IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Competition Appeal Court Case No. 68/CAC/MAR/07
Competition Tribunal Case No. 39/AM/May06

In the matter between:

AFRICAN MEDIA ENTERTAINMENT LTD	Applicant
and	
DAVID LEWIS NO	First Respondent
NORMAN MANOIM NO	Second Respondent
YASMIN CARRIM NO	Third Respondent
PRIMEDIA LTD	Fourth Respondent
CAPRICORN CAPITAL PARTNERS (PTY) LTD	Fifth Respondent
NEW AFRICA INVESTMENTS LTD	Sixth Respondent
THE COMPETITION COMMISSION	Seventh Respondent

J U D G M E N T

TSHIQI, AJA:

[1] This is a review of a decision by the Competition Tribunal ("*the Tribunal*") to approve, unconditionally, the acquisition of an indirect 24,9% management interest and a maximum 18% financial interest by the fourth respondent in Kaya FM (Pty) Ltd ("*Kaya*"), a radio station that is a potential

competitor of radio stations operated by Primedia Broadcasting (Pty) Ltd ("*Primedia*"), a subsidiary of Kaya.

[2] The acquisition of the interest in question was subject to the jurisdiction of the competition authorities as a notifiable merger because it occurred through the acquisition by Kaya and the fifth respondent ("*Capricorn*") of all the equity in New Africa Investments Ltd ("*Nail*"), the company that held the 24,9% interest in Kaya.

[3] This transaction was notified on 29 July 2005. The merger was an intermediate merger, subject to the jurisdiction of the Competition Commission ("*the Commission*"). The Commission approved the merger on certain conditions. Later when the matter came before the Tribunal (at the instance of the merging parties), who sought to have the conditions considered in terms of section 16 of the Competition Act 89 of 1998 ("*the Act*"), the Commission argued that the merger ought to be prohibited. In this it was joined by the intervening party, the current applicant ("*AME*"); the rival bidder for the stake in question. The Tribunal unconditionally approved the transaction in February 2007 ("*the first approval*").

[4] AME brought a review of the first approval before this Court ("*the first review*"). The Commission, cited as a respondent in the review, participated fully in joining in AME's contention that the Tribunal's determination fell to be set aside. This review application was upheld, and the first approval was set aside on the basis that the Tribunal had committed a material error of law in

that it misunderstood the nature of the statutory inquiry it was mandated to conduct in terms of s 12A of the Act, by conflating the jurisdictional and factual roles to be played by the question of control in the assessment of a merger. This Court remitted the matter to the Tribunal for expeditious reconsideration. By agreement the second hearing was restricted to renewed oral argument, preceded by further written argument submitted by the three parties (merging parties, Commission and AME). The Tribunal embarked upon a full substantive assessment as directed by this Court and unconditionally approved the transaction ("*the second approval*") on 9 May 2008.

[5] This review application, once again brought by AME, relates to the second approval. The Commission has not joined the present application.

[6] Section 53 of the Competition Act of 1998 (as amended) ("*the* Act") deals with the right to participate in the hearing and allows a party which has a material interest to participate in the hearing, subject to the discretion of the Tribunal and only to the extent required for the party's interest to be adequately represented.

[7] It is trite that an intervening party, for good policy reasons, is not recognised as sufficiently "*affected*" by a merger to the extent of being granted a right of appeal. Such an intervening party nevertheless has a right to review. As the present application is in the form of a review, it is necessary to set out briefly the indicated approach to such proceedings. Traditionally grounds for review are generally narrow and often deal with procedural

aspects and/or irregularities. There are however instances where the courts have to consider the merits. The courts have always been careful to point out that these two concepts should not be used interchangeably as it is sometimes the case. Because of this very important consideration, the courts on review should be careful not to determine merits except when considering whether the Act is justifiable according to the reasons given for it.

[8] The correct approach was in my view aptly described by Cameron JA in *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 where the learned Judge (paras 31-32) in approving of *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC)) stated that "*the question is not whether the decision is capable of being justified, but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion*". However, the learned Judge also acknowledged that under PAJA the courts are obliged to take into account to some extent the merits to determine whether the outcome is <u>rationally justifiable but clearly not to substitute own opinion on the correctness thereof</u> (my own emphasis).

The principle of deference in review matters therefore ought to be adopted against this background. This Court has concisely stated in *TWK Agriculture Ltd v The Competition Commission* 67/CAC/Jan07 (unreported) as follows:

> "*To recapitulate: were this court to have jurisdiction, it would be required to decide whether the Commission had properly exercised the powers entrusted to it to make a determination and further that it had applied its mind to the matter in arriving at a reasonable decision. In*

addition, consideration would have to be given to the particular expertise of the Commission in competition matters of this nature. It is here that the principle of deference to the expertise of the Tribunal or Commission would apply. This is a very different enquiry to an appeal when the court must consider whether the record of evidence contains material which reveals that the decision of the lower body was correct. In such a case this court would apply its own view as to the correct decision based on the evidence placed before it. The fact that this court would read the record of the evidence and then, after argument form the parties, arrive at its own decision is in the very nature of an appeal. In a case where the Tribunal's decision is based on a technical explication of the economic evidence, respect in the jurisprudential sense, must be shown to that body's expertise but even here, the decision on appeal is that of the court, based on its evaluation of the evidence and applicable law. By contrast, as indicated, a court has a far narrower remit in the case of a review where it must be particularly cognizant of the role, function and expertise of the administrative body."

[9] The Tribunal has been granted a legislative discretion to determine whether a merger should be approved and is thus empowered to perform an administrative function. It is clear as stated in *TWK Agriculture (supra)*, that this Court recognises that the most persuasive rationale for the principle of deference is that the Tribunal, given its mixed composition, is far more equipped to deal with the issues of both economics and law.

Merger proceedings entail extraordinarily protracted evidential investigations and reams of documentary material. To find that the failure on the part of the Tribunal in every determination, expressly, to deal with every single point of evidence or argument put before it amounts to reviewable irregularity would paralyse the exercise of its merger control functions and undermine the policies of the Act. As long as the court is satisfied that the Tribunal exercised its discretion properly and that the outcome is rationally justifiable; the court may not interfere. Before I turn to the substance of the application, it has

become necessary in the light of the Tribunal's second decision to deal with the relevant legal position regarding mergers of this kind.

THE SCOPE OF SECTION 12A: The Tribunal's postscript

[10] In the successful review brought by AME against the decision of the Tribunal of February 2007, this Court upheld the argument that the Tribunal had misconstrued the mandated enquiry and therefore misunderstood the nature and limits of its discretion in terms of section 12A. This Court noted that section 12 defines a merger whereas section 12A deals with competitive considerations and an evaluation of a merger as defined. Once a determination has been made that a merger exists, the enquiry mandated by the Act must be conducted in terms of section 12A of the Act. This Court further found that the Tribunal had focussed exclusively upon the question of control rather than dealing expressly and comprehensively with the considerations set out in section 12A. In short, the court's finding was that the entire assessment undertaken by the Tribunal was based on an examination of whether fourth respondent could "*exercise sole control over Kaya Fm by virtue of section 12(2)(g)*".

[11] To recapitulate: Chapter 3 of the Act deals with merger control. A merger is defined in terms of section 12 of the Act. Section 12(1) provides "*for the 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. Of particular relevance to this dispute is*

section 12(2)(g) which provides 'a person controls the firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) – (f)'."

[12] Section 12A is headed 'Consideration of Mergers'. Section 12A(1) provides for a two-stage enquiry. Initially the authority must determine whether or not a merger is likely to substantially prevent or lessen competition. If the merger is so likely to substantially prevent or lessen competition, the enquiry moves to an examination of any technological, efficiency or pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition and further whether the merger can or cannot be justified on substantial public interests grounds. In order to facilitate the investigation as to whether the merger is likely to substantially prevent or lessen competition, the Act provides the following guidance in section 12A(2):

> "*(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including –*
>
> *(a) that actual and potential level of import competition in the market;*
>
> *(b) the ease of entry into the market, including tariff and regulatory barriers;*
>
> *(c) the level and trends of concentration, and history of collusion, in the market;*

> *(d) the degree of countervailing power in the market;*
>
> *(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;*
>
> *(f) the nature and extent of vertical integration in the market;*
>
> *(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and*
>
> (h) *whether the merger will result in the removal of an effective competition.*"

[13] It is clear from an analysis of these provisions that the relevant competition authority, being either the Commission or the Tribunal has jurisdiction over a transaction in terms of Chapter 3 when that transaction falls within the definition of a merger as set out in section 12.

The thrust of the adverse finding by this Court of the Tribunal's approach in its February 2007 determination concerned the conflation of the definition of merger in section 12 which can be considered as the port of entry into Chapter 3 and the further enquiry as to whether that merger substantially lessens or prevents competition as set out in section 12A.

The Tribunal, somewhat unusually, provided a lengthy defence of its approach in its second determination which is the subject of this review.

[14] In a postscript to its determination it raised the following concern:

> "*What concerns us is a likely interpretation of the Court's decision that may result in a confusing dichotomy in merger analysis. Direct or triggering acquisitions are judged by the control standard – no control, no merger, no need to notify, and, short of a prohibited practice, no*

> *subsequent remedy even if it was a transaction that gave rise to the anticompetitive effects that have been association with passive financial investment that come to us in the jet stream of a triggering transaction are subject to scrutiny for their anticompetitive effects.*" (para 159 of the Tribunal's determination.)

[15] The confusion with regard to the relationship between section 12(2)(g) and section 12A has, arguably, been caused, in this case by the Tribunal's initial holding that it had jurisdiction over the enquiry into whether fourth respondent could control Kaya FM through sixth respondent for two reasons. It had jurisdiction over the acquisition of control over sixth respondent, being direct acquisition which meant: "*[t]he definition of what constitutes a merger also implicates the indirect acquisition of control of a business. Translated into the facts of the present merger, if Primedia through acquiring joint control over Nail acquired indirect control over Kaya FM we would have jurisdiction to examine an acquisition of control as part of the present notification*". (para 54.) Secondly, it found jurisdiction, in terms of its previous merger decision in relation to Tiso Consortium's takeover of sixth respondent, including Kaya FM. On this basis the Tribunal went on to say: "*It follows then as part of our substantive enquiry as to what the likely post merger effects are that whether the acquirer will indirectly control asset in the first enquiry*". (para 57.) From hereon the determination appeared to blur the two stages of the enquiry.

[16] Given this confused approach and its later carefully considered postscript, it becomes necessary for the sake of clarity in this area of law to set out what this Court considers to be the proper position with regard to questions of this kind. The first enquiry is to determine whether a merger has

taken place. If there is no merger as defined in section 12, then the relevant competition authority does not have the necessary jurisdiction pursuant to Chapter 3 of the Act. The competition authority, whether it be the Commission or the Tribunal, must therefore consider the necessary jurisdictional facts in order to determine whether the transaction properly enters into the scope of Chapter 3.

Briefly stated, jurisdictional facts refer to the preconditions that must exist prior to the exercise of the relevant power and procedures to be followed or formalities to be observed when exercising the power. The facts are jurisdictional because the exercise of the power granted to the authority depends on their existence or observance, as the case may be. See Hoexter *Administrative Law in South Africa* at 260.

It is therefore incorrect to refer to the transaction as a merger until such time a as the jurisdictional facts contained in section 12 had been found to exist. Once the case is treated as a merger then the enquiry must move to section 12A and not revert back, for example, to section 12(2)(g) of the Act.

[17] This then raises a second question, being the extent to which the kind of control found in section 12(2) (g) may then have an effect on a section 12A enquiry. It is clear, both from the approach adopted by the Tribunal and the earlier decision of this Court, that once the jurisdictional enquiry has been completed in favour of the competition authority's power to engage in the section 12A investigation, the enquiry conducted in terms of section 12A

needs to take account, of in cases such as the present, the nature of the control exercised. For example, in terms of the MHH I model employed by the Tribunal, the calculation of a minority financial interest is undertaken with a different formula to the one which would apply to a full acquisition of the share capital of the acquiring company. In short, once it has been decided that the transaction falls within the definition of merger under section 12, for example, because the conditions set out in section 12(2)(g) have been met, the relevant competition authority must proceed to an examination of the transaction which is then a merger as defined in terms of section 12. That enquiry is aided by the pointers set out in section 12A(2), which are not, however, exclusive of the enquiry. The nature of the transaction, taking account of the level of control which is now exercised, may become an important part of the substantive enquiry into the likely post merger effects.

GROUNDS OF REVIEW

[18] There are several grounds on which this review is based. However, there are two main issues which ultimately were emphasised during argument in the course of the review proceedings. In my view, the resolution of these two issues is determinative of the review. They are interrelated questions. The first issue is whether the Tribunal acted irregularly when it took into account the Kaya documents in considering the nature of the market. The second issue is whether the Tribunal failed to define the market properly. If it is finally determined that the Tribunal determined the market by means of

reasoning which is sustainable on review, the balance of AME's case is doomed.

THE USE OF KAYA DOCUMENTS

[19] The complaint is that through a mistake of law, the Tribunal was influenced in its finding by documents comprising extracts from board minutes of Kaya, the target firm despite the fact the documents were not formally proved in evidence through a witness with personal knowledge. Consequently, it is submitted, AME was deprived of an opportunity to test the documents through examination. It is further submitted that AME and the Commission objected to the use of the documents and the objection was never upheld or dismissed – such that the documents were never ruled admissible.

[20] The history behind the use of the documents can be summarised as follows:

The merging parties subpoenaed the managing director of Kaya, Ms Charlene Deacon, *duces tecum* to produce the relevant documents. On the first day of the hearing, Ms Deacon appeared, represented by counsel. The question arose as to the need for her continued presence during the hearing. It was indicated, given that she had not produced the required documents, that she would need to return to the proceedings once she had obtained the documents, at which point, depending on the contents of the documents, the

merging parties would indicate whether it was necessary to call Ms Deacon as a witness. The documents were in due course produced and the merging parties indicated that the documents would be put before the Tribunal and that they did not require to call Ms Deacon.

[21] During the course of the evidence-in-chief of the expert economist who testified for the merging parties, Dr Nicola Theron ("*Dr Theron*"), the witness referred to the "*strategic documents, which I'm sure we'll get to later*". At a point in her evidence-in-chief, junior counsel for the merging parties, conducting the examination, indicated that he was going to put documents in respect of which confidentiality claims had been made to the witness. In that context, a bundle of documents that had been extracted and paginated from the Kaya documents that had been produced by Ms Deacon under subpoena *duces tecum* was produced for the examination. Counsel for AME stated:

> "*Chairperson, we don't have bundles of documents from Kaya and nor do we understand any to have been approved.*"

[22] When it was explained that the bundle was extracted from the Kaya documents produced by Ms Deacon under subpoena, counsel for the Commission remarked:

> "*Chair I think the point that my learned friend, Mr Campbell, was making and with which we adjoin is that these are not documents of record. No witness has come to speak to them or say anything about them. They are just documents that were produced pursuant to a subpoena.*"

[23] Thereupon senior counsel for the merging parties placed the following with respect to these documents on record:

> "*Chair, could I clarify, because I dealt with this earlier? You will recall that we had Ms Dekan* [sic] *under subpoena. We managed with great difficulty but with the assistance of the Tribunal ultimately to extract the documents. We have them. We had indicated in the arrangement, you will recall, that if anybody wanted Ms Dekan, they could ask for Ms Dekan. This arduous question of having to call Ms Dekan to say is this a minute of the meeting of, I hope that none of my colleagues is serious about that, but if there is a problem, I'm sure we can go down that road. We had asked you to receive these provisionally and if there's any challenge specifically to their status that they look like recent replicas, then perhaps we can deal with the problem as and when it arises. But I suggest otherwise we are wasting time.*"

[24] At that stage counsel for the Commission stated the following:

> "*Chair, that is not our position at all. It's not that these are* [not] *documents of Kaya. The question is we have no idea what they need to put to an expert witness as to what the significance or meaning of the contents of these documents is. The proper people to explain the strategic significance of the documents is the firm itself. Those are then facts, which can be put to an expert. Why Dr Theron has a privileged insight into the meaning of Kaya's strategic documents is wholly unclear to us.*"

Junior counsel for the merging parties then explained why the merging parties submitted it was proper for the expert to explain what conclusions she drew from the documents – in answer to the specific objection in this regard from counsel for the Commission:

> "*Chair, the expert testified that she found amongst strategic documents various supports* [sic] *for various propositions. It would be useful to the Tribunal for her and for me to highlight, which those documents were.*"

[25] This elicited the following from the Tribunal:

"*Ja, just go ahead and we'll see how it goes.*"

The discussion between the Tribunal and counsel for the parties reveals that this was a provisional ruling on the admissibility of the documents.
AME's complaint amounts to the following:
The documents were employed by the Tribunal as evidence upon which it could reasonably rely, against objection. AME did not have the "opportunity" to cross-examine the relevant witness.

As Mr Gauntlett, who appeared together with Mr Snyckers on behalf of the merging parties, submitted, the simplest answer to this complaint is that the documents were received by consent, on the terms recorded in the arrangement described by counsel for the merging parties – that anyone who wanted to call Ms Deacon to explain anything in particular would do so, and that any challenge to any document would be dealt with if and when it arose.

[26] As the documents had been debated in this fashion and as all the parties were aware of the source; any of the parties could have called Ms Deacon if they needed to do so. Mr Campbell, who appeared together with Mr Wesley for AME, submitted that the obligation was on the merging parties to call Ms Deacon because they are the party who sought to introduce such evidence and to rely on the documents. In my view this submission is not correct because it was announced by counsel for the merging parties that

they did not intend calling Ms Deacon. Ms Deacon had presented herself and the documentation at the Tribunal under subpoena. As noted, nothing precluded any of the other parties from calling her. Furthermore, the admissibility of the documents was not challenged. It was agreed that the documents were what they purported to be. The objection was rather an objection to having the expert witness for the merging parties advance opinions relating to the significance of those documents.

[27] There is a further answer to AME's argument; it concerns the procedures of the Tribunal. Section 55 of the Act deals with the rules of procedure provides as follows:

> "***55. Rules of procedure***
>
> *(1) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).*
>
> *(2) The Tribunal may condone any technical irregularities arising in any of its proceedings.*
>
> *(3) The Tribunal may –*
>
> *(a) accept as evidence any relevant oral testimony, document or other thing, whether or not -*
>
> *(i) it is given or proven under oath or affirmation; or*
>
> *(ii) would be admissible as evidence in court; but*
>
> *(b) refuse to accept any oral testimony, document or other thing that is unduly repetitious.*"

[28] The current AME ground of review is not to any recourse of the Tribunal to the views expressed by the expert evidence of Dr Theron when she attached significance to the documents in question. The issue is not that the Tribunal wrongly allowed Dr Theron to answer the questions and wrongly attached significance to the answers she gave. Instead, AME objects to the use, by the Tribunal itself, of what it could glean from the documents. In terms of section 55, the Tribunal is empowered to accept any relevant document whether or not it is given or proven under oath or affirmation or whether or not it would be admissible as evidence in court (my emphasis). Although the Commission's objection had been directed at the idea that it was wrong to ask the merging parties' expert to express views on them, reference to the documents by the Tribunal in the circumstances is not irregular for the following reasons:

Section 55 of the Act specifically requires the Tribunal to conduct its hearings "*as expeditiously as possible*", and confers for this purpose an inquisitorial jurisdiction on the Tribunal, and allows it to accept as evidence "*any document … whether or not it is given or proven under oath or affirmation, and* [whether or not] *it would be admissible as evidence in court*" (*Momentum Group Ltd & Others v The Chairperson, Competition Tribunal & Others* [2006] 1 CPLR 17 (CAC) and *Nutri-Flo CC & Another v Sasol Ltd & Others* [2004] 1 CPLR 248 (CT), par 68.)

[29] The documents overwhelmingly comprised extracts from the minutes and materials submitted at board meetings, in circumstances where the person recording them had a duty to record them, and where their recording had no connection at all with these proceedings – a point specifically considered by the Tribunal in pointing to the inherent reliability of these documents. These documents were accepted to be what they purported to be. They reflect the attitude of the board of the target firm to its competitive environment.

[30] In the circumstances of the merger, as indeed acknowledged by the expert witness who appeared for AME, it would have made little sense for the Tribunal not to have had regard to what these documents revealed about the way in which the industry viewed the market when it was talking to itself. It is clear from the manner in which the documents were handled that they formed part of material that the experts agreed was sensible and fair to use for assessing the effects of the merger. It is also clear that the contents of the documents were subjected to cross-examination and were thus tested through the questioning of experts. The acceptance and use of the documents by the Tribunal is in the circumstances not reviewable.

MARKET DEFINITION

[31] On the merits, the central contention in justification of the relief sought by AME was that the Tribunal's approach to market definition was vitiated by a fundamental flaw – namely the conflation of the market for listeners with the

market for advertising. AME contends that the market for advertisers entails a homogenous product market, and that the notion that the differentiation in the market for listeners translates into a differentiated product market for advertising is a fundamental flaw.

[32] Both AME and Primedia agree that the relevant product market is the LSM 6-10 listeners. This is the product that is offered by both Kaya and Highveld to the advertisers. AME contends that there is no differentiation in the advertising market to determine, because the product (LSM 6-10 listeners) is a homogenous one and the radio stations compete only on volume and price. AME accepts that radio stations compete with one another for the volume of the listeners in the LSM 6-10 category because the higher the concentration of LSM 6-10 listeners in the listenership that they are able to offer advertisers, the more they will be able to charge the advertisers. Mr Campbell submitted that it is not revenue that is supplied as the product, but listeners. It is the listenership of each radio station that is the product supplied by such radio station. The product is supplied to the advertisers, not by them; and the advertising revenue, far from being the product, is the payment for the product.

He further submitted that differentiation in the listener market does not determine differentiation in the advertising market because:

a) There is no differentiation in the advertising market to determine, because the product – LSM 6-10 listeners – is a homogonous one and the radio stations compete only on volume and price.
b) In this regard, advertisers are concerned only to obtain a sufficient number of LSM 6-10 listeners, and at the best price. They are not interested in their colour, taste in music or whether they wear glasses.

[33] The submissions by the AME seem to be premised on the reasoning that the whole objective of competition in the listener market is to obtain the product sold in the advertising market. Therefore, it follows that once the radio stations have their desired LSM 6-10 listenership, they in effect sell the listeners to the advertisers. Thus the AME argument is to the effect that there is no differentiation in the product sold; it is sold as a homogenous product. Consequently, radio stations are unusual in that they may differentiate whilst they compete for the listeners, but once the product is obtained, they all offer the advertiser the same product and there is no differentiation in quality. Mr Campbell offers the following example to illustrate their contention:

In so far as an advertiser seeks to reach, for example, 10 000 LSM 6-10 listeners, the fact that the 10 000 LSM 6-10 listeners on Station A are not the same as the 10 000 LSM listeners on Station B does not alter the fact that the listeners on Station A are substitutes for those on Station B. Therefore Stations A and B compete with each other to sell their LSM 6-10 listeners to

advertisers and the advertisers are interested only in the disposable income of the LSM 6-10 listeners.

[34] Further in support for its contention that the product is homogenous, AME states that, for example, an advertiser like a cell phone company has no interest in psychographic profile (i.e. whether the prospective purchaser prefers classical music to African contemporary jazz); but only in obtaining exposure to persons with sufficient disposable income to purchase the contract.

[35] Primedia on the other hand contends that all examples of considering the market for advertising in radio mergers point out that radio mergers entail a dual sided or dual platform market; one side represented by the market for listeners and one side represented by the market for advertising. Primedia contends that this analysis emphasises the degree of differentiation in the relevant product market because of the interplay between the differentiation in the market for listeners and the market for advertisers. Primedia submits that AME's contention is at odds with the expert opinion of the three economists who testified at the Tribunal about the differential nature of the product market and its consequences for the assessment of the merger.

In my view, AME's argument in favour of a homogeneous market is problematic for the following reasons:

[36] Mr Hodge, the economist for AME, conceded during cross-examination that, in order to do a full analysis of the competitive dynamic of the advertising market, it is necessary to analyse the listener market. He also agreed that the Tribunal had to take into account the opinion of Winter, as cited by the economist for the Commission Prof Roberts, that "*the chances of a merger having the effect of substantially lessening competition are lower if the merging stations have different formats and different profiles*".

[37] It was also clear from the evidence of both Prof Roberts and Mr Muller (the media advertising expert) that the differentiation on the listener market translates into differentiation in the advertising market. The key passage of Roberts' report, citing Muller, makes this point clear:

> "*The relevant market then in any radio merger must take into account the different characteristics of the stations, including the format and the profiles of their listeners. The chances of a merger having the effect of substantially lessening competition are lower if the merging stations have different formats and listener profiles [here the reference is to Winter's report]. For instance, advertisers of a particular cell-phone product seeking to reach a younger audience between 16 – 25 years of age would not see a classical radio station as a close substitute to an urban youth-orientated station. Listeners would be more likely to alternate between stations of a similar format depending on the changing offerings, DJ's, play-list etc. At different times of the day, listeners may have different preferences, for example, to listen to news in the morning and music at other times. The different formats are*

complementary in this case, with competition between stations within the formats. In addition, stations with similar formats can compete for DJ's and the quality of their offering. Such stations are generally viewed by advertisers as comparable also. Radio stations therefore have different psychographic profiles which are derived from their listeners' profiles."

[38] Evidence led at the Tribunal clearly showed that Kaya is a less effective competitor, a concession made by Mr Hodge, AME's expert. This contradicts the submission made by AME that once the radio stations have their desired LSM 6-10 listenership, there is no differentiation in the product sold. This is further highlighted by the fact that Highveld at times commands a basic rate for advertising that is almost four times that of Kaya. This would clearly not be possible in a market of homogenous products populated by both stations.

[39] The Tribunal's approach to market definition in this merger paid attention to the nuances arising from the fact that the market in question entailed a differentiated product market in which Kaya and Highveld were not perfect competitors, and that the relative degrees of proximity between stations in one's attempts at market definition required close election.

[40] Notwithstanding that the Tribunal had the benefit of three economists, no consensus could be found because of the complex nature of the analysis of radio markets. Mr Wilkins, the advertising executive for Primedia stated that, although most radio stations have rate cards, they are rarely utilised in reality; clearly suggesting flexibility and that what is charged in reality is highly negotiable. It also transpired that radio stations change format and audience during the day shows and the so-called "*drive-time slots*" are the ones for which there is demand.

[41] In order to define the market in a manner sensitive to the degree of differentiation, the Tribunal accepted the need to find relative degrees of proximity between the respective stations. But that proved to a complex task Accordingly, as the Tribunal found that there was no reliable evidence from the demographics of audience and advertiser profiles, it decided to utilise the Kaya documents as the next best evidence in that it reflected the opinions of the station (Kaya FM) on who competes in the market. In this the Tribunal candidly states:

> *"Absent reliable econometric evidence and inconclusive evidence from the demographics of audience and advertiser profiles, the next best evidence we have of who competes in the market are the opinions of the stations themselves. While Primedia witnesses testified to this in the hearing, some caution must be expressed about this evidence, given their interest in the outcome. One piece of evidence that cannot be regarded as having been drawn up in contemplation of this*

hearing are the internal documents of Kaya FM which were obtained under subpoena prior to the hearing.

While the Kaya documentation does not help to decide definitively who is in and who is out, it does help to evaluate the competitive proximity of stations."

[42] It must also be accepted that the Tribunal was not dealing with a 100% (hundred per cent) merger nor a homogenous product. The Tribunal was also acutely aware of the problem that, with partial non-controlling acquisitions, MHHI assessments were intended to measure potential unilateral effects in homogenous product markets, while diversion flow assessments were intended to measure potential unilateral effects in differentiated product markets. The Tribunal accordingly sought to find degrees of closeness between the relevant firms in defining the market for differentiated products. On the basis of the available evidence, the Tribunal engaged in an exercise of drawing such concentric circles around target firm and acquiring firm. Thus, "the proper approach in a case such as this is to consider the market as composed of a number of firms which constitute better or worse substitutes for one another".

Kaya's first circle contained Metro FM, then Highveld, Jacaranda, YFM and 5FM. Highveld's first circle contained Jacaranda, then 5FM, and then Kaya. Kaya's second circle contained 702, SAFM Classic FM and Radio Jozi (and, of course, all the stations in the first circle). Highveld's second circle "may be

the same as it is for Kaya, but some in the second circle, “may be the same as it is for Kaya, but some in the second circle may be closer to it than to Kaya.”

Where precisely the degree of differentiation as between Highveld substitutes and Kaya substitutes would end up drawing the best composite circle, was, as already noted, an intensely difficult question to answer. Hence the Tribunal found:

> *“We are not certain that the marker extends only to the first circle and there may be circumstances for some advertisers, as they are not a homogenous group either, that stations in the second circle are an adequate substitute, and this group of advertisers may be sufficiently large to deter a successful post merger price increase, assuming Primedia was in a position to control Kaya’s pricing post merger.”*

The point of this analysis was that, if one of the two first circles on its own, either that of the target firm or that of the acquiring firm, without consideration even of the firms included in the other first circle, and without any consideration of any firms included in the second circle of either, did not cause concern on an MHHI assessment, then, given that an MHHI assessment would grossly overstate the effects of the merger in a differentiated market, and further given that the boundaries of the market would always lie somewhat outside those of the bigger first circle of either firm, there could be no concentration problem.

Thus, it made sense to consider whether, as a worst case scenario, the bigger first circle of either of the two firms in the merger on its own gave rise to concerns when the inappropriate yet crude starting point of an MHHI assessment was performed on that circle.

But, the Tribunal also considered that the Kaya first circle was not merely one of the first circles in question – it was in fact regarded as the *smallest plausible possible market*; it had, for this hypothesis, the corroboration of being identical to the wider market proposed by the Commission, and ultimately adopted by it, as the market. The Tribunal was clear that this market was indeed a candidate market, but the smallest or most concentrated plausible candidate, rather than, as viewed by the Commission, the widest plausible boundary. This was made explicit in the following passage from its determination:

> "*Note that our first circle corresponds with what the Commission term their wider market. The difference between our approaches is that we consider the first circle as a possible universe of the market and, that if it errs, it does so by narrowing the market more than might be justified, whilst the Commission comes to the opposite conclusion."*

The MHHI analysis on this smallest plausible market, Kaya's first circle, yielded a delta of 79.4. This was, however, once the Commission's thesis had been accepted of 'upweighting' the market shares in favour of Gauteng, a device that increased the concentration level.

That level fell below the level (100) suggested by the US Guidelines as raising a presumptive anti-competitive concern. AME argued that this was above the level of 50 which suggested a potential of raising a concern. That submission means, in effect that it is not a level where there is not even a possibility of concern.

However, an MHHI assessment employed in a differentiated product market is likely grossly to overstate the effects of the merger, as it is premised upon a homogenous product market and perfect competitors. Furthermore, the MHHI assessment would at best be a crude starting point to measure unilateral effects, as was stressed by Mr Hodge before the Tribunal. The Tribunal had in the past expressed the *caveat* that HHI analyses were an "insufficient basis for drawing conclusions regarding competition impact."

I accept that the point of such an assessment is to give an indication of potential unilateral effects, to measure whether the diversion flow from Highveld to Kaya after a putative "*merger*" would be such as to make a unilateral price hike on the part of Highveld a profitable proposition. This enquiry took place in circumstances where an MHHI assessment was an inappropriate tool, given the differentiated nature of the product market, and which would grossly overstate the effects of the merger. It was however the next best tool available, given the absence of any diversion flow analysis based on a price pressure index. The Tribunal was alive to this problem, and did not leave its investigation into the potential for a diversion flow from Highveld to Kaya at the results of the MHHI assessment done on the smallest

plausible market. Instead, it examined in detail the theory that, post the transaction, a price hike by Highveld would be attractive because lost custom might be expected to flow to Kaya.

[43] After a careful examination, of this situation the Tribunal concluded that:

> "*The idea that Highveld would now contemplate a price increase that they would not have contemplated without the merger, because they are now comfortable with the notion that what they lose to rivals they will gain back in their share of Kaya's earnings, sounds so devoid of commercial reality as to not require further contemplation.*"

[44] The merging parities contended, with justification, that the Tribunal was correct in its approach to be sensitive to the differentiation in the product market. In my view, the Tribunal was faced with a case which did not, as is evident from the expert economic evidence, admit to forensic precision. The Tribunal applied economics with respect to the appropriate way of considering the market in the circumstances, with awareness of the difficulty of employment of MHHI assessments in the case of such differentiation, and, taking account of the reality, that Kaya was a less effective competitor to Highveld than were several other stations. The MHHI assessment, imperfect a tool though it be, was employed on the smallest plausible possible market, and the hypothesis it was supposed to measure, namely likely diversion flows from Highveld to Kaya, considered in detail beyond the unworrying results of the MHHI assessment, yielding a thoroughly grounded and logical conclusion.

[45] It must be borne in mind that this is an application to review the Tribunal's approach. That observation prompts a return to the issue of deference. As is evident from my reasoning, I am of the view that the Tribunal has provided a justifiable, careful reasoned approach to the present dispute. Being cognisant of the Tribunal's expertise and mandated function there is no basis to interfere with its findings.

[46] The following order is therefore made:

45.1 The application is dismissed.

45.2 The applicant is ordered to pay the costs including the costs of two counsel.

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DAVIS JP and MAILULA JA agreed