THE COMPETITION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 259/CAC/Oct24

In the matter between:

CAPITAL NEWSPAPERS PROPRIETARY LIMITED	**FIRST APPLICANT**
CAXTON & CTP PUBLISHERS & PRINTERS LIMITED	**SECOND APPLICANT**

and

MEDIA24 HOLDINGS LIMITED	**FIRST RESPONDENT**
NOVUS HOLDINGS LIMITED	**SECOND RESPONDENT**
NOVUS PRINT PROPRIETARY LIMITED	**THIRD RESPONDENT**
FREE 4 ALL PROPRIETARY LIMITED	**FOURTH RESPONDENT**
INTREPID PRINTERS PROPRIETARY LIMITED	**FIFTH RESPONDENT**
VICTORY TICKET 376 PROPRIETARY LIMITED	**SIXTH RESPONDENT**
MEDIA24 PROPRIETARY LIMITED	**SEVENTH RESPONDENT**
THE COMPETITION COMMISSION	**EIGHTH RESPONDENT**
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	**NINTH RESPONDENT**

Coram: MANOIM JP and NKOSI JA and PHATSHOANE AJA

Heard: 11 June 2025

Delivered: 16 September 2025

Summary: **Competition law – The ambit of Competition Commission's merger jurisdiction** – whether the migration of certain titles to digital form was part of the merger - finding in Part A and B of the application that migration decision was a unilateral commercial decision without loss or acquisition of control and not part of the merger as defined in s 12 of the Act – No case made out to review and set aside the Competition Commission's merger approval – the application dismissed.

ORDER

Review of the Competition Commission's decision:

1. Part B of the application is dismissed with costs, including costs of three counsel, where so employed.

JUDGMENT

Phatshoane AJA (Manoim JP and Nkosi JA concurring):

Introduction

[1] The first and second applicants, Capital Newspapers (Pty) Ltd (Capital) and Caxton & CTP Publishers & Printers Limited (the applicants), approached this Court for relief in two parts. In Part A they sought an order: interdicting the first to the seventh respondents, Media24 Holdings Limited, Novus Holdings Limited, Novus Print Proprietary Limited (Novus), Free 4 All Proprietary Limited (Free 4 All), Intrepid Printers Proprietary Limited (Intrepid), Victory Ticket 376 Proprietary Limited (Victory Ticket), Media24 Proprietary Limited (Media24); (the merging parties), from taking any steps to implement the approved merger between Novus, Free 4 All, Intrepid, Victory Ticket and Media24 Supply Chain Management Division operated by Media24 Proprietary Limited referred to as 'On the Dot', the local news portfolio of Media 24, and the Football Publication Division of Media24 styled 'Soccer Laduma and Kick off (the merger). In addition, the applicants sought an order that the decision of the eighth respondent, the Competition Commission (the Commission), to approve the merger, be stayed and or suspended pending the determination of the relief in Part B. Part A of the application was dismissed with costs.

[2] It now remains for us to consider Part B in which the applicants' principal relief sought is a declaratory order that the Commission's decision to approve the merger is inconsistent with the Constitution, unlawful and invalid. Secondly, they seek an order reviewing and setting aside that decision. Thirdly, its remittal to the Commission for reconsideration or alternatively, an order granting the approval of the merger subject to conditions imposed by the Commission on 30 October 2024 and certain further conditions specified in the amended notice of motion with regard to the distribution prices On the Dot charged the publishers and the restoration of the geographic footprints of the distribution services to what they were prior to 30 October 2024. Key to the determination of the

declarator and the review is the question of the ambit of the Commission's merger jurisdiction, an aspect which this Court already disposed of in Part A, but is being persisted with for reconsideration by this Court in the present review.

Background

[3] Capital is a majority black-owned newspaper publishing business with six publications in Pietermaritzburg and the Midlands area of KwaZulu-Natal. Caxton is a South African-based listed company involved in the publishing and printing of newspapers and magazines, as well as the manufacturing and distribution of packaging, stationery and labels. Caxton operates through its wholly-owned subsidiary, CTP Limited, which publishes 'The Citizen'. Caxton holds 45% shares in Capital.

[4] Media24 is a company registered in South Africa. Its immediate holding company, Media24 Holdings, is controlled by Naspers Limited, a multinational media group. It publishes a range of well-established newspaper titles, which include Beeld, Rapport, Die Burger, City Press and Daily Sun. It is a leading South African online news publisher with two online platforms, namely, News24 and Netwerk24. On the Dot is a subsidiary of Media24 and a distributor of magazines and paid-for newspapers. It distributes 90% of paid-for newspapers and magazines in South Africa to more than 10 000 retail outlets. It also distributes leaflets, books and the like; collects unsold paid-for newspapers and magazines; and performs merchandising services.

[5] Novus is one of South Africa's largest print production and manufacturing operations with a history spanning over 100 years. The fourth to the sixth respondents, Free 4 All, Intrepid, and Victory Ticket, are wholly owned subsidiaries of Novus. They, together with Novus, are the primary acquiring firms in the merger. The media supply-chain management division operated by Media24, styled 'On the Dot'; the local news portfolio of Media24; and the football publication division of Media24 titled 'Soccer Laduma and Kick Off', are the primary target firms.

[6] On 5 August 2024, Media24 entered into three agreements, first, with Free 4 All for the sale of On the Dot; second, with Intrepid for the sale of its portfolio of 20 community newspapers circulated within the Eastern Cape, Free State, Northern Cape and Western Cape (community newspapers); and third, with Victory Ticket for the sale of the national soccer publications styled 'Soccer Laduma' and 'Kick Off', which are national publications covering local and international soccer news (the sale assets).

[7] In terms of s 12(1)(*a*) of the Competition Act 89 of 1998 (the Act), a merger occurs when one or more *firms* directly or indirectly acquire/s or establish/es direct or indirect control over the whole or part of the business of another *firm*. There are three categories of mergers: small, intermediate and large mergers. The classification is with reference to combined annual turnover or assets, or a combination of these.[1] On 6 August 2024, in terms of s 13A of the Act, the Commission received a notification of an intermediate merger from the merging parties because the sale of the specified assets resulted in a change in control and the transaction value surpassed the merger thresholds as contemplated in s 11 of the Act. On 30 October 2024, the Commission approved the merger subject to certain conditions, to which I shall return.

The migration decision

[8] As already alluded to, the question of the ambit of the Commission's merger jurisdiction remains contested in the present application, and it is, in truth, the actual area of contention. Therefore, it behoves this Court to first dispose of the question whether Media24's migration decision fell within the Commission's merger jurisdiction. The merging parties' contention is that the migration decision was not part of the merger, and neither was it caused by it. According to them, the sequential set of events was that Media24 took a decision to migrate certain titles (Beeld, Rapport, City Press, Daily Sun brands), commonly referred to as terminating newspapers, from print to digital. Thereafter, in pursuance of its broader migration strategy, it then took the decision to sell the "sale assets". The merging parties maintained that the migration is not sufficiently

[1] Section 11 of the Competition Act 89 of 1998.

closely connected to the merger to fall within the Commission's merger jurisdiction. Put otherwise, the migration would have come to pass irrespective of the merger.

[9] On the converse, the applicants contended that the migration is part of an overall strategic plan which should have been notified to and investigated by the Commission. The applicants argued that the merging parties' own internal documents confirm that the closure of the terminating newspapers and the sale of On the Dot and related assets were part of one overarching strategic decision (composite plan). They argued strenuously that the Commission was required to investigate not only the narrow-notified transaction but the composite plan. The features of that plan, so it was argued, are closely connected steps in the composite process to warrant consideration by the Commission as part of its investigation of the sale transaction notified to it for approval.

[10] The applicants went on to argue, in an attempt to demonstrate that the closure of the terminating newspapers was part of the composite plan, that 'it was clear from the evidence that Media 24 was not willing to, and did not in fact, proceed with the closure of the terminating newspapers and the retrenchment of employees either at Media24 or On the Dot until after the approval of the sale of On the Dot and related titles had been obtained from the Commission'. This submission is less than frank because the merging parties gave an undertaking, at the insistence of the applicants, not to implement any retrenchments nor to migrate the titles until after the approval process. This was on the basis that the merging parties had not conceded, as they put it, 'to the applicants' continuing negative and incorrect characterisation of the proposed transaction'.

[11] A common thread that runs through the applicants' papers is set out in a supplementary affidavit deposed to by Mr Anton Roets, their attorney, in Part A of the application. He states:

'In essence, Media24's strategic decision to exit the print newspaper business to benefit its digital subscription news platform meant that there was no need to retain a newspaper distribution business, whose sole purpose was to distribute paid for newspapers. Each step that formed part of the strategic decision to exit the print newspaper business had a knock-on effect on all aspects of the newspaper business (including distribution business) and will also give rise to a permanent and irreversible effect on the newspaper sector in South Africa, giving rise to an existential threat to the press in South Africa as well as the freedom of the press and diversity of voice. This is a threat to democracy itself. Media24 itself expressly acknowledged that the Commission's approval of the merger paved way for it to continue with the various interrelated steps, including retrenchments of staff and closure of the newspaper titles.'

[12] Section 12A(1) of the Act provides:

'Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

The Criteria for each of these evaluations is set out in s 12A(2) and (3) of the Act.

[13] This Court in Part A of the application dealt with the question whether a merger, which not only encompassed the sale of On the Dot and 20 community newspapers but involved a composite plan which encompassed both the sale of On the Dot and the community newspapers and the decision to close down a series of printed titles and only to publish them in digital form, had taken place.

[14] What requires a sharp focus is whether this Court's findings and the order in Part A were interlocutory and not final in effect on the dispute between the parties. It is a matter of notoriety that the distinction between interlocutory and final decisions is inherently difficult to draw. In *Albutt v Centre for the Study of Violence and Reconciliation and Others,*[2] the Constitutional Court held:

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[2] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (2) SACR 101 (CC), 2010 (5) BCLR 391 (CC) para 25.

'Our courts have held that, in determining whether an order is final in effect, what matters is not only the form of the order, "but also, and predominantly, its effect". An interim interdict has a final effect if it disposes of any issue or portion of an issue in the main application; put differently, if it "anticipates or precludes some of the relief which would or might be given at the hearing". An examination of the issues raised in the interim-interdict proceedings and the manner in which they were dealt with may help to determine whether the court meant to express a final decision on those issues, that is, whether it intended to dispose finally of those issues or any part thereof.'

[15] A synopsis of this Court's findings in Part A is necessary in order to determine whether they were definitive on the question whether the migration decision was part of the composite plan that ought to have been notified to and investigated by the Commission. In that part, this Court detailed the essence of the applicants' case regarding the Commission's alleged failure to properly assess both the competition and public interest implications of the notified transaction as a composite strategy and consequently its failure to apply the broader merger decision-making process as required in terms of the Act. It then dealt with the applicants' constitutional argument, in particular its focus on the reasoning adopted by the Commission on the impact of the strategic plan on entrenched constitutional rights, where the Commission said:

'The merger transaction in this case therefore involved a garden variety competition and public interest analysis which did not animate any lofty constitutional principles.'

[16] It was argued, for the applicants both in Part A and B that the Commission's approach was contrary to the principles enunciated in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* (*Mediclinic*),[3] in particular, the *dictum* in para 55, where the majority judgment of the Constitutional Court said:

'In its interpretation of section 12A(1)*(a)* and (2) of the Act, the majority [of the CAC] overlooked sections 7(2) and 39(2) of the Constitution, thus failing to adopt the correct interpretive approach to statutes as set out in this Court's judgments. Its approach fails to advance the purpose of the Act and to promote the spirit, purport and object of section 27 of the Constitution.'

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[3] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35; 2022 (4) SA 323 (CC); [2023] 1 CPLR 2 (CC).

[17] As correctly determined by this Court in Part A, the approach adopted by the Constitutional Court in *Mediclinic* was linked to the factual matrix of that case. The Court there held that where the merger would have significant effects on medical costs, particularly affecting the indigent sections of the South African community, it was important that such a merger be analysed through the lens of s 27 of the Constitution. The importance of *Mediclinic*, this Court found in Part A, was inextricably linked to the question whether a merger had taken place in the present case, which not only entailed the sale assets but involved a composite plan which included the closure of terminating newspapers and their migration to digital platform. This Court observed that a merger must always involve one firm acquiring control over a part or the whole of the business of another firm.

[18] The Court then evaluated whether the closure of the print titles and the sale of On the Dot constituted a unitary decision-making process. On this score, the Court noted that the applicants' argument was predicated on both factual and legal basis. The legal aspect hinged on two decisions of this Court: *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* (*Gold Fields*)[4] and *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another* (*Wal-Mart*).[5]

[19] The Court distinguished *Gold Fields* from the present case because there, the Court had to evaluate 'whether the acquisition of a significant parcel of shares which did not give it control coupled with an irrevocable undertaking by another shareholder to cooperate with the acquirer sufficed to bring the entire transaction within the definition of merger'.[6] It then held definitively that in this case there had been no change in control in relation to the terminating newspapers.

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[4] *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* [2005] 1 CPLR 74 (CAC).
[5] *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another* (*Wal-Mart*) [2012] ZACAC 2; [2012] 1 CPLR 6 (CAC) (9 March 2012).
[6] *Capital Newspaper (Pty) Ltd and Another v Media 24 Holding Ltd and Others (Capital Newspaper Part A)* [2024] ZACAC 5 para 60 (Part A).

[20] The Court then turned its attention to *Wal-Mart,* where the question was whether certain retrenchments, which took place prior to the notified transaction, formed part of the merger decision-making process. In *Wal-Mart,* this Court made this observation:[7]

'An examination of the reasoning does not automatically support the argument that, because the retrenchment took place prior to the merger, it cannot be merger specific, . . . A retrenchment which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would accordingly be sufficiently closely related thereto.'

This Court reasoned that *Wal-Mart* could only be applicable to the present dispute if the evidence justified a similar conclusion. It held that '… citing cases as support for a submission where the factual matrix is palpably different is unhelpful'.[8] As already discussed, the Court found that in the present dispute, there had been no change in control of the terminating newspapers. They remained under the total control of Media24 before and after the notified transaction.

[21] On the applicants' trepidation, with regard to the increase in costs of distribution of print media following the sale and the radical reduction of print media due to migration of the titles from print to digital which would cause closure of print newspapers, the Court said:

'In the final analysis it is the dynamic character of the market which created the impetus for the migration decision and hence the continuing decline of print media requiring distribution. The decision to migrate, which does not entail a change of control, would not have necessitated a different form of authorisation from the Commission, nor on the evidence can it be suggested that there was a composite set of corporate transactions that would have necessitated a different form of authorisation by the Commission.'[9]

[22] The Court found no sufficiently closely related link between the migration decision and the sale of On the Dot and the community newspapers to justify any of the variation of the theme of a composite transaction contended for by the applicants. The migration

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[7] Ibid para 140.
[8] *Capital Newspaper Part A* fn 6 para 33.
[9] *Capital Newspaper Part A* fn 6 para 76.

decision, reasoned the Court, was a separate commercial decision taken by Media24, which did not fall within the definition of merger and thus the competition authorities' merger jurisdiction was not engaged.

[23] Even though the proceedings before this Court in Part A were of an interim nature, a reading of the judgment shows that the findings and conclusions were not merely *obiter*. What is striking is that the applicants filed an appeal against the decision in Part A with the Constitutional Court. Implicit in that approach is their acceptance that the findings were final in effect and thus appealable. In my view, the findings were decisive and clearly dispositive of the initial question whether the migration decision formed part of a composite plan. The upshot of this is that the ambit of the Commission's merger jurisdiction is *res judicata.*

[24] Even if I am wrong on the definitive nature of the proceedings in Part A, it bears repeating that determining whether the migration decision is sufficiently closely related to the merger as to fall within the Commission's merger jurisdiction remains a matter of causation. The Constitutional Court considered the issue of causation in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another (Coca-Cola),*[10] where one of five substantive issues for determination concerned the test for evaluating whether post-merger employees' retrenchments were causally linked to the merger or merger-specific, where merger approval was conditional on there being no retrenchments as a result of the said merger. There, *Coca-Cola* had argued that the reasons for the retrenchments were commercial, regulatory and operational factors, therefore unrelated to the merger.

[25] The Constitutional Court held that:[11]

'The Tribunal in the present case considered that the "delictual test" for causation adopted in the first judgment in *Aveng*[12] to ascertain the true reason for the retrenchments was inappropriate in

[10] *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another (Coca-Cola)* [2024] ZACC 3; 2024 (4) SA 391 (CC).
[11] Ibid para 27.
[12] *National Union of Metal workers of South Africa and others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* (2021) 42 *ILJ* 67 (CC); 2021 (2) BCLR 168 (CC); [2020] ZACC 23 (CC).

the present context. The approach in the second judgment in *Aveng* was to be preferred. The latter approach characterises the enquiry as one related simply to proof. Where conflicting reasons are proffered for the retrenchments, the true reason for them is a factual question to be resolved on the probabilities, applying *Stellenbosch Farmers' Winery*[13]. This approach, in the Tribunal's view, was consistent with the Tribunal's judgment in *BB Investment.*[14]'

[26] At paragraph 29, the Court said:

'The Tribunal accepted that if the retrenchments had been aimed at removing positions that were duplicated as a result of the merger, this would be merger specific. However, there was "insufficient evidence to demonstrate that a principal reason for the retrenchments was the removal of duplicate roles" arising from the merger. The probabilities favoured Coca-Cola's reasons for the retrenchments, namely the need to reduce costs to address the impact of the sugar tax, adverse macroeconomic circumstances and rising input prices. The Tribunal accordingly granted an order declaring that Coca-Cola had substantially complied with condition 9.2 and set aside the notice of apparent breach.'

[27] At paragraphs 69 and 70, the Court held:

'Although the wording of the conditions did not in my view warrant the application of the second judgment in *Aveng*, the Tribunal ultimately asked itself the right questions. It said, quoting *BB Investment*, that —

"firms are dynamic institutions" and "not every change that results post-merger is necessarily attributable to the merger". That approach it held "is far too mechanistic" and changes can be conceived of "a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific."'

That observation on the part of the Tribunal aligns with the but-for test, the first stage of the enquiry. In then seeking to identify the "true reason" for the retrenchments, the Tribunal tested for the requisite link between the merger and the retrenchments and found this wanting. Its reasoning was consistent with the authorities relating to the test for causation in the contractual and statutory settings.'

[13] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); [2002] ZASCA 98.
[14] *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty) Ltd* [2014] 2 CDLR 451 (CT).

[28] The question to be asked in the present setting is whether, but for the merger, the migration would still have taken place. Put differently, did the merger cause the migration decision under consideration. Ms Hofmeyer, for the merging parties, was at pains to emphasise that the merging parties demonstrated how Media24's print titles have been haemorrhaging readers and sales, with a consequent alarming and irreversible decline in advertising revenue. It was those prevailing market conditions, she contended, that caused Media24 to adopt the digital migration strategy and to migrate the titles from print to digital. The applicants have not meaningfully and cogently disputed any of the facts underpinning Media24's decision to migrate to digital.

[29] Apparent from its explanatory affidavit, the Commission correctly approached the argument on the increase in distribution costs in its merger analysis as follows:

'The Commission critically found that there was unlikely to be any merger specific increase in distribution costs. Whilst the Commission found that pre-merger, distribution costs were already increasing substantially, this was due to the general decline of the newspaper print publishing industry, and Media24's separate decision to migrate some of its print tittles to digital not the merger.'

[30] The applicants' case regarding the link between the merger and Media24's migration decision is subversive of the Constitutional Court's reasoning in *Coca-Cola*. The flaw in their argument is that it seeks to compare the pre- and post-merger position to test merger specificity and then postulates that any changes between the two is attributable to the merger. That would be a far too mechanistic approach which the Constitutional Court referred to. It cannot be that the increase in the distribution costs, which coincided with the timing of the merger, meant that they were merger-specific.

[31] To conclude on this score, the migration decision was part of Media24's overarching digital strategy, a unilateral commercial decision without any incident of loss or acquisition of control. It did not form part of the merger as defined in s 12 of the Act and was thus not notifiable.

Whether the application concerns a review or an appeal

[32] The merging parties contended that the applicants conflated the appeal and review process. They argued that an appeal is concerned with the merits of the case, which entails that the second decision-maker is entitled to declare the first decision right or wrong, whereas a review focuses on the process and the manner in which the decision-maker came to the challenged conclusion.[15]

[33] The following seminal remarks by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* are apt: [16]

'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. *Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies.* Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

In the SCA, Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor *Hoexter's* account as follows:

"[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped

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[15] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed 2021 at 137; see also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

[16] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 paras 45-46.

by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

Schutz JA continues to say that "(j)udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function". I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.' (My emphasis.)

[34] The applicants' contention is that the Commission misunderstood the scope of the investigation; committed an error of law relating to the scope of its statutory powers; failed to have regard to the relevant consideration; and acted unlawfully, unreasonably and/or irrationally in *inter alia*, failing to consider the applicants' counterfactual. It is on this basis that a review-related relief is sought.

[35] As I see it, the Commission made the impugned decision as an organ of state performing a public function in terms of legislation. The Commission's decision constitutes administrative action in terms of s 1(*a*)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and thus reviewable by this Court under PAJA. Additionally, the decision constitutes the exercise of public power equally reviewable under the principle of legality. Even though some of the applicants' submission signifies an appeal as opposed to a review, regard being had to how they have couched their grounds of review, the approach we adopt would be on the basis that the Commission's merger approval is subject to review under PAJA.

The Commission's reasons for merger approval

[36] Assessing competition in the context of the merger, the Commission found:

'(T)hat competition concerns may arise if the merged entity requires its customers to either (i) exclusively procure coldest printing services and distribution services from the merged entity or (ii) procure printing/distribution on condition that the customer also procures distribution/printing services. That is because the merged entity's competitors are not able to offer a similar bundle.

To address this concern, the Commission and the [merging] parties have agreed that for 3 years after the implementation of the merger, the merged entity will offer coldest printing and distribution services separately. These conditions are set out in Annexure A hereto.
Given the conditions, the Commission concluded that the merger is unlikely to result in a substantial lessening or prevention of competition in any relevant market.'

[37] On public interest considerations, the Commission stated:
'In order to address employment concerns, the merging parties have tendered the commitments set out in Annexure A.
The merger does not raise any other public interest concerns that require further intervention.'

[38] The two conditions set out in the Commission's report are these:
'2. EMPLOYMENT CONDITIONS

2.1. Save for the Affected Employees, Merging Parties shall not retrench any employees as a result of the Merger for a period of 3 (three) years from the Implementation Date.

2.2. For the avoidance of doubt, Merger specific retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 66 of 1995; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as result of misconduct or poor performance.

2.3. Novus will seek to redeploy as many of the Target Firms' potentially Affected Employees as possible should vacant positions become available at Novus and its subsidiaries, provided the employees are sufficiently qualified and experienced for such roles.

2.4. Media24 will offer the Affected Employees preferential employment as and when opportunities arise at its operations, for a period of 3 (three) years and provided the employees are sufficiently qualified and experienced for such roles.

3. TYING / BUNDLING

3.1 For a period of 3 (three) years post the Implementation Date, the Merged Entity shall offer customers coldest printing services and On the Dot's distribution services separately. For the avoidance of doubt, the Merged Entity will not require that customers of the Merged Entity procure coldest printing condition that they also procure distribution services from the Merged Entity (or vice versa).'

The review

[39] The applicants contend that the review is justified because the merger will result in a substantial prevention and lessening of competition, with no countervailing efficiencies that outweigh the significant anti-competitive effect of the merger. In addition, it is submitted that the merger will also have a significant negative impact on the public interest in multiple ways.

[40] In *Mediclinic,* the Constitutional Court trenchantly restated that this Court does not have unbridled powers to interfere with the decisions of the Tribunal. Although this was said in the context of an appeal the principle is also apposite in the consideration of the review, particularly where this Court, as here, is enjoined to evaluate certain factual findings made by the Commission. It was there said: [17]

'[The Competition Appeal Court's] powers to interfere with the decision of the Tribunal were more aptly set out by Rogers JA in [*Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1] in these terms:

"Where a determination of the Tribunal on a matter identified in section 12A(1) is brought on appeal, this Court will, apart from the well-known restrictions on appellate interference in factual findings, show a measure of deference to the Tribunal. The matter was put thus in the [*Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2001-2002] CPLR 84 (CAC) ([2002] ZACAC 2)] case:

'The approach which this Court adopts to an appeal against the decision of the Tribunal in respect of a merger should take cognisance of the composition and role of the Tribunal as a specialist body which consists not only of lawyers but also of members possessed of the necessary financial and economic knowledge and thorough grasp of the relevant policy issues required in these kind

[17] *Mediclinic* fn 3 para 44.

of deliberations. Section 12A requires that the Tribunal make a determination after a holistic inquiry into whether the proposed merger is likely to substantially prevent or lessen competition. In assessing such a decision, this Court should take account of the composition and expertise of the Tribunal as well as the nature of the enquiry which entails an element of probabilistic investigation into the effect of the proposed merger….In its decision as to whether to set aside, amend or confirm the decision of the Tribunal, *this Court must be cautious before imposing its own conception* of the policy considerations upon the decision adopted by the Tribunal. *The Court should seek rather to examine and test rigorously the justifications offered* by the Tribunal for the decision to which it has arrived before it invokes its power in terms of section 17."'

[41] The Commission is the conduit through which the Competition Act seeks to investigate, control and evaluate restrictive practices, abuse of market dominance and mergers. It must act as both the watchdog and enforcement vehicle as far as transgressions of the provisions of the Competition Act are concerned.[18] To this end, it is responsible to authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3.[19]

[42] The reviewability of the Commission's decision must be assessed against the backdrop of what is set out in the preceding paragraphs. The Commission abides the decision of this Court. It filed an explanatory affidavit solely to assist the Court in its consideration of the application. In so doing, it confined itself to the merger investigation and its findings as contained in its report. The applicants did not substantiate their claim that the explanatory affidavit travels beyond merely explaining the process or the contents of the record. I am therefore unpersuaded that the Commission has fully entered the ring as a litigant to actively defend its decision to approve the merger. In my view, the applicants' objection to the delivery of this affidavit and their request that it be struck out is baseless.

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[18] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14; 2021 (3) SA 1 (CC); (2020 (10) BCLR 1204 para 42.

[19] See *Competition Commission of SA v Telkom SA Ltd and Others* [2010] 2 All SA 433 (SCA) para 36; See also s 21(1)(*e*) of the Competition Act 89 of 1998.

[43] The review is founded on three grounds. First, the applicants contend that the Commission misunderstood the scope of the investigation and that it was required to enquire into the economic substance of the transaction. Thus, it committed an error of law relating to the scope of its statutory powers and duties. Second, the applicants contend that the Commission failed to consider and apply the correct counterfactual test, therefore it did not perform the necessary public interest assessment of the effects of the merger. Third, it is contended that the Commission failed to take into account relevant considerations and did not properly apply its mind to the concerns and evidence provided by third parties.

The first ground of review: the Commission's alleged misunderstanding of its investigative powers

[44] This review ground has its foundation on the migration strategy and consequently regurgitates the issues that have already been addressed under the Commission's merger jurisdiction. For instance, the applicants contended that a constitutionally compliant and purposive interpretation of the merger control provisions required the Commission to assess not simply the form of the transaction that was notified to it, the acquisition of On the Dot and related sale assets, but the economic reality and the parties' economic objectives underlying the acquisition. It was argued that the notified transaction formed an integral and necessary step of an underlying strategic plan which comprised interlinked steps or unitary decision-making process, being the closure of certain of Media24's terminating newspapers, the transition to digital of those titles and the sale of the On the Dot newspaper distribution business. It was contended that failure by the Commission to have regard to the broader context and consequences of the transaction notified to it constituted a reviewable irregularity.

[45] The applicants further argued that the composite plan has led to a significant increase in distribution costs and a reduction in the distribution footprint of the third-party newspaper titles distributed by On the Dot, with a detrimental effect on the competitiveness of the competing newspaper titles. Under Novus, it was argued, On the Dot's distribution network has contracted, its deliveries to outlying and less populated

areas has been curtailed and readership in regions already underserved by media is being eroded. The introduction of new geographic pricing by On the Dot, it was argued, makes distribution to remote or lower-volume markets more expensive. Rising distribution costs, shrinking coverage, and mounting financial pressures on publishers (including HDP Publishers) are all contributing to making printed newspapers more expensive and less accessible.

[46] The applicants contended that the above constitutional and public interest harms were foreseeable and ought to have been taken into account by the Commission had it conducted a proper merger investigation. Instead, it adopted an unduly blinkered approach to its statutory mandate.

[47] The Commission's merger jurisdiction has already been discussed at great length and need not be repeated. It bears emphasis that the strategy to digitise did not amount to a change in control that resulted in the acquisition of another firm (not in the form of shares, an interest or assets nor does it amount to an amalgamation). The strategic decision to digitise was first conceptualised in 2019, the decision to migrate the terminating newspapers around 2022, whereas the merger was negotiated between January 2024 and July 2024. From its explanatory affidavit the Commission concluded that the migration strategy was a 'unilateral, independent decision taken by Media24 before the merger that stood to be assessed'. Against the backdrop of the discussion under the rubric of the Commission's merger jurisdiction, it can hardly be contended that the Commission misunderstood the scope of its investigative powers in respect of the merger.

[48] Under this ground of review the merger approval is also assailed on the basis that the Commission should have been astute to recognise and consider the impact of the implementation of the composite plan on the right of freedom of expression. It was argued that the approach the Commission adopted ignored the objectives of the Act and the constitutional prism through which it was required to apply its powers and duties under the merger provisions of the Act. According to the applicants, the implementation of the composite plan will result in the closure of several major printed newspaper titles thereby

undermining the public's ability to access diverse viewpoints. This, they argued, threatens the plurality of voices in South Africa's media landscape (a cornerstone of the right to freedom of expression) and violates the right of members of the public to access information. It was argued that freedom of press is not consonant with the press being dominated by a single press company, such as News24 or with limiting the availability of media news to digital platforms such as News24.

[49] The applicants argued that printed news remains a critical source of original news for many South Africans. They contended that Media24's plan will result in the closure not only of its print titles but also likely to result in the closure of several rival print newspapers. The digital format of news, it was argued, is entirely different to the printed media, focusing on snippets and short-form news articles while print allows for opinions, analysis and more in-depth reportage. The closure will relegate news to a 'one size fits all' approach. Printed news is different and often more targeted and accessible than online subscription services, so ran the argument.

[50] It was further argued for the applicants that there are barriers which impede South Africans from accessing online news due to, inter alia, a lack of affordable, reliable internet or devices necessary to access online news. Even if coverage is available, subscription fees and the need for a credit card to pay such fees exclude a large part of the population.

[51] The argument on the right to freedom of expression bears all the hallmarks of the migration decision and is therefore unrelated to the merger approval. Mr AJ Basson, the editor in chief of News24, deposed to an affidavit in answer to the non-confidential version of some specified paragraphs in the supplementary founding affidavit by Mr AJ Roets filed in support of Part B of the application, as well as certain paragraphs of the non-confidential replying affidavit to which Mr Roets cross-references. In paras 23-24 Mr Basson states:

'Accordingly, in terms of news consumption preferences:

The unique digital readers total 29 848 112 (96%); and

Unique print readers total 1 105 275 (4%).

That warrants repetition: 96% of consumers access their news via digital means. And so even if the shift to digital were to result in total foreclosure of the entire print media industry- which is denied- it would still only affect 4% of the consumers. Mr Roets' claims of the shift to digital signaling the end for media freedom are, at best, grossly overstated'.

These averments were not seriously contested by the applicants.

[52] Mr Basson's affidavit may not have been before the Commission during its investigation of the merger, as Mr Wilson, for the applicants, argued. However, through its investigation, the Commission found that the South African media landscape has altered drastically over the years and has been experiencing a decline in print media readership. On the state of the industry, in its report, the Commission referred to the article titled 'Independent Media to Restructure in Response to Banking Threats and Rising Operational Cost', where, *inter alia*, it was stated:

'Print media has been an iconic pillar of our company for decades but the current business model is no longer sustainable in a world where digital platforms offer far greater reach and engagement opportunities.'

[53] The Commission tabulated the overall decline in demand for daily, weekly and weekend newspapers within South Africa, consistent with the indication of the Association of Independent Publishers (which represents 191 community newspapers publications, and which equally highlighted the difficulties encountered by community papers which resulted in a 64.6% (22.6 million to 8 million) decline in readership between 2016 and 2023 and proportional decline in advertising revenue.

[54] With regard to the pricing effects, the Commission found that the increase in distribution costs was not attributable to the merger because the industry is in decline and the increase in distribution costs was already a feature of the market pre-merger and likely to continue post-merger due to the constant decline in demand and decisions by publishers to exit print newspapers. The Commission explained that it is not the merger 'that should be understood to constitute a threat to the right to freedom of expression, and in particular the freedom of the press and other media and freedom to receive or impart information and/or ideas. Consideration of the merger effect on this right that are caused

by the digitization of the media industry and concomitant increase in publishers' costs, do not arise as a result of this merger'.

[55] In this digital age, change is accelerating and inevitable. As this Court correctly observed in Part A, '(I)t is the dynamic character of the market which created the impetus for the migration decision and hence the continuing decline of print media requiring distribution'. The criticism that the Commission misunderstood the scope of the investigation; that it failed to enquire into the economic substance of the transaction; and that it committed an error of law relating to the scope of its statutory powers and duties, cannot be sustained. This ground of review must fail.

The Second Ground of review: The Commission's alleged failure to consider the relevant counterfactual

[56] The applicants contended that the Commission acted irrationally and unreasonably in that it applied the incorrect counterfactual, failed to assess the correct counterfactual and consequently the negative public interest effects of the transaction and competition consequences associated to thereto.

[57] The applicants submitted that the Commission accepted Media 24's argument that the relevant counterfactual to the sale transaction with Novus was the closure of On the Dot and the community newspapers included in the sale. This, so it was argued, ignored that Capital, an HDP firm, made a better offer for On the Dot and the community newspapers. It also overlooked that Capital made a further offer to purchase the terminating newspapers in addition to the sale assets. Capital argued that it did so in an endeavour to find ways to keep distribution costs manageable and to retain the print titles for the benefit of employment, media diversity in South Africa and a greater spread of ownership than the notified transaction. It was argued that had Media24 accepted Capital's offer to purchase the terminating newspapers, this would have ensured the ongoing survival of the terminating newspapers and avoided severe employment consequences and On the Dot increased distribution costs associated with the closure of the terminating newspapers.

[58] Ms Hofmeyer argued that it was virtually impossible to pin down what case the merging parties had to meet because the applicants' case has shifted continuously throughout the proceedings and remains utterly opaque. To illustrate this point, she argued that during the Commission's investigation and in their founding papers, the applicants contended for a counterfactual in which Capital acquired the sale assets and the migration titles. However, in their replying affidavit in Part A, for the first time, they claimed that the Commission was required to have regard to a new counterfactual in which Capital acquired only the sale assets. This completely new counterfactual, she argued, was not properly placed before the Commission during its investigation, thus it cannot be relied upon. She added that these irreconcilable counterfactuals are also articulated in the applicants' heads of argument.

[59] What the evidence points to is that, when Capital made its offer on 13 June 2024, it had already known for a week that Media24 had accepted Novus's offer. The merging parties' papers are replete with contentions that the migrating titles were never for sale because Media24 has brand equity in the titles. The terminating newspapers have always been earmarked for migration. The Commission rejected the applicants' counterfactual regarding Capital's bid to acquire the sale assets and the terminating newspapers for this very reason, and because Media24 had accepted Novus's offer prior to Capital's submission of its offer to it.

[60] The applicants' counterfactual resonates with what this Court was confronted with in *Pioneer Hi-bred International Inc and Another v Competition Commission and Another (Pioneer).*[20] Expressing disapproval with the approach adopted by the Tribunal in that case, this Court said:

'This approach effectively compels Pannar to enter into such a "strategic partnership" to prevent its demise and thereby preserve its germplasm pool, which would be in the public interest of

[20] *Pioneer Hi-bred International Inc and Another v Competition Commission and Another* [2012] ZACAC 3 para 22.

maintaining competition, by ensuring the presence of at least three competitors in the market. The Tribunal correctly noted that, in the context of a higher price being paid for a target firm, in terms of a transaction under scrutiny, as opposed to an alternative transaction, the private interests of firms "cannot ever trump the broader public interest consideration of a substantial lessening or prevention of competition, with concomitant negative effects on consumers".

However, in my view, such an approach is of limited application in the present context. The Tribunal framed the key question for determination thus: "If realistic alternative strategies exist that Pannar could pursue and which could stem the alleged decline of its maize seed business, which strategies may include an alternative transaction with another partner, ultimately of Pannar's choice, should the current transaction not proceed." The public interest in maintaining competition in the market, cannot justify the refusal of a merger, on the basis that competition will be maintained in the market, as a consequence of such refusal, by virtue of unsubstantiated speculation that the target firm will enter into a partnership with another firm, which is not a competitor in the market, and which is wholly unsuited to a merger. *The Tribunal's approach runs the danger of placing too much emphasis upon the interests of competitors rather than upon the key principle, of maintaining or promoting competition in the relevant market*. The public interest in maintaining competition in the market, does not justify the exploitation of the vulnerability of a target firm, by the competition authorities, in such a manner. *To condone such an approach would constitute an intrusion into the management and control of private companies, not justified in the public interest, particularly, as on the available evidence such a merger could not possibly be considered to make financial sense*.' (My emphasis.)

[61] One of the key statutory responsibilities of competition authorities in merger transactions, as already indicated, is to ensure that mergers do not have a negative effect on competition in a market and to conduct the public interest analysis of the notified transaction. The Commission considered the potential dilution in HDP ownership. It brought its mind to bear on both quantitative and qualitative factors of what underpinned the BBEE requirements. Ultimately, the target firms will remain significantly transformed post-merger. The Commission found that the merger could be justified on public interest grounds because there was arguably a positive HDP ownership impact. Any negative HDP ownership, as there might be, was not substantial.

[62] In the final analysis, it does not lie within the Commission's remit to determine which firm is or was suitable to purchase the sale assets under the guise of 'correct' counterfactual or public interest analysis, an exercise which the applicants contend the Commission ought to have performed. As the Commission explained, 'even in a scenario where Capital/Caxton were to purchase the target assets this would amount to no more than placing emphasis on the interest of competitors and an interference into the management and control of private firms not justified in the public interest'.

[63] In substance, this ground of review must fail because a fair-minded examination of the Commission's report demonstrates a thorough consideration of the relevant counterfactual in relation to the sale assets. The Commission acted lawfully and rationally in rejecting as the counterfactual the acquisition by Capital of the sale assets with the migrating titles which were not for sale. Neither can it be argued that its decision undermines the objectives of the Act.

The third ground of review: The Commission's alleged failure to have regard to relevant considerations and apply its mind to submissions by third parties

[64] The applicants contended that the investigation by the Commission was cursory and narrowly focused in that the Commission did not afford itself time to properly consider relevant evidence of third parties before issuing its conditional approval of the merger. It was argued that the Commission was still investigating the proposed transaction on the day on which it approved it; requesting third parties to supply it with documents and information on the afternoon of the approval. Therefore, the information produced by third parties at 16h38 on 30 October 2024, could not properly have been considered by the Commission before issuing its decision that same evening.

[65] It was further argued for the applicants that the fundamental change in the pattern and fees for distribution at On the Dot post-merger were raised by third parties, but the Commission did not take this into account. This has significant competition and public interest effects as the change in the distribution model will result in significant costs increases for newspaper publishers and ultimately lead to reduced sales of paid for

newspapers in South Africa. This, it was contended, undermined the viability of the remaining competing newspaper publishers reliant on On the Dot's distribution services, including Caxton, Capital, Arena, Mail & Guardian and independent Newspapers, all of whom are HDP-owned.

[66] The Commission had several engagements with third parties with regard to their concerns in relation to distribution costs. Following these interactions the Commission, inter alia, considered it unlikely that the merged entity would have a commercial incentive to raise publication costs which may push third parties to exit the market. Furthermore, the Commission considered the merging parties' disclosure that the migration decision would negatively affect On the Dot's revenue base with the resultant spread of On the Dot's fixed costs over fewer revenues in future, which would make business increasingly costly. The Commission also had regard to the disclosure that this may affect pricing to all publications which On the Dot distributed. It held, however, that the increase in publishers' distribution costs is not as a result of the merger but the market conditions and the migration decision, which would reduce the volume of distribution by On the Dot.

[67] Based on the aforegoing exposition, the third parties' complaint of lack of consultation is devoid of any merit. In addition, based on the evidence, the issue of potential foreclosure that the third parties raised had already been investigated by the Commission. Consequently, the third parties' grievance that the Commission did not dedicate sufficient time to consider their submissions is equally without any basis.

[68] Under this review ground the applicants condemned the merging parties for their failure to play open cards with the Commission and thus tainted the constitutionality and legality of the merger approval by failing to disclose to the Commission their intention to conclude the Transitional Services Agreement (the TSA), which embodied and shaped their transaction. The applicants argued that the non-disclosure of the TSA entailed that the Commission took the impugned decision in ignorance of material facts and failed to take into account relevant consideration which makes its merger approval susceptible to review.

[69] It was argued for the applicants that the TSA was designed to make the sale of On the Dot to Novus more attractive by compensating Novus for losses stemming from the closure of Media24's titles. In terms of the TSA, it was argued, Media24 agreed to make various payments to Novus as a 'sweetener' for the acquisition of On the Dot in order to compensate Novus for the changes to the distribution business that would be brought about by Media24's closure of the terminating newspapers.

[70] The applicants averred that under the TSA, Media24 assumed liability for the inevitable retrenchments at On the Dot which would follow from the closure of the terminating newspapers. It was further argued that Media24 also committed to indemnifying Novus for retrenchment costs, subsidising the continued operation of the distribution network in the Northern Provinces and paying out substantial sums for 'negative impacts due to planned title closures'. The post-merger scenario, where distribution footprints shrink, costs rise, and certain intangible costs are indemnified, would significantly harm independent publishers and the public interest, so the argument went. The merging parties denied that they deliberately withheld the TSA from the Commission.

[71] The Commission was alive to the fact that the migration decision would affect On the Dot's business. This is evident from the correspondence dated 12 September 2024, which the merging parties directed to it, which recorded that the migration decision:

'(W)ill necessitate a restructuring of OtD's operations to align with the resulting revenue shortfall, as these titles contributed R109.5 million to OtD's revenue in FY2024. Media24 estimates that approximately 137 jobs will be lost at OtD, and 87 additional jobs among the labour broker employees, as a result of ceasing to print these titles. Additionally, the decision will also result in possible retrenchments in the SNL24, Afrikaans news and AdSpace24 divisions, due to shared resources among the divisions as well as in various shared services operations. Overall, the decision is expected to result in 318 job losses, independent of the merger. Media24 has, however, confirmed that it will be retaining all 66 journalists initially identified for retrenchment, from the four print newspapers earmarked for closure, incorporating them into Netwerk24, News24 and at the Daily Sun website respectively.'

[72] The applicant's argument under this ground is premised on what has now become a common theme, the sale of On the Dot and the closure of terminating newspapers, as it maintained that 'the belated-disclosed TSA highlights the interconnectedness' between the specified transactions. It must be borne in mind that the complaint on the belated disclosure of the TSA was introduced for the first time in the applicant's replying affidavit. This prompted the merging parties to file a response thereto. Insofar as the replying affidavit sought to introduce a new ground of review, dictates of fairness and the *audi* principles required the merging parties to be afforded the opportunity to respond thereto. The merging parties leave to file further affidavit on this aspect ought to be granted, and it is so ordered. There can be no prejudice.

[73] The TSA became relevant to these proceedings because, in the applicants' amended notice of motion, Part B, they sought a new pricing and distribution remedy. It is not in dispute that the TSA was concluded between the merging parties on 31 October 2024, and therefore, it did not exist in any shape or form when the transaction was notified to the Commission. In my view, but for the pricing remedy, the TSA had no bearing on the notified transaction because the terms of the sale agreements remain binding on Novus from August 2024 irrespective of the TSA which was concluded long after the merger. The TSA could not have made the sale of assets more attractive because Novus was bound to acquire the sale assets irrespective of the TSA. The TSA's concomitant subsidies and indemnity are completely distinct from the merger but were a consequence of the migration because the subsidy was designed to plug a revenue gap resulting from the migration and to bridge a period of operational change.

[74] It is important to remember that the Commission has an ongoing oversight obligation post-merger approval. In terms of s 15(1) of the Act it may revoke its own decision to approve or conditionally approve a small or intermediate merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)*(b)* and *(c)* if – (a) the decision was based on incorrect information for which a party to a merger is responsible;

(b) the approval was obtained by deceit; or (c) a *firm* concerned has breached an obligation attached to the decision.[21]

[75] In the end, the lawfulness, rationality and reasonableness of a decision is assessed at the time the decision is taken.[22] A lawful decision cannot be rendered unlawful by subsequent events. The third ground of review must also fail.

Conclusion

[76] On a conspectus of all the factual and legal issues that bear upon this application, I am of the view that the applicants did not make out a case for the primary relief sought, that the Commission's decision to approve the merger be declared unconstitutional. It therefore falls to be dismissed. Neither did they make out a case for the review and setting aside of the Commission's merger approval.

Remedy

[77] The applicants urged this Court, in the event that the Commission's decision is not set aside, to still afford them a just and equitable alternative relief in terms of s 8(1)(*e*) of PAJA through sanctioning new conditions on the merger approval in this way. First, by imposing a duty on the merging parties to ensure that the distribution prices charged by On the Dot revert to their pre-merger approval level and only increase over the next five years in line with inflation as calculated with reference to the South African Reserve Bank's core inflation measure published by Statistics South Africa. Second, by ordering that the footprint of the distribution services provided by On the Dot revert to their pre-merger approval levels and remain constant over the next five years.

[78] The effect of the order, it was contended for the applicants, would ameliorate the financial hardship being imposed on publishers consequent to the merger and afford them

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[21] See also *Competition Commission of SA v Hosken Consolidated Investments Ltd and Another* [2019] ZACC 2; [2019] 1 CPLR 1 (CC); 2019 (3) SA 1 (CC); 2019 (4) BCLR 470 (CC) paras 69-73.

[22] *eTV (Pty) Ltd and Others v Minister of Communications and Others* [2016] ZASCA 85; 2016 (6) SA 356 (SCA).

a greater chance of survival as competitors in the media sector; would assist them to regain a measure of financial stability and to suitably adapt their operations to compete effectively with Media24 by inter alia expanding their digital operations; and would also safeguard the freedom of expression by offering a path which would facilitate the sustainability of freedom of press in South Africa, while allowing On the Dot to continue operating. The applicants contend that the just and equitable relief is not contingent upon the order setting aside the Commission's impugned decision to approve the merger and therefore not an order of substitution. However, a reading of the amended notice of motion paints the exact opposite.

[79] Mr Mbikiwa, for the merging parties, argued that the merger was approved subject to certain conditions. What the applicants now seek, he argued, is a different merger decision with extraordinarily new, far-reaching conditions which constitutes substitution relief. Counsel's submission is manifestly good.

[80] Section 8(1)(*c*)(ii)*(aa)* of PAJA provides that:

'(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

…

(c) setting aside the administrative action *and* –

…

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action.' (My emphasis.)

[81] I am of the view that what the applicants require this Court to do amounts to no more than substituting the Commission's decision with its own. In respect of polycentric decisions, which this one is, where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator.[23] The administrative review context of s 8(1) and

[23] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 50.

the wording under ss (1)*(c)*(ii)*(aa)* of PAJA make it plain that substitution remains an extraordinary remedy.[24] In determining a just and equitable relief, a court must seek, as far as possible, to fully vindicate an administrative breach. In this case, no such breach was found, and therefore, substitution is not implicated. In any event, the word 'and' in s 8(1)(*c*)(ii) of PAJA is used conjunctively. What this means is that the substitution order may be available where exceptional circumstances are extant, and the administrative action has been set aside. The administrative decision in this case remains live and no case has been made out, as I have shown, to set it aside. To repeat, a conditional approval of a merger, as in this case, always remains subject to the continuing scrutiny by the Commission.[25] It follows that the alternative relief the applicant urged cannot be sustained.

The question of costs

[82] The merging parties seek costs on a punitive scale. To justify such an order, they contended that the applicants harassed them to provide undertakings under a threat of urgent interdict proceedings; when the applicants failed in Part A, they approached the Constitutional Court to answer the very question under consideration in Part B before this Court. They pressed ahead with the litigation in the Constitutional Court and refused to withdraw despite the merging parties' legitimate dissuasion. It is further argued that in Part B the applicants have made disparaging attacks against the Commission and the merging parties without foundation. And lastly, that the applicants have endeavored to argue this case by presenting a skewed version of the facts.

[83] In general, attorney and client costs are rarely granted. Such an award is exceptional and intended to be punitive and indicative of extreme opprobrium by the Court.[26] The applicants may well have been compelled to act in the manner they did by the exigencies of the litigation. Although there may have been some considerable degree

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[24] Ibid para 42.
[25] *Minister of Economic Development and others v Competition Tribunal and Others; South African Commercial Catering and Worker's Union v Wal-Mart Stores Inc* [2012] ZACAC 6;[2013] 1 CPLR 37 (CAC) (9 October 2012) para 33.
[26] *Plastic Converters Association of South Africa (PCASA) v National Union of Mineworkers Union of South Africa and Others* [2016] 37 ILJ 2815 (LAC) para 46.

of frustration on the part of the merging parties at the behest of the applicants, I am unpersuaded that costs be awarded on a punitive scale. They shall follow the result on party and party scale.

[84] In the result, the following order is made:

1. Part B of the application is dismissed with costs including the costs of three counsel, where so employed.

[redacted]

M V PHATSHOANE

ACTING JUDGE OF APPEAL

Appearances:

For the first and second applicants:	J Wilson SC, S Pudifin-Jones and D Sive
Instructed by:	Nortons Inc, Johannesburg
For the first to seventh respondents:	K Hofmeyr SC, M Mbikiwa, S Quinn and A Molver
Instructed by:	Edward Nathan Sonnenbergs Inc, Johannesburg.