such as newspapers.
[3] Retief family trusts and other businesses

3.4.2 Retief shall have primary authority and responsibility to oversee and supervise the CEO who shall in turn be responsible for the overall day to day management of the Group (including the appointment and dismissal by the CEO of the Managing Directors of the respective Business Units of the Group in consultation with Retief), and the CEO shall be primarily answerable and report to Retief subject to ultimate accountability of the CEO to the Board;

3.4.3 Retief shall procure that the CEO formulate and prepare in consultation with Retief the consolidated annual budget and consolidated business plan of the Group from time to time for submission to the Board for approval;

3.4.4 Retief shall monitor the implementation by the CEO of the above-mentioned approved budget and business plan during each financial year of the Group or part thereof falling within the period of his appointment (which, for the avoidance of doubt, will include the monitoring of the financing policy of the Group and its capital expenditure programme);

3.4.5 It is intended that Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conducting of the business of the Group on the basis of operational independence in principle from the Board, Media 24 and the Shareholders, provided that it is exercised in consultation with the Board and further subject to his ultimate responsibility to the Board;

3.4.6 Retief shall in consultation with the Board, primarily be responsible for the planning and implementation of the strategic direction of the Group;

3.4.7 Retief shall have the authority and responsibility to implement and ensure compliance with sound and generally accepted corporate governance policies by the Group (which, for the avoidance of doubt, will include the establishment of, and consulting with, an audit committee and such other committees the Board may deem necessary); provided that it is understood that such policies shall be implemented

as required by the Act and not serve as a motivation to impair the operational independence in principle of Retief as contemplated in clause 3; and

3.4.8 if any of the terms and conditions of the printing agreements need to be amended in any respect (including, without limitation, the pricing mechanisms), it shall be done in consultation with Retief despite not being a contracting party to the aforesaid printing agreements.'

[13] As can be seen from these clauses of the agreement, Retief had a wide variety of powers conferred upon him. Some of the powers possessed had to be exercised '*in consultation with*' the Board or its Executive team or the Chief Executive Officer ('CEO'). It is common cause that this meant that these powers had to be exercised with the concurrence of both parties.[4] This effectively gave each party a veto over any exercise of these powers. An example of those powers is in clause 3.4.1 where Retief had the power 'in consultation' with Exco to appoint and dismiss the CEO and the Chief Financial Officer ('CFO') of the PMG Group. He however had primary authority and responsibility to oversee and supervise the CEO in terms of clause 3.4.2.

[14] Clause 3.4.3 gave Retief powers to prepare with the CEO the Group's annual budget and consolidated business plan for submission to the Board for approval. He monitored the implementation of the budget and business plan by the CEO in terms of clause 3.4.4.

[15] Clause 3.4.5 established, in relation to the exercise of Retief's duties and responsibilities, the principle of operational independence between him on the one hand and the Board (i.e. PMG's board of directors), Media 24 and the Shareholders, on the other. Clause 3.4.6 conferred on him primary responsibility for the planning and implementation of the strategic direction of the Group in

[4]See *Van Rooyen and Others v The State* 2001 (4) SA396 (T) at 453 D-E. The authorities on this point state that a decision 'in consultation with' another functionary requires the concurrence of that functionary while a decision 'after consultation with' requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary.' See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 206 D – F and *Premier Western Cape v President of the RSA* 1999 (3) SA 657 (CC) at para [85] footnote 94.

consultation with the Board. Lastly, in terms of clause 3.4.8 Retief had a right to be consulted on any amendments to the terms and conditions of printing agreements despite not being a contracting party to those contracts. In terms of clause 3.8, the parties could refer any dispute concerning their duties to an expert whose decision would be final and binding.

2014 Notification

[16] In October 2014, Retief expressed an intention to retire as non-executive chairman of the PMG Group and thus exercise the 'put options' contained in the shareholders' agreements against Media 24, thereby disposing of the Retief entities' interests in the PMG Group. This would have made PMG the sole shareholder of the operating subsidiaries and would have terminated the management agreement.[5]

[17] The respondents allege that they were not sure whether the retirement would involve a change from joint to sole control of the PMG Group in terms of s 12(2)(g) of the Act. They accordingly filed a merger notification with the Commission on 28 January 2014, purely out of caution. The Commission investigated the proposed merger over a period of five months.

[18] On 24 June 2014 the Commission recommended to the Tribunal that the proposed merger be approved without conditions. On 1 August 2014, Caxton applied to the Tribunal for leave to intervene in the merger proceedings and oppose the merger. The merger parties opposed the intervention but Caxton was granted leave to intervene on 18 August 2014.

[19] This led to the abandonment of the proposed transaction. Retief said he regarded it as untenable that PMG Group's direct competitor, Caxton, should have access to its confidential information. The Tribunal had already ordered the merger parties to furnish the Commission with documents and details regarding the Nasper's control structure and Caxton had proposed to the Commission that a wide

[5] See clause 5.1 of the old agreement.

range of other documents also be requested. The proposed merger was accordingly abandoned. The Commission was notified of the abandonment on 22 August 2014.

The listing and the new agreement

[20] On 9 February 2015 PMG was converted into a public company, known as Novus at which time its Memorandum of Incorporation ('the MOI') was registered. On 18 February 2015, it was announced on the Stock Exchange News Services ('*SENS*') that Media 24 had applied for a JSE listing of Novus, its subsidiary. The rationale for the listing was stated in the following terms:

> ' ...With an ever growing percentage of Novus's work now coming from third parties, and Novus's continued diversification of its revenue streams, it is appropriate to list Novus on the JSE. The listing will be effected via a private placement of Novus shares on the JSE. Media 24 will remain the majority shareholder of Novus.'

[21] Subsequent to this and on 23 February 2015 Retief, Novus and Media 24 concluded the new agreement. It is this new agreement which Caxton contends diminishes Retief's joint control. Caxton submits that the new agreement subjects all of Retief's powers and functions to the authority of Novus' Board thus leaving Media 24 with sole control over Novus' business. In terms of a related contract, the so-called 'flip-up agreement', the Retief family shareholdings in PCS and PMH (held by Adbait) were sold to Novus in return for shares in Novus, so that PCS and PMH became wholly-owned subsidiaries of Novus and Adbait acquired a minority shareholding in Novus.

The new agreement

[22] Clause 4.3 of the new agreement is broadly the counterpart of clause 3.4 of the old agreement. It provides as follows:

> '4.3 Subject to the duties of the members of the Board in terms of the Act [the Companies Act, 71 of 2008], the MOI, the Listing Requirements and the Law, and that Mr Retief, as non-executive Chairman and director of the Company, discharges his duties in compliance with the Act, the MOI, the Listing

Requirements and the Law, it is agreed, on the same basis as provided for in the prior agreement in that:

4.3.1 Mr Retief shall in consultation with Exco, have the authority to appoint and dismiss the CEO, the CFO and the COO of the Group, provided that the Exco shall be entitled to request Mr Retief to initiate a dismissal process of the CEO on reasonable grounds, and provided further that where the matter concerns the CEO he/shall be excluded from the deliberations of Exco;

4.3.2 Mr Retief shall have primary authority and responsibility to oversee and supervise the CEO who shall in turn be responsible for the overall day to day management of the Group (including the appointment and dismissal by the CEO of the Managing Directors of the respective Business Units of the Group in consultation with Mr Retief), and the CEO shall be answerable and report to Mr Retief subject to accountability of the CEO to the Board;

4.3.3 Mr Retief shall procure that the CEO formulate and prepares the consolidated annual budget and consolidated business plan of the Group from time to time for submission to the Board for approval;

4.3.4 Mr Retief shall monitor the implementation by the CEO of the above-mentioned approved budget and business plan during each financial year of the Group or part thereof falling within the period of his appointment (which, for the avoidance of doubt, will include the monitoring of the financing policy of the Group and its capital expenditure programme);

4.3.5 Mr Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conduct of the business of the Group on the basis of Operational Independence from Media 24 (the controlling shareholder of NOVUS as at the restatement date) provided that it is exercised from time to time in consultation with the Board and further subject to Mr Retief's accountability to the Board;

4.3.6 Mr Retief shall oversee the strategic direction of the Group and monitor the implementation thereof by the CEO;

4.3.7 Mr Retief, as non-executive Chairman shall have the authority and responsibility to oversee the implementation and ensure compliance with sound and generally accepted corporate governance policies by the Group (which, for the avoidance of doubt, will include the establishment of, and consulting with, an audit committee and such other committees the Board may deem necessary or as required in terms of the Act and the King Report); provided that it is understood that such policies shall be implemented as required by the Act, the Listings Requirements and the King Report and not serve as a motivation to impair the Operational Independence; and

4.3.8 if any of the terms and conditions of the printing agreements need to be amended in any respect (including, without limitation, the pricing mechanisms), it shall be done in consultation with Retief despite not being a contracting party to the aforesaid printing agreements.'

[23] Clause 4.6 makes provision for the Board, 'in the interest of the Group to ensure that the conduct of the business of the Group takes place on the basis of Operational Independence.'

Issue to be determined

[24] The issue to be determined is whether the joint control that Retief shared with Media 24 under the old agreement has been diminished by the provisions of new agreement to an extent resulting in Media 24's acquisition of sole control, which required notification of a merger in terms of the Act.

[25] Caxton contends that whilst Retief retains certain of his former functions, he has been stripped of all power-sharing and accordingly no longer has material influence over the strategic aspects of Novus.

[26] The significant change, it argues, was brought about by the conversion of Novus to a public company on the terms set out in the MOI, which effectively rendered the old agreement unlawful. In this connection, it submits that the regime of joint control under the old agreement was incompatible with s 66 (1) of the Companies Act 70 of 2008 ('the new Companies Act'); paragraph 35.1 of the

MOI, the Listing Requirements of the JSE and King III. The change had to be made, it submits, in compliance with the law.

[27] Section 66 (1) of the new Companies Act (which came into force on 1 May 2011) provides that:

> 'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[28] The 'except' part of s 66(1) means that the usual dispensation set out in the main part of the section may be altered by the MOI. The old agreement, so Caxton contends, represented a deviation from the main part of s 66(1). However, for as long as Novus (then called PMG) was a private company, the doctrine of unanimous consent (furnished by its sole shareholder Media 24) permitted this deviation even if the deviation was not recorded in PMG's constitutional documents.[6] But this changed, so Caxton argues, upon Novus' conversion to a public company on the terms set out in its new MOI, a change furthermore on which the JSE insisted as a requirement for Novus' listing, The MOI in this case simply echoes s 66 (1). Article 35.1 of the MOI provides that 'The business and affairs of the Company shall be managed by or under the directions of the Board, which has authority to exercise all of the powers and perform any of the functions of the Company, except to the extent that the Act or this Memorandum of Incorporation provides otherwise.' Article 35.2 goes on to state that: 'The general powers granted to the Board by this clause 35 shall not be limited or reduced by any special authorisation or power granted to the Board by any other clause in the MOI.' The MOI makes no reference to the old or new management agreement and does not contain provisions derogating from s 66(1)'s primary dispensation of board control.

[6] Whether the 'deviation' was so recorded is not known because PMG's constitutional documents predating the MOI of February 2015 are not part of the record.

[29] Paragraphs 3.84 (b) and 7F(6)(b) of the Listing Requirements require that 'there must be a policy evidencing a clear balance of power and authority at board of directors' level, to ensure that no one director has unfettered powers of decision-making.'

[30] The Listing Requirements further prescribe compliance with principles 2.1.1 and 2.2.5 of King III which require companies to be headed by a board that directs, governs and is in effective control of the company and the board to play a prominent role in the strategy-development process and not be the mere recipients of strategy proposed by management.

[31] Caxton's case is accordingly that the preamble clause (clause 4.3) of the new agreement subjects all of Retief's powers and functions to a new general qualification which is in conformity with the legal requirements set out above.

[32] The respondents on the other hand contend that Retief remains a joint controller of the Novus group. They submit that Media 24 acquired no form of control of the Novus Group as a consequence of the listing and the new agreement. The listing gave rise to no change of control and hence no merger existed for purposes of the Act.

[33] In this connection they submit that under both the old and new agreements, Retief was and is still able to exert material influence over key aspects of Novus' policy, including the constitution of Novus' senior executive team; overseeing and supervising the CEO's conduct of Novus' businesses, affairs and subsidiaries; what is contained in the annual budget and business plan and their implementation by the CEO; and the extent to which Novus' printing agreements can be varied.

[34] Their argument is premised on the interpretation of 'material influence' in s 12(2)(g) of the Act which they argue postulates a standard of influence that is weaker than decisiveness which is the test that is applicable under the European law.

[35] Mr Unterhalter SC, who appeared together with Mr Pearse, for the respondents, emphasized this difference. He submitted that the concept '*material*

influence' denotes '*significant*' but not necessarily decisive influence. He further submitted that a person who may exercise material influence under s 12(2)(g) must have an ability to do so in a manner that is consistent and predictable in contrast to a person who may do so on an adhoc or on a contingent basis. In his view the standard of influence contemplated in s 12(2)(g) did not require that a person should have the power to determine the firm's policy in preference to or even against the wishes of other stakeholders and/or to act independently of them; there was no requirement that such person's consensus or approval was needed in taking strategic and competitive decisions of the firm before there could be *'material influence'*.

[36] In Mr Unterhalter's view, material influence by Retief over the strategic aspects of the company could be found to be present even if s 66(1) and the preamble to clause 4.3 vested residual and overriding authority in the board. Retief might have less power than before but he still had sufficiently material influence to constitute a continuation of joint control.

[37] In this regard, Mr Unterhalter went on to argue that it would be incorrect to postulate that a mere reduction of power would constitute a merger. A person either has control or does not; there are no degrees of control. In other words, even if Retief was, despite a reduction of powers, left with material influence, he still had control.

[38] The matter turns on the interpretation of s 12(2)(g) of the Act. It is necessary to determine its meaning and scope.

Applicable provisions of the Act

[39] Section 13A(1) of the Act makes it mandatory for any party to an intermediate or large merger to notify the Commission of the merger in the prescribed manner and form. Parties to an intermediate or large merger may not implement the merger until it has been approved with or without conditions by the Commission, the Tribunal or by this Court in terms of section 13A(3) the Act. It is

common cause that, should it be found that a merger indeed took place, it constitutes a 'large merger', as contemplated in s 13A(1).

[40] Section 12(1) of the Act defines a merger as follows:

'(a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –

(i) purchase or lease of the shares, an interest or assets of the other firm in question;

(ii) amalgamation or other combination with the other firm in question.' (Own emphasis)

[41] Section 12(2) lists various forms of control as follows:

'A person controls *a firm* if that person –

(a) beneficially owns more than one half of the issued share capital of *the firm*;
(b) is entitled to vote a majority of the votes that maybe cast at a general meeting of *the firm*, or has the ability to control the voting of the majority of those vote either directly or through a controlled entity of that person;
(c) is able to appoint or to veto the appointment of the majority of the directors of *the firm*;
(d) is a holding company, and *the firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No.61 of 1973);
(e) in a case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of a close corporation, owns the majority of members' interest, or controls directly, or has the right to control the majority of the members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commerce practice, can exercise an element of control referred to in paragraphs a to f"

[42] It was held in **Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) (Ltd)** [2001-2002] CPLR 36 (CAC) that s 12 of the Act envisaged '*a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market structure and in particular reduces the level of competition in the relevant market*.' The wording of s 12(2) thus contemplates a situation where more than one party simultaneously exercises control over a company.[7]

Interpretation of s 12(2)(g)

[43] Section 12(2)(g) proceeds from the assumption that a person with control in one of the forms set out in paras (a) to (f) of the subsection (each of these forms being 'an element of control') usually, that is, 'in ordinary commercial practice', has the ability to materially influence the policy of a firm. The nature of the influence contemplated in paras (a) to (f) is thus relevant to the interpretation of para (g).

[44] Sutherland **Competition Law in South Africa** at 8-27 suggests that (a) to (f) provide that a firm will control another firm if (i) it directly or indirectly owns more than 50% of a firm, and further that (e) lays a different basis for control of a trust ; (ii) it has the ability, directly or indirectly, to appoint or dismiss controlling managers of a firm; (iii) it has the ability to make management decisions of a firm whether directly or through a power of dismissal or replacement of managers.

[45] Section 12(2)(g) permits for a filling-in of potential lacunae in the manifestations of control as provided for in (a) to (f) with the touchstone being material influence. Expressed differently, it may not be required by the section

[7] *Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd* supra

that a person must have a right *strictu sensu* to steer a firm or to appoint persons to do the necessary steering to constitute control in terms of (g) but the person must have a power to either steer or appoint those who can do the necessary steering. The term power is derived from Hohfeld, **Fundamental Legal Conceptions as Applied in Judicial Reasoning** (1917). A power is the opposite of a disability in that if A can exercise a power B is disabled from interfering with the consequence of that exercise, which in turn depends on the scope of the power so possessed.

[46] In the case of (g) the term 'ability' can, in my opinion, be viewed as a power sourced in an agreement or similar legal instrument, just as the powers in (a) to (d) are sourced in legal instruments such as the company's founding documents, shareholder agreements and the like. The influence which can be exercised pursuant to such a power under (g) must, in terms of the wording of the section, be an influence over the 'policy' of the firm. Matters of 'policy' would be important or strategic decisions of the company such as are typically decided by shareholders in general meeting or at board level (as reflected by (b) and (c)).

[47] The most obvious way of exercising influence, for **purposes** of s 12)2)(g), would be by way of a direct decision-making power on matters of policy, in the same way as the majority shareholder can usually exercise a direct decision-making power on such matters. The present case does not require us to decide whether, and if so how, indirect influence akin to that exercised by the person having the power to appoint a majority of directors (para (c)) could arise in the context of para (g).

[48] The word 'materially' in para (g) refers, in my opinion, not to the decisiveness of the power but to the range of matters over which it extends. The word 'ability' in para (g), viewed in the context of the preceding paragraphs of the subsection, points to the power to do something (which may be the positive power to determine an outcome or the negative power to prevent an outcome). However, if the power applies only to one or two matters, depending on the nature of those matters, it may not be sufficiently extensive to meet the threshold of materiality. The range of influence need not be as extensive as that exercised directly by

shareholders through the general meeting or indirectly through the board by the person with the power to appoint the directors but it must, as in both those cases, be reasonably extensive since otherwise it will not be comparable to the influence exercised by a person with control contemplated in paras (a) to (d).

Section 12(2)(g) and the old agreement

[49] The Tribunal found that the parties paid only lip service to the apparently wide powers conferred on Retief by the old agreement and that he did not in fact exercise material influence. In approaching the case in that way the Tribunal erred. Viewed through the prism of (g) the question is what powers he possessed rather than what he exercised in practice.

[50] Both parties agree that the word '*ability*' means that a person can influence the policy in the required manner, without having to show that it in fact does so in practice. The respondents contended that the enquiry is not limited to contractual entitlement but includes the manner in which Novus was governed in the years following the 2008 restructuring.

[51] I disagree with the respondents' proposition in this regard. It is not necessary, in this case, to embark on a factual enquiry beyond what is stated in the two agreements. This is because Retief's powers are clearly stipulated and ascertainable from the provisions of the contract. How Novus was in fact governed in practice is irrelevant.

[52] The parties before us were agreed that by virtue of the old agreement Retief had control of PMG in terms of para (g). At the same time Media 24 had control of PMG in terms of paras (a) to (d). Although the parties referred to this situation as joint control it might be more accurate to describe it as dual control since joint control more typically refers to the case where parties combine rights of a similar kind so as to create control, for example, where shareholders who individually lack

a majority combine their rights so that together they can command a majority of the general meeting and can control the appointment of a majority of the directors.

[53] With a view to contrasting Retief's position under the old agreement with his position under the new agreement, it is necessary briefly to state why I agree with the parties that under the old agreement Retief had control in terms of para (g).

[54] The authority to appoint and dismiss the CEO and CFO, the two most senior executive positions in the company, vested in Retief. Because he had to exercise the appointment power 'in consultation with' PMG's Exco, the Exco had a veto right but the positive power nevertheless vested in Retief. Furthermore, the Exco comprised Retief, the CEO and two board members nominated by Media 24, so that – at least following the appointment of the first CEO – power on the Exco would be evenly distributed between Retief and his appointee on the one hand and the two nominated directors on the other. The CEO was primarily answerable to, and reported, to Retief, not the board.

[55] The CEO was to formulate and prepare the company's consolidated annual budget and consolidated business plan 'in consultation with' Retief. This meant that Retief had a veto power in respect of the budget and business plan, so that they could not go forward to the board for approval unless they carried Retief's approval.

[56] Retief was primarily responsible for the planning and implementation of the PMG Group's strategic direction. This power was to be exercised 'in consultation with' the board, meaning that the latter had a right of veto. Again, though, the positive power vested in Retief.

[57] The printing agreements between PCS and PMH on the one hand and Media 24 on the other could not be amended by those parties except in consultation with Retief, meaning that he had the right to veto amendments.

[58] Cumulatively the matters summarised above covered a sufficiently wide range of strategic matters to constitute material influence, in some respects positive and in some respects negative. They encompassed the heartland of matters to

which EU regulators conventionally look when assessing whether influence over, and thus control of, a firm exists: budgets, business plans and the appointment of senior managers.[8] The agreement emphasised the separate location of control in Retief by recording that he was to exercise his duties and responsibilities and arrange the conducting of the Group's business on the basis of 'operational independence in principle' from PMG's board, from Media 24 and from the shareholders of PCS and PMH. The principle was not merely one of the Group's independence from Media 24 but of Retief's independence from PMG's board and from the shareholders of PMG's operating subsidiaries. This is important because the usual locus of strategic control of the Group would have been these very entities.

[59] In terms of the preamble the rights conferred on Retief were subject to the fiduciary duties of the members of PMG's board. This did not mean that the board could override Retief whenever they preferred their view to his. Viewed within the context of the contract as a whole and the circumstances in which it was concluded, the preamble could not have been intended to allow the board to intervene unless Retief in their view was not acting bona fide in the best interests of the Group. In this and other instances where the board had a veto right, the board could not ultimately have its way – unresolved disputes in that respect were to be referred to an expert for determination and his or her determination was to be final and binding on both sides.

[60] All of this must be viewed against the backdrop of a legal environment in which a company's board was viewed as the recipient of delegated authority from the shareholders and where there was no objection in principle to an arrangement by which certain powers, which would usually vest in the board, were instead conferred contractually on someone else, so that there were three centres of power: the general meeting, the board and the third party. The arrangements contained in

[8] Faull and Nikpay*The EC Law of Competition* 2nd Ed at 808; Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C95/01) para 67.

the old agreement were approved, inter alia, by Media 24, which was PMG's sole shareholder, and by all the shareholders of PCS and PMH (being Media 24 and the Retief entities).

Section 12(2)(g) and the new agreement

[61] Leaving aside, for the moment, the preamble to clause 4.3 of the new agreement, some apparently important powers remain with Retief while others have fallen away or been diluted.

[62] The important powers which remain are the following. Retief still has the right, in consultation with Exco, to appoint the CEO and the CFO. His right of appointment has been extended to include the COO. The Exco with the veto right is arguably now weighted in Retief's favour because it comprises himself and his three appointees (the CEO, the CFO and the COO) and two directors nominated by Novus. Retief still has the authority and responsibility to oversee and supervise the CEO who is answerable and must report to Retief.

[63] Retief also retains his right to veto amendments to the printing agreements.

[64] There has been a dilution of Retief's powers in relation to the Group's consolidated annual budget and consolidated business plan. His role is now simply to procure that the CEO prepares these documents. The CEO is not required to do so in consultation with Retief, so the latter has lost his veto right in respect of these important strategic documents.

[65] In regard to the strategic direction of the Group, Retief is no longer responsible for its planning and implementation. His responsibility appears to be the more modest one of 'overseeing' the strategic direction and the monitoring of its implementation. This dilution must be viewed in the context of the fact that the strategic direction of the Group would be set by its consolidated business plan, over the content of which Retief has lost his veto right.

[66] The principle of operational independence has also undergone an important change. The independence is now independence between the Group on the one hand and Media 24 on the other. The principle governing the exercise by Retief of

his duties and responsibilities is not one of operational independence from PMG's board. In this regard clause 4.3.5 must be read together with the new definition in clause 2.2 of the term 'Operational Independence', the opening part of which refers to the conduct of the Group's business in a manner which ensures its ability to secure and conduct business in its commercial interests 'as determined from time to time and for the time being by the Board'.

[67] This takes one conveniently to the preamble to clause 4.3. Everything is made subject to the duties of the members of PMG's board in terms of the 2008 Companies Act, the MOI, the Listing Requirements and 'the Law' (a term very widely defined in the agreement and including, so the parties agree, King III).

[68] In terms of the new Companies Act a company's board is the repository of original powers rather than the recipient of powers delegated to it by the shareholders through the articles of association. Section 66(1) states in this regard that the business and affairs of the company must be managed by or under the direction of its board, which has the authority to exercise all the powers and perform any of the functions of the company, 'except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'. The 'except' part of section 66(1) permits a deviation from the usual dispensation if the MOI makes provision for such deviation.

[69] The appeal record does not tell us whether PMG adopted a new MOI when the new Companies Act came into force in May 2011. What can be said is that until 9 February 2015 PMG was a private company with Media 24 as its sole shareholder. The parties appear to be agreed that, even if PMG did not adopt a new MOI which sanctioned the terms of the old management agreement, the arrangements in the old agreement were – notwithstanding any deviation from s 66(1) – legitimised through the doctrine of unanimous assent.

[70] Things changed when on 9 February 2015 PMG, now called Novus, was converted to a public company and adopted a new MOI. At least upon listing and the diversification of its shareholders, the doctrine of unanimous assent would cease to be a practically relevant consideration. More importantly, the new MOI

does not contain any provisions departing from the usual dispensation ordained by s 66(1). The MOI does not mention the management agreement or derogate in any way from the board's statutory power and duty to manage Novus's business and affairs or its authority to exercise all powers and perform all the functions of the company.

[71] The absence of derogation from the board's powers and duties is consistent with the Listing Requirements and King III. The former require that a listed company must have a policy evidencing a clear balance of power and authority at the level of the board to ensure that no one director has unfettered powers of decision-making. The latter requires inter alia that a company must be headed by a board that directs, governs and is in effective control of the company and that the board must play a prominent role in the strategy-development process and not be a mere recipient of strategy proposed by management.

[72] The preamble to clause 4.3 of the new agreement thus appears to have a far more limiting effect on what follows than the preamble to clause 3.4 of the old agreement. Indeed, to the extent that the individual sub-clauses confer positive or veto powers on Retief, they would appear to be inconsistent with s 66(1) as read with Novus' MOI and thus, as Caxton argues, unenforceable. An alternative and perhaps preferable view is that, although Retief may in the first instance perform the responsibilities which the agreement apparently confers on him, the board has an unlimited right to intervene and override if it regards a different course of action as preferable. On the latter view, Retief's powers have been diluted to a level similar to those of a managerial employee who may from day to day appear to have significant influence but who does not have control of the kind contemplated in s 12(2)(g) because he is subject to being overridden at any time by his superiors.

[73] One might ask why parties would conclude an agreement which appears to take away with the one hand what it gives with the other. However, in the unusual circumstances of the present case the answer is not hard to discern. The initial plan was for Retief to sell his family's minority interest in the Group and to retire, bringing the management agreement to an end. This was thwarted by Caxton's

intervention in the merger proceedings initiated by the notification of January 2014. Although a different course of action was then resolved upon, there is no reason to believe that Retief became intent on maintaining an influential role in Novus' affairs. Novus' listing, it may fairly be assumed, was regarded by Retief as likely to enhance the value of his family's minority shareholding (which in terms of the 2015 transaction has been 'flipped up' from PCS and PMH to Novus). The JSE would not permit Novus to be listed unless its MOI placed management control squarely in the board's hands. Retief is unlikely to have had any opposition to such a dispensation. The parties would have been aware, however, that the termination of the management agreement would present the same difficulties as the 2014 merger. After all, it was the proposed termination of the management agreement in 2014 which prompted the 2014 merger notification and Caxton's disruptive intervention.

[74] Against that background, it is not unreasonable to suppose that the parties intended, consistently with the MOI, the Listing Requirements and King III, to place final management authority on all matters in the board's hands while retaining as much verbiage from the old agreement as would get past the JSE, thus providing a basis for arguing that there has not been a transition from dual (or joint) control to sole control. But for the reasons I have endeavoured to explain, the argument cannot succeed.

[75] There was an argument that, even if Retief no longer has material influence for purposes of s 12(2)(g), there has been no merger because no additional influence had been acquired by Media 24. The argument was based on s 12(1)(a) which provides that a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. The view generally adopted, correctly in my view, is that if there is a transition from joint or dual control to sole control there is a merger.[9] Both here and abroad competition regulators have always regarded there as being a

[9]*Ethos Private Equity Fund IV / Tsebo Outsourcing Group (Pty) Ltd* [2003] 2 CPLR 371 (CT) at paras 24 and 25 and *Iscor Ltd and Saldahna Steel (Pty) Ltd (67/LM/Dec01***)**

sufficient distinction between the character of sole control and joint control to engage merger assessment. An enquiry into the change in the remaining controller's actual influence more properly belongs to assessment than notification. Bright lines are needed for merger notification.

[76] I would simply add that if X has control of a company in terms of paras (a) to (d) and Y has control in terms of para (g), it would appear to follow as a matter of basic logic that Y's ability (i.e. power) to influence the company's policy must be a derogation from X's presumed ability to influence such policy in terms of paras (a) to (d). With the disappearance of Y's ability to influence, the derogation from X's presumed influence ceases and X's presumed influence can thus be taken, for merger notification purposes, to have been enhanced (ie restored), unless of course Y's ability to influence has been transferred to Z, in which case Z's acquisition of joint or dual control will also be a notifiable merger.

[77] A further question arose as to what would be the purpose of clause 4.8 which allows for an expert to make a decision if parties reached a deadlock, if Retief was not meant have 'joint' control under the new agreement. Clause 4.8 stipulates:

> 'Should any dispute arise between the Parties regarding the duties and responsibilities of Mr Retief and/or the Board in terms of this clause 4 (which, for avoidance of doubt, will include a dispute as to whether Operational Independence is materially or on an on-going basis impaired), which the Parties are unable to resolve, such dispute shall be referred to the Expert for determination in terms of clause 9 below.'

[78] Clause 9 sets out the dispute resolution mechanism. In terms of clause 9.2 the expert shall make his/her decision as an expert and not as an arbitrator which decision shall be final and binding on each of the parties.

[79] Mr Trengrove submitted that clause 4.8 is *pro non scripto* in the light of the preamble and the new legislative parameters. According to him, the expert must interpret the powers vested on the parties in light of the preamble. This effectively means that the expert's decision will not be able to trump the decision of the board.

[80] The drafters of the new agreement were possibly not alive to the consequences of s 66(1) of the new Companies Act. In the final analysis the question is not whether Retief has retained some significant powers (although his powers have been diminished under the new agreement as indicated before) but whether he can legally exercise 'joint or dual control' with the Board as he did before. The preamble in clause 4.3 subjects the provisions that follow to the structure of the new Companies Act. It follows therefore that at the interpretative level, s 66 must prevail.

[81] It follows that the Tribunal erred in finding that a notifiable merger had not occurred. The merger, although it has now been implemented, will thus need to be notified and assessed in terms of s 12A. This is not, after all, such a dramatic conclusion. It does not seem to be in dispute that sooner or later there will need to be a merger notification. If not now, merger notification will be required when the new agreement comes to an end, which will occur at the latest when Retief turns 65 in November 2017.

Have the requirements for the granting a final interdict been satisfied?

[82] Mr Unterhalter argued that Caxton did not show that it had a clear right worthy of protection but merely contended that it had an interest in the 2015 listing given that it was the respondents' competitor and that it was granted leave to intervene in the abandoned merger 2014 proceedings.

[83] Caxton has a real interest in ensuring that the merger is subjected to scrutiny by the relevant competition authorities. As was stated in **American Soda Ash v the Competition Commission** [2005] 1 CPLR 18 (CAC) at para [4]'*there is no need for a participant at any hearing to show that he or she has suffered damages or that they may be exposed to them.*' A party need not show that any specific right has been infringed or that they require protection against any serious or irreparable damage entitling them to an order. This position was confirmed by the SCA in **American Soda Ash v the Competition Commission** [2005] 1 CPLR 1 (SCA) para [34] where it held the following:

> 'We agree with the CAC's conclusion. Ansac's argument seeks to conclude from the limited express rights the Act confers on a participant in a hearing that the Act requires an intervenor to comply with the strict common-law requisites for interdictory relief; but this is to overlook the significance of the fact that a broad ambit of participatory rights is created in the first place.'

[84] There is no need for Caxton itself to show that it would suffer damage if the interdict was not granted. An unnotified merger would undermine the objects of the Act which prohibits implementation of a merger without the approval of the Commission. Mr Unterhalter submitted that parties should be discouraged from directly approaching this Court when it was open to them to approach the Commission to investigate and report on transactions. Direct access to the Tribunal, he argued, should be preserved for those parties whose rights are so imperilled so as to warrant the immediate attention of the Tribunal.

[85] Mr Trengrove argued that for these matters to be taken up by the Commission they must be reported. There is no mechanism available to pursue the Commission to act on unreported mergers.

[86] When an urgent application was brought to the Tribunal, the listing had not yet taken place. Even if ordinarily a third party should report an anticipated unlawful implementation of a merger to the Commission and leave it to the Commission in the first instance to take action, time did not allow for this in the present case. Caxton was thus entitled to approach the Tribunal as a matter of urgency. The horse has now bolted, so to speak, as the implementation of the transaction has taken place. Caxton became confined to an order seeking notification post the listing. Listing took place after the matter was considered and adjudicated upon by the Tribunal. It seems permissible for Caxton to approach this Court with the view to setting aside the Tribunal's order. By granting the relief sought this Court would not be encouraging parties to approach it directly as the context in other cases might differ. Indeed, the policy of the Act regarding notification to the Commission remains and parties are still required by the Act to adhere to the provisions of the Act regarding notification of mergers.

[87] For the reasons above, the new agreement falls within the meaning of s 12(1) of the Act and a merger ought to have been notified in terms of s 13A(1) of the Act.

[88] Although the points of law involved in this matter are not free from complexity, the matter was not so voluminous and extensive as to justify the use of three counsel.

[89] In the result the following order is made:

1. The appeal is upheld with costs including the costs of two counsel;
2. The first to fourth respondents are ordered to notify the fifth respondent of the change of control of the second respondent brought about by the implementation of the restated management agreement dated 23 February 2015.

N P BOQWANA AJA

DAVIS JP and ROGERS AJA concurring

APPEARANCES

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