IN THE COMPETITION APPEAL COURT

CAC Case No. 68/CAC/MAR/07

Tribunal Case No. 39/AM/May06.

In the matter between

AFRICAN MEDIA ENTERTA INMENT LIMITED	**Applicant.**

And

DAVID LEWIS NO	**First Respondent**
NORMAN MANOIM NO	**Second Respondent**
YASMIN CARRIM NO	**Third Respondent**
PRIMEDIA LIMITED	**Fourth Respondent**
CAPRICORN CAPITAL PARTNERS (PROPRIETARY) LIMITED	**Fifth Respondent**
NEW AFRICA INVESTMENTS LIMITED	**Sixth Respondent**
THE COMPETITION COMMISSION	**Seventh Respondent**

JUDGMENT: 19 NOVEMBER 2007

DAVIS JP

Introduction.

[1] **The applicant has approached this Court to review and set aside a decision of the Competition Tribunal ('the Tribunal') to approve a merger between fourth, fifth and sixth respondents. It also seeks an order substituting the order of the Tribunal with one which would prohibit the merger.**

The factual background

[2] **The facts of this case have been meticulously set out in the decision of the**

Tribunal. Given this exposition and the limited nature of this application, I intend to provide a summation of the facts.

[3] Fourth and fifth respondents entered into an agreement to acquire all the ordinary and issued 'N' shares of sixth respondent The only relevant asset that sixth respondent holds is a 24.9% equity stake in Kaya FM (Pty) Ltd which in turn controls and operates a radio station, Kaya FM.

[4] In terms of an agreement between fourth and fifth respondents, fourth respondent acquired an economic interest of 73% in sixth respondent, with the two parties having equal voting rights. Fourth and fifth respondents agreed further that fourth respondent would manage the media assets of sixth respondent which effectively meant that through the acquisition of sixth respondent and, in terms of this agreement, fourth respondent would control the 24.9% shareholding so acquired in Kaya.

[5] The merging parties notified this transaction to the seventh respondent ('the Commission') as constituting an intermediate merger. The Commission investigated the merger and concluded it would lead to an increase in fourth respondent's market power in Gauteng and it would both facilitate co-ordinate behaviour between fourth respondent and Kagiso Media Limited which controls Jacaranda, a competing radio station, and hence reduce competition between the radio stations owned by fourth respondent, being Highveld FM, Radio 702 and Kaya FM. The reasoning of the Commission is reflected in the following passage

from its report of 28 April 2006:

> **'Considering the above factors the Commission is of the view that the merged firm will be able to behave to an appreciable extent independently of its customers and competitors. From the information provided Kaya FM is an important competitive force in the relevant market and the product offering of the Primedia radio stations and Kaya FM are highly substitutable. The Commission has found that this market is highly concentrated with very few opportunities to switch between commercial radio advertising stations in Gauteng.**
>
> **Although the SABC radio stations can be considered as substitutes for regional radio stations in Gauteng for certain customers the Commission found that regional customers are not able to substitute to SABC stations from regional radio stations.**
>
> **In this market Primedia is regarded as a major player and holds a significant portion of the market. According to the Commission the parties do not face any significant competitive constraints other than from Jacaranda and YFM. The Commission views Kaya FM as an important role player in this market and has the ability to grow significantly and be able to significantly constrain the current market participants.**
>
> **The Commission is of the view that the merger will entrench the market power that Primedia already has and eliminate an effective competitor. Considering the above the Commission is of the view that the transaction is likely to cause significant adverse unilateral effects.'**

[6] In contrast to this conclusion, the Commission originally considered that its concerns could be addressed by the imposition of behavioural conditions and accordingly approved the merger subject to conditions.

[7] The merging parties then submitted a request to the Tribunal to reconsider the

conditional approval granted by the Commission. The merging parties submitted that the merger should be approved unconditionally or, in the alternative, approved subject to revised conditions they tendered. When the matter was argued before the Tribunal, the Commission submitted that, on further investigation, it was concluded that the merger was likely to result in both unilateral and coordinated anti-competitive surplus and accordingly the merger should be prohibited outright.

The Tribunal's decision.

[7] The Tribunal began its substantive inquiry by examining the respective shareholdings in Kaya:

Shareholder	Percentage
Nail	24.9%
Shanike	**24.9 %**
The be Convergent Technologies	45.2%
Motsamai	5%

[8] The Tribunal posed the question as to how fourth respondent, by way of its shareholding in sixth respondent, could exercise control over Kaya after the merger when sixth respondents' rights as a shareholder remained unaltered. Prior to the merger, there was no basis to conclude that sixth respondent had exercised control over Kaya, as defined in the Competition Act 89 of 1998 ('the Act').

[9] The opposition parties to the merger submitted to the Tribunal the merger would lead to a change in incentives among the shareholders in Kaya and that there was a greater possibility of coordination of behaviour so that fourth respondent would exercise a measure of indirect control over Kaya, either on its own or through joint control with one or more of the other shareholders.

[10] The Tribunal rejected the argument that fourth respondent, in any way, could exercise sole control over Kaya because 'it can only vote 24.9% of the votes at shareholders and a board meeting (sic). This does not give it either a majority of votes or the power to veto a resolution or require its consent for a resolution to be valid. Simply put, Nail can be ignored at both shareholder and board level' (para 65). The Tribunal concluded that there was no evidence that fourth respondent could exercise sole control over Kaya FM in terms of s 12(2)(g) of the Act.

[11] The Tribunal then raised a further question: 'Whether any of the other shareholders have an incentive to co-operate with it?', a positive answer to which may have lead to the conclusion that Kaya could be controlled jointly by fourth respondent with 'one or more others'.

[12] In this regard, the Tribunal considered three possibilities:

i) Coordination will be lead by fourth respondent over advertising prices and that together with Kagiso Media, this will enable the three key commercial music stations in Gauteng, Highveld, Kaya and Jacaranda to raise advertising rates without a fear of loss of advertisers to remaining stations which might defeat the strategy. Examining the evidence the Tribunal concluded: 'Since Kaya on all evidence is a more likely threat to Highveld than it is to Jacaranda, it is hard to see why Kagiso Media has an interest in coordinating with Primedia in the Gauteng market presently'.

ii) Ka giso Media and fourth respondent will coordinate the positioning strategy of the three stations to ensure that they minimize competition between one another and in a sense constitute a form of market division. In this regard, the Tribunal referred to a board presentation by Kagiso Media which described Kaya and Jacaranda 'as a powerful combined force against competitors especially Highveld'. The Tribunal concluded on the basis of this evidence that :

'The implication being that each is well situated to attack the crown jewel of Primedia from a different vantage point. This suggests that Kagiso Media has little to gain and much to lose from co-ordination over station strategy, since it is Highveld that has the most to lo ose and it the most to gain. Whilst the merger may give Primedia some say in the direction of Kaya there is no

reason why Kagiso Media would have any incentive to position Kaya away from Highveld if that became a strategic choice facing the station' (para 78).

iii) Coordination will not take place amongst the radio stations but could take p lace amongst the owners being Kagiso Media, Caxton and fourth respondent who would divide up opportunities in the market as and when they arose as to ensure that there is an allocation of opportunity among them. In this regard, the Tribunal stated:

'But this prospect of deal making does not, prima facie, constitute anti-competitive activity – it might be some form of market division, but not so self-evidently for us to conclude that the only motive is anti-competitive as opposed to simple bargaining between owners with incomplete control over assets.' (para 78)

[13] O n the basis of this analysis, the Tribunal concluded as follows:

'We conclude that there is insufficient evidence to suggest that the acquisition of the Nail stake will give Primedia joint control with any other shareholder over the business of Kaya FM. At best co-ordination to give rise to joint control is a possibility but it is not a probability'. (para 79)

[14] The Tribunal therefore found that fourth respondent's acquisition of a stake in

Kaya FM by way of a shareholding in sixth respondent would not give it sole or joint control over Kaya. The Tribunal found it unnecessary to consider, whether if it had acquired control, this would lead to an anti-competitive outcome. In its decision, the Tribunal considered the merger in terms of section 16(1)(a) of the Act and approved the merger unconditionally in terms of section 16(2)(a) thereof.

The issues on appeal.

[15] Two central questions were required to be determined by this Court, being

1 The right of an intervener to review merger approvals;

2 The submissions that the Tribunal failed to assess whether or not the merger was likely to substantially prevent or lessen competition as was required of it in terms of section12 A(1) read in the light of the factors listed in section 12 A(2) of the Act and accordingly whether this omission rendered the decision of the Tribunal reviewable.

[16] A third leg of the argument concerned the question as to whether this Court should, if the review succeeded, substitute the order of the Tribunal with its own order which

would prohibit the merger. During argument , Mr Campbell, who appeared together with Mr Wesley on behalf of the applicants, abandoned this leg of the case and contended that, were applicant to succeed upon review, the matter should be referred back to the Tribunal for further consideration.

The right of an intervene r to apply for a review of the decision of the Tribunal to

permit the merger.

[17] Mr Gauntlett, who appeared together with Mr Snyckers on behalf of fourth and fifth respondents, referred to the decision in Competition Commission v Distillers Corporation (SA) Ltd and Another [2004] 1 CPLR 14(CAC) to support his submission that an intervening party may not bring an application to review an approval of a merger by the Tribunal. In Distillers, the Tribunal had approved the merger of respondent subject to certain conditions. The Commission subsequently filed a notice of appeal in which it sought to have the decision of the Tribunal set aside by the Court. The question arose as to whether the Commission had locus standi to appeal against the Tribunal's decision.

[18] The Court referred to section 17(1) of the Act which regulates which parties may appeal to the Court against Tribunal merger proceedings: :'Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court subject to its rules, by:

a) any party to the merger; or

b) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal'.

[19] **Sec tion 13A(2) provides that 'in the case of an intermediate or large merger, the primary acquiring firm and primary target firm must each provide a copy of the merger notification to: (a) any registered trade union that represents a substantial number of its employees; or (b) the employees concerned or representatives of the employees concerned, if there are no such registered trade unions'.**

[20] **After an analysis of this section, Malan AJA held: 'It follows that the Commission does not enjoy a right to appeal against the merger decision of the Tribunal in terms of section 17(1) of the Act. Having specifically stipulated two categories of persons as having this right, it is clear that the Legislature intended such right of appeal to be limited to these two categories of persons: expression unius est exclusio alterius' (para 4).**

[21] **Mr Gauntlett submitted that this finding could not be reconciled with the recognition of a right of an intervening party in a merger to approach this court to review a decision regarding a merger. This Court had decided that sections 61 and 17 of the Act had to be read together so that only parties identified as potential appellants in section 17 were, 'affected by' the Tribunal's decision as contemplated in section 61, which in turn gave parties, defined as affected, a right to appeal or to bring a review.**

[22] Section 61(1) of the Act provides that 'a person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter'. Section 17 gives to the concept of 'affected' by a decision regarding a merger. Only parties as set out in section 17 can appeal a merger decision. Accordingly, Mr Gauntlett submitted that it made no sense to say that a party may not be affected by a decision and hence could not appeal it but could be affected by a decision if it wished to review it.

[23] Section 61 (1) of the Act may well not be a model of drafting clarity. Insofar as merger proceedings are concerned, it would be difficult to argue that any party outside of those set out in section 17 could appeal a decision of the Tribunal, notwithstanding that the phrase 'affected by a decision of the Competition Tribunal' was employed in section 61 as opposed to a specific reference to section 17. However section 61(1) is a general provision, with regard to appeals and accordingly, the catch phrase 'affected by a decision of the Competition Tribunal,' was presumably employed for that purpose.

[24] But with regard to review powers section 61 is not the only relevant provision

and cannot be read on its own. Section 37(1) of the Act empowers this Court to review 'any decision of the Competition Tribunal'. Furthermore, in terms of section 53(1)(c), the Tribunal is empowered to grant a right to a hearing to 'any other person' whom the Competition Tribunal recognised as a participant .

[25] In this case, the applicant was recognised as a participant by the Tribunal acting within the power granted to it in terms of section 53. It would be an anomalous situation if the other parties as set out in section 53(1)(c) of the Act were entitled to bring a review application of a decision of the Tribunal with regard to a merger but that any other person recognised as a participant (my emphasis) would not be so entitled to bring a similar application on the basis that it was not affected by a decision of the Tribunal . Manifestly, once it becomes recognised as a participant in the proceedings, it was affected by a decision of the Tribunal and accordingly section 61(1) must apply to it. that is the clear impact of the words as employed in section 61(1) and it is the meaning that is most congruent with the principle of legality, being that a party affected by a decision should be entitled to bring a review application.

[26] Such an interpretation follows the decision to admit the applicant as a participant and therefore to have equal status to other participants. It is also congruent with section 33 of the Republic of South Africa Constitution Act 108

of 1996 which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The interpretation which I have therefore given to section 61 read together with section 53 of the Act is congruent with the Constitution, in particular section 33 and section 34 which encapsulates a principle of legality, the latter which would be eroded by the inability of a recognised participant to proceedings to bring, what would otherwise be a justifiable application, for review of such proceedings in which they had been granted the status of a participant. This finding in no way disturbs that of this Court in Distillers which was concerned with the question of an appeal.

The Review Application.

[27] Much of the attack on the reasoning of the Tribunal was based upon submissions that the Tribunal's decision was materially influenced by an error of law. It was argued that the Tribunal had misconstrued its powers and the nature of the discretion it was granted in merger control as mandated by section 12 A of the Act. Accordingly, the decision was reviewable, particularly in terms of section 61(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), namely that its decision was materially influenced by an error of law. In Glaxo Welcome(Pty) Ltd v Terblanche NO and Others [2001-2002] CPLR 48(CAC) at 54 Selikowitz AJA dealt comprehensively with the review jurisdiction of this Court. He found that 'the Tribunal's decisions, although

judicial in nature, are administrative decisions. Further this Court must exercise its review powers in accordance with the normal common law principles of judicial review which now derive their force from the Constitution…..'

[28] In order to determine whether the Tribunal's decision to approve the merger was materially influenced by an error of law, it is necessary to examine the essential architecture pertaining to the evaluation of a merger; in particular section 12 A(1) and (2) of the Act which read thus:

(1) 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

a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

(i) 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

(ii) whether the merger can or cannot be justified on substantial public

interest grounds by assessing the factors set out in subsection (3)

(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 firm 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) the 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 countervai ling 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 competitor

[29] This Court has previously set out its approach to these sections to the Act. See Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd [2001-2002] CPLR 84 (CAC)at 87:

:

‘ Section 12A provides for definite stages in the inquiry which it mandates. In the first place the Commission or the Tribunal must determine whether the merger is likely to substantially prevent or lessen competition. In making such a determination the Competition Tribunal must assess the strength of competition in the relevant market and the probability that, after the merger, the firms in the market will behave competitively or co-operatively. In making this assessment consideration must be given to the non-exhaustive list of factors set out in section 12A(2) which are relevant to the assessment of competition in that market. This initial inquiry may be termed the threshold test. The test must be applied to the relevant market which is the actual market and not a hypothetical or idealized market….(Emphasis added).

The case made out by applicant and seventh respondent

[30] The case made out both by applicant and the seventh respondent was that the Tribunal had failed to assess:

i) The specific market relevant to the determination of the merger;

ii) The strength of competition in the identified relevant market;

iii) The probability that firms in the relevant market (which is not limited to shareholders of Kaya) would behave competitively or co-operatively;

iv) The factors set out in section 12A(2) of the Act.

[31] Both Mr Campbell and Mr Unterhalter, who appeared together with Mr Maenetje on behalf of seventh respondent, located the basis for the review in the failure of the Tribunal to take relevant factors into account in its assessment of the merger. Both counsel submitted that the essential reasoning of the Tribunal was that, in the absence of sole or joint control of Kaya by fourth respondent post the merger, there was no need to assess the extensive evidence which had been presented on the merits of the transaction, all of which related to the factors for assessment as mandated in terms of section 12A. By approaching the matter in this way, the Tribunal had made a decision which was materially influenced by an error of law.

[32] As Mr Campbell submitted, section 12A requires the Tribunal to make an assessment as to the strength of competition in the relevant market as a precusor to an assessment of the probabilities that firms in the market will behave competitively or co-operatively after the merger. The proper test, in his view, is to ascertain whether the merger will alter the dynamics within the market as a whole, resulting in more co-operative behaviour or less competitive behaviour. By limiting its enquiries to the determination of control, the Tribunal disregarded all the other incentives and reasons as to why a merger may precipitate a change of behaviour from competition to co-operation.

[33] The applicant and the Commission contended that the relevant market for the merger is the Gauteng regional market for the supply of high income listeners to advertisers on radio stations. In this market, Radio Highveld, 702 Talk Radio, Kaya FM target similar listeners. They all service the upper LSM market in English and in Johannesburg (Gauteng). All three stations compete with one another, they all target similar audiences in the same area, Johannesburg, and similar advertisers advertise on all three radio stations. Accordingly, advertisers use these stations collectively and interchangeably.

[34] The evidence of Mr Hodge, an expert witness called on behalf of the applicant, indicated that Radio Highveld was dominant in the market in terms of the advertising revenue generated. Kaya is a competitor for such advertising as it has a substantial number of LSM 6-10 listeners. Currently it attracts a number of advertisers similar to those who advertise on Highveld; 80% of Kaya's advertisers by revenue also advertise on Highveld and on Radio 702 74%.

[35] Based on this information Mr Hodge concluded 'Using advertising revenue data we show that Primedia's stations, 702 and Highveld are dominant and the addition of Kaya FM causes a rise in HHI that suggests a significant reduction in competition. Secondly, we explore the competitive dynamics of this market and demonstrate that Kaya FM is particularly well placed to challenge the dominance of Primedia's Highveld Stereo in the relevant market. Finally, we show that the regulatory environment implies there is no realistic possibility of entry by another independent into the market.'

[36 Mr Unterhalter submitted that the evidence derived from the market revealed it to be concentrated before the merger and that it would become even more concentrated as a result of the merger, even if a broader definition of the market was employed to include two further radio stations, YFM and Classic FM

[37] Mr Unterhalter referred to the evidence of an expert economist who testified on behalf of the Commission, Dr Roberts. Dr Roberts examined concentration levels both for a narrow and wider market and concluded thus: 'The wide market is again going through the same exercise, but adding in 5FM and YFM and computing the market shares you are seeing, the time listened to each of the stations and computing the market shares and the HHI's and again it doesn't change our conclusion that the merger at least have a substantial increase in concentration.

[38] In Mr Unterhalter's view, the concentration levels reported by Dr Roberts required the Tribunal to apply far closer scrutiny on the likely anti-competitive effects of the merger because, as defined, the market revealed serious regulatory barriers to entry. There was no significant countervailing power on the part of the advertisers when it came to radio advertising. Kaya FM presented the only effective competitive constraint on Highveld, even, if only in

the future. As a result of the merger, it would be extremely difficult for advertisers to 'buy around' Highveld.

The Merging Party's Case

[39] Mr Gauntlett wisely conceded that an analysis of the applicable market was a necessary component to the statutorily mandated enquiry required to be undertaken by the Tribunal. As Mr Unterhalter wryly remarked, it would have been difficult to have adopted a different approach, given that vast record built up at hearings conducted between 15 March to 25 April 2006 which had concentrated predominantly on contentions regarding the applicable market. Rather, Mr Gauntlett submitted that while the decision of the Tribunal may not have been a model of jurisprudential clarity, (he correctly observed that, given the Tribunal's extremely heavy case load, forensic precision in the formulation of its decisions could not always be expected), a reasonable reading of the decision illustrated that the Tribunal had examined the market as a central component in its reasoning.

[40] In this connection, Mr Gauntlett referred to the following paragraph from the Tribunal's decision.

> **'[T]he co-ordination will be led by Primedia over advertising prices and that together with Kagiso Media this will enable the three key**

commercial music stations in Gauteng, Highveld, Kaya and Jacaranda, to raise advertising rates without a fear of loss of custom to remaining stations that would defeat this strategy.

Primedia disputes this. I t argues that a sufficient number of stations remain in the Gauteng area to render co-ordination ineffective, as advertisers would switch to either the SABC stations or to other private stations such as Classic FM and YFM and so the price rise would not be sustainable.
This is extremely difficult to predict and we have not been given any information from either side of the debate to be able to take a firm view of the probabilities. What we have to concern ourselves with is not whether the market is ripe for the possibility of an effective co-ordination, but whether the merger will enhance or lead to such a prospect. It is by no means clear that co-ordination is in the interests of Kagiso Media. Their prime asset is Jacaranda – more than most stations it would appear to benefit from any upward rate move by Highveld if advertisers were to move elsewhere. To the extent that Primedia wanted post merger, to induce Kaya into a rate high, Kagiso Media may not have an interest in moving up with them in order to benefit Jacaranda. What is less clear because of the indirect way in which Kagiso .Media has its interests in Kaya, is its real economic stake. We know Primedia's economic stake at the moment is 18%. Makana in one document, in the amendment application before Icasa, reflects Kagiso's interest at 12.5% but in another, this is reflected as 6.2%. Whichever is correct Primedia will have a greater economic interest in Kaya, than does Kagiso Media. Neither of them has an interest in Kaya gaining at the expense of their more valuable asset. Jacaranda and Highveld respectively. Since Kaya on all evidence is a more likely threat to Highveld than it is to Jacaranda, it is hard to see why Kagiso Media has an interest in co-ordinating with Primedia in the Gauteng market presently.'

[41] In this passage, the Tribunal acknowledged that it was difficult to predict the nature of the future market and furthermore, accepted that Highveld, Jacaranda and Kaya formed the basis of the market. Mr Gauntlett contended that this passage revealed that the Tribunal had indeed taken account of the market, being these three radio stations in Gauteng. It had based its decision on this foundational assumption. Mr Gauntlett also submitted that the main case

against the merger had been based on the assumption that fourth respondent was to acquire Kaya, that Kaya was a potential future competitor of Highveld and that there were concentration problems in this potential future market to be occupied by Highveld and Kaya that would render it rational for fourth respondent to steer Kaya away from, rather than towards Highveld in such a market. The Tribunal accepted that it was difficult to predict the nature and scope of a future market. It then sought to engage with the possibility of effective co-ordination between the parties, given that, at best for fourth respondent, it would have control of 24.9% of the shareholding of Kaya.

[42] Mr Gauntlett also made much of the cross examination of Mr Hodge by his junior Mr Snyckers during the hearing before the Tribunal. Mr Hodge was asked 'if you don't have control by the acquiring firm, there is no alteration incentive of the acquired firm correct? to which Mr Hodge answered in the affirmative. For these reasons, Mr Gauntlett submitted that any objective reading of the evidence placed before the Tribunal and its own assessment of such evidence as contained in its reasons, would justify the conclusion that the merger and its effects had been properly considered and ruled upon by the Tribunal. Its finding about control was decisive of the dispute. The Tribunal concluded: 'If a firm cannot control another then it is unlikely to be able to alter its behaviour to produce anti-competitive effects of a merger. This situation

must be contrasted to one in which a firm can still influence a competitive posture of another but has this influence irrespective of the merger'. The Tribunal went on to hold that even if 'the theories of harm that the Commission and AME contend for – Primedia is anxious to protect the pricing power of its major asset Highveld and is anxious to prevent Kaya from emerging as a competitor for the station…..Without the ability to exercise even disproportionate control this remains at present an unachievable goal'.

Evaluation.

[43] The essence of the attack against the Tribunal's decision was that it had misconstrued the mandated enquiry and misunderstood the nature and limits of its discretion in terms of section 12A. In short, the attack upon the Tribunal's decision was based on the submission that it only examined whether fourth respondent acquired sole or joint control of Kaya. Having found that this would not serve as a result of the merger, it ceased its enquiry because 'if a firm cannot control another then it is unlikely to be able to alter its behaviour to produce anti-competitive effects qua merger.'

[44] In this regard Mr Campbell placed some emphasis upon the following exchange between the Tribunal and counsel for the merging parties:

<u>CHAIRPERSON</u> Can I just ask you? But if we are with you on the question

of control, we don't even get to the examination of the competition issues. Is that your contention?

ADV GAUNTLETT: Well I would have thought, Chair, that they are two lines of inquity for you. You would have to look at them together.

CHAIRPERSON : Why?

ADV GAUNTLETT Well I am not sure what hypothesis you are putting.

CHAIRPERSSON: The hypothesis is that if, Primedia did not acquire…if by acquiring control of NAIL, Primedia did not thereby acquire control of Kaya, would we be getting to the competition issues at all or not?

ADV GAUNTLETT: No, we submit that that wouldn't be so. I am sorry I misunderstood…" (my emphasis)

[45] The point of this reference was that the question posed by the Tribunal fitted with the approach it ultimately adopted to the mandated enquiry, one in which the test for control was conflated with a holistic enquiry envisaged by the Act.

[46] In its analysis of sole control, the Tribunal found: 'there is no evidence that Primedia can exercise sole control over Kaya FM by virtue of section 12(2)(g).' This provision states that a person controls a firm if it 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 as set out in the balance of the section. This section is a gateway section: it asks of the Tribunal that it examine whether 'one or more firms directly or indirectly

acquire or establish a direct or indirect control over the whole or part of the business of another firm'. This is a first order question the answer to which is necessary to determine the existence of a merger. Only when it has established that a merger, as defined, constitutes the transaction before the Tribunal, is there a need to examine the factors set out in section 12A.

[47] Section 12 defines a merger; Section 12 A deals with the competitive considerations and evaluations of a merger as defined. In this case the Tribunal had jurisdiction, in that it was accepted that there was a merger. The reason why this was common cause between the parties is comprehensively set out in the Tribunal's decision. There is no need to recapitulate.

[48] Once that determination is made, the enquiry shifts to one in terms of section 12 A of the Act. The Tribunal however focused exclusively upon the question of control rather than dealing expressly and comprehensively with the considerations in Section 12A. Once the merger had been determined to be the transaction, the question arose as to whether the merger was 'likely to substantially prevent or lessen competition' The Tribunal failed to appreciate the distinction between the two separate enquiries provided for in the Act.

[49] This problem is not only the case with its enquiry into sole control. The

Tribunal went on to consider joint control. It concluded that fourth respondent would not be able to exercise joint control over Kaya. It assessed whether any of the other shareholders of Kaya would have had any incentive to co-operate with fourth respondent. It concluded that the case for co-ordination had been given less attention by the Commission and the applicant. No clear theory for the rationale for co-ordination had been suggested It then assessed, as has been set out in this judgment, the three possible forms of coordination which had been put forward by the Commission and dismissed each in turn. In doing so, it sought to assess the likelihood of fourth respondent exercising joint control of Kaya together with the other shareholders in Kaya.

[50] This entire assessment was undertaken in the context of and for the purposes of assessing the likelihood of fourth respondent exercising joint control of Kaya together with the other shareholders. It was never a comprehensive assessment of the likelihood of co-ordination after the merger, taking into account the relevant market, the competitive dynamics within the market and any or all of the factors set out in section 12 A (2).

[51] The question for the Tribunal was all about control. Manifestly control per se is relevant to determining whether a merger exists and thus whether the Tribunal has jurisdiction to examine the transactions in terms of the factors set out in

section 12 of the Act. Once a merger exists, the Tribunal must focus its enquiry into whether the merger is likely to substantially prevent or lessen competition. Again the question of the nature and scope of control which fourth respondent could exercise over Kaya is an important consideration in this part of the enquiry. But alone it is insufficient. The mandated enquiry had to be undertaken within the broader context of the market and the dynamics within such a market.

[52] An examination of the record will reveal that there was extensive evidence which covered:

1) the relevant geographic and product market

2) concentration levels within the relevant market and effect thereof

3) regulatory barriers to entry

4) the absence of significant countervailing power on the part of the advertisers insofar as radio advertising is concerned.

5) Whether the merger would result in the removal of an effective competitor , being Kaya FM

[53] Much evidence was devoted to the implications and determination of the Herfindahl-Hirschman Index ('HHI') its application to market concentration and, in particular, to a modified version of the HHI Index developed by Daniel O'Brien and Steven Salop "Competitive Effects of Partial Ownership: Financial

Interest in Corporate Control" 2000(67) Antitrust Law Journal 559. Significantly, for the purpose of this dispute, O'Brien and Salop comprehensively show that the previous assumption developed by Areeda and Turner that 'a non controlling acquisition has no intrinsic effect to competition at all' was incorrect (Phillip Areeda and Donald Turner Antitrust Law (1980) at 322)

[54] The thrust of O'Brien and Salop's argument in this connection is that [a] full merger is a special case of a"partial" investment of 100%, that gives the acquiring firm complete control. Partial ownership 'forces the analyst to grapple with the question of the degree of control or influence that partial owners have over managers, how partial ownership translates into control or influence and how this influence translates into competitive effects' at 563.

[55] In extending the conventional HHI analysis of a change of ownership upon market concentration to partial ownership, O'Brien and Salop have sought to develop a modified HHI. As they write:

> **'The HHI index of concentration is used in used in antitrust as a rough screen for gauging the effect .of a merger on competitive incentives. Although the HHI sometimes gets treated as an arbitrary measure of concentration, it has a theoretical underpinning industrial organizational**

economics. In the Cournot oligopoly model of quantity competition among firms producing homogenous products and protected by entry barriers the HHI is related to the margin between the market price and cost. That Cournot model can be extended to take into account partial ownership interest under different assumptions regarding corporate control'. 595.

[56] In developing a formula for the increases in the MHHI, O'Brien and Salop correctly note that this can be used to evaluate the competitive effects of partial ownership acquisitions in the same way that the increases in the HHI are used in merger analysis'. 596.

[57] The implications of using the HHI Index and therefore by analogy, the MHHI Index are set out succinctly in Massimo Motta Competition Policy and Practice (2004) at 235:

Othe r things being equal, the larger the number of independent firms operating after the merger the less likely it is to be detrimental to consumers. The intuition for this result is straight forward, as the ability of merging firms to exert market power clearly depends on the number of rivals. In the case of a merger to monopoly, for instance, the new firm will not face any restraint from competitors in its pricing decisions. At the other extreme, in an industry which

is extremely fragmented and in which each firm has only tiny market shares, the impact of a merger on the market price will be irrelevant.

This gives us a rationale for using a concentration index, such as the Herfindahl Hirschman Index (HHI), as a first screening device for the unilateral effects of mergers .*Ceteris paribus*, we should worry more about a merger in an industry which is highly concentrated than about one which occurs in a fragmented industry'.

[58] An examination of the O'Brien and Salop analysis reveals that both the existing financial interests and the nature of corporate governance are important in the determination of the effects of partial ownership, viewed within a particular market. Briefly stated, different forms of partial ownership can have different competitive effects depending on specific financial interests, corporate governance and market structure. Hence the mandated enquiry extends beyond an exclusive examination of control as it appears in s12 of the Act ; s12A requires this inquiry particularly because market structure needs to be taken into account in the determination of the likelihood that even a 24% shareholding may have an anti competitive effect.

[59] Dr Roberts' evidence which was not challenged under cross examination revealed significant concentration levels in the defined market. For this reason,

the acknowledged existence of a concentrated market and the nature of the acquisition required the Tribunal to engage in a careful scrutiny of the likely anti-competitive effect upon the market and not simply to conclude that in the absence of sole or joint control it could complete its enquiry as mandated in terms of section 12A.

[60] In summary, the Tribunal conflated the question of control to be determined in section 12 with the enquiry that, having so determined that there was a merger, the latter substantially prevented or lessened competition in the defined market as mandated by section 12A. The decision of the Tribunal was thus predicated on a material error of law.

[61] Mr Gauntlett submitted that it would be wrong to so conclude because the Tribunal had been granted a legislative discretion to determine whether a merger should be approved. That discretion was exercised by an expert regulatory agency and should accordingly be treated with deference. See in this regard Cora Hoexter Administrative Law in South Africa (2007) at 138-139. This Court accepted this principle in TWK Agriculture Ltd. v The Competition Commission (unreported decision CAC of 7 August 2007). Nothing in this decision should be construed to undermine or diminish the adherence to the approach to deference as set out in TWK, supra. However, there cannot be

deference to a decision predicated on so material an error of law. Bad law in this kind of case prevents good economics from being employed.

[62] However, the respect and deference owed to the Tribunal means that it is not for this Court to make the determination as to whether the merger should be approved or not. The Tribunal is still best placed in the light of this judgment to assess all of the evidence placed before it and determine afresh whether the merger should be approved.

[63] For this reason, it would be inappropriate for this Court to substitute its own decision for that of the Tribunal without the benefit of the Tribunal's obvious expertise in this regard. It is for the Tribunal, unfettered by a mistake of law, to engage in the mandated enquiry in terms of s 12A.

ORDER.

[64] 1. The decision of the first three respondents to unconditionally approve the merger between the fourth, fifth and sixth respondents under case number CT39/AM/May 06. is reviewed and set aside.

2. The determination as to whether the proposed merger between the fourth, fifth and sixth respondents should be approved and, upon what basis, is referred back to the first three respondents for an expeditious consideration and

determination.

3 Fourth and fifth respondents are ordered jointly and severely, the one paying the other to be absolved, to pay the applicant's costs of this application, including the costs incurred by the employment of two counsel.

MAILULA and TSHIQI AJJA agreed.