

# IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: 39/AM/MAY06**

In the matter between:

**PRIMEDIA LTD**

**CAPRICORN CAPITAL PARTNERS (PTY) LTD**

**NEW AFRICA INVESTMENTS LTD**

Merging Parties / Appellants

and

**THE COMPETITION COMMISSION**

Respondent

**AFRICAN MEDIA ENTERTAINMENT LTD**

Intervenor

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Panel : D Lewis (PM), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 15 March - 25 April 2006 with argument heard on 18 January 2007

Delivered on : 12 February 2007

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## REASONS

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MANOIM TM:

### Introduction

[1] This intermediate merger comes to us for consideration in terms of section 16(2)(b) of the Competition Act ('the Act'). The merging parties have asked us to consider the Competition Commission's decision to approve their merger subject to conditions.<sup>1</sup> The merging parties seek an order from us approving the merger without

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<sup>1</sup> The Commission's conditions are annexed to this decision as Appendix 1.

conditions or if we find that the merger is likely to substantially lessen or prevent competition, subject to conditions that they tender.<sup>2</sup>

[2] A ‘consideration’ proceeding is not an appeal in the strict sense.<sup>3</sup> We are not confined to the record before the Commission when it made its decision. Under this procedure we not only have regard to the Commission’s record, but also other evidence placed before us, by way of documents, witness statements and *viva voce* testimony. This consideration proceeding has been no exception. Subsequent to the merging parties filing their application for consideration, the Commission’s record has been considerably supplemented by way of further discovery, witness statements and the oral testimony of eight witnesses over a period of nine days.

[3] All this is prefatory to an explanation of why the Commission, which had been willing to approve the merger subject to conditions during its initial proceeding, changed its position before the Tribunal, and concluding that the anticompetitive effects of the merger could not be cured by way of conditions, argued for a prohibition. The intervening party, African Media Entertainment Limited (“AME”), a rival media grouping, has consistently argued for prohibition, both before the Commission and the Tribunal.

[4] We have decided to approve the merger without conditions. Our reasons for this decision follow.

## **The Transaction**

[5] This merger involves the direct acquisition by Capricorn Capital Partners (Pty) Limited (‘Capricorn’) and Primedia Limited (‘Primedia’) of New Africa Investments

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<sup>2</sup> This is the test set out in Section 12A(1). The merging parties’ tendered conditions are annexed to this decision as Appendix 2.

<sup>3</sup> Harms, in his commentary, refers to an appeal in the *strict sense* as being one where there is a rehearing on the merits, but limited to the evidence or information on which the decision was made. An appeal in the *wide sense*, is one where there is a complete rehearing of and fresh determination on the merits of a matter, with or without additional evidence. The consideration proceeding in terms of the Act, would be considered an appeal in the wide sense. (See Harms, *Civil Procedure in the Superior Courts*, C 1.4.)

Limited ('Nail').<sup>4</sup> Primedia and Capricorn have made the offer jointly and have an agreement between themselves that regulates their respective rights in respect of Nail. Primedia and Capricorn will hold joint voting rights in Nail. The direct consequences of the merger are uncontroversial and raise no competition or public interest concerns. Nail is a holding company that has historically held many investments in many areas, primarily media and financial services. Presently, it is a cash shell and has only one investment to consider – a 24,9% stake in the Kaya FM (Pty)(Ltd) ('Kaya'), held via its own wholly owned subsidiary, New Africa Media Holdings (Pty) (Ltd). Kaya owns a radio station known as Kaya FM.

[6] It is this indirect acquisition of an interest in Kaya that has created controversy – not from the point of view of Capricorn, which is a financial services firm, but because Primedia owns substantial radio assets.<sup>5</sup> The opponents of the merger assert that if Primedia acquires indirect control over the Kaya stake, this would enable it to control the station and this would lead to a lessening of competition in the radio market in Gauteng. Primedia would use this stake as an opportunity to exercise unilateral market power in the Gauteng market or in conjunction with Kaya's other controllers, Kagiso Media Limited and Caxton Limited, who also own radio assets outside of Kaya, exercise market power through co-ordinated effects.<sup>6</sup>

[7] The merging parties argue that Primedia will be unable to control Kaya FM via a stake of 24,9%, and even if we find that it could, the merger would not lead to a substantial lessening of competition, as Kaya is not a competitor of the radio stations in the Primedia stable.<sup>7</sup> In brief Primedia had argued that the correct analysis would be to either hold that each radio station is a monopoly as licencing conditions ensure that there is a distinct format in each geographical area, or that

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4 We are advised that the shares will be registered in the name of Capricorn but will be beneficially owned by Capricorn Capital Partners Investment (Pty) (Ltd) a wholly owned subsidiary of Capricorn. See Merging parties' bundle page 3, paragraph 5.

5 Capricorn's interest in the merger appears to be the use it can put to using Nail as a cash shell. See Merging parties' bundle page 3, paragraph 5.2.

6 We will refer to Caxton as this is the name by which the company has been referred to in the record however, the interest in Kaya FM is held by CTP Limited.

7 The merging parties have contended that either every radio station is a state created monopoly, because the Icasa licensing regime has made each distinctive, or that the market if contestable, is subject to competition from a variety of other radio stations and alternate media such as television.

radio stations are subject to a much wider range of constraints than the Commission suggests including, other radio stations, television and even print media.

[8] Primedia is a diversified media company with interests in radio, outdoor advertising and film exhibitions. The assets of interest in this merger are its radio assets, held via its subsidiary Primedia Broadcasting. These assets are:

- **Highveld** a commercial adult contemporary music radio station, which broadcasts on the FM band in the Southern Gauteng region. It is Primedia's largest radio asset and styles itself "Joburg's No. 1 Hit Music Station";
- **702 Talk Radio** a commercial talk radio station which broadcasts on the AM band in Gauteng, parts of Limpopo Province, North West Province and Mpumalanga. This station has now received permission to broadcast on FM frequencies. It styles itself "Your No. 1 News and Talk Station".
- **CapeTalk** a commercial talk radio station which broadcasts on the AM band in the Cape Town area.
- **KFM** a commercial adult contemporary music radio station broadcasting in the Western Cape and Northern Cape regions. Primedia recently acquired control over this station when it bought Nail's interest in it.

[9] Nail's only asset of interest is its holding in Kaya the owner of Kaya FM. **Kaya FM** ("the Heart and Soul of Jozi") is a commercial radio station broadcasting to an adult contemporary audience in Johannesburg. The licensed program format of Kaya FM is "an African focused adult contemporary / jazz format with a 60% music and 40% talk format."<sup>8</sup>

## Background

[10] Private ownership of broadcasting licences is a relatively new phenomenon in South Africa, owing much to the change in political dispensation, post 1994. In order

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<sup>8</sup> See page 786 of the Intervenor's Trial Index and Bundle (File 2).

to operate a radio station a licence is required from the responsible regulator, the Independent Communications Authority of South Africa ('ICASA'), which succeeded to the jurisdiction of its predecessor, the Independent Broadcasting Authority ('the IBA'). Icasa, as did the IBA, requires licencees to conform to strict criteria to meet the social objectives of the broadcasting legislation. Amongst these criteria are rules that affect the content and ownership of the broadcaster.

[11] When private radio stations were first licenced by the IBA, licences were usually owned by firms whose shareholding was fragmented, as consortia, who were formed to compete for the licences on offer, attempted to mirror the universe of ownership criteria that the legislation sought to promote, in their constellation of shareholders. As a result radio stations, and Kaya is typical of this, had shareholding structures where large corporations had shareholdings, similar in size to either new entrants or entities created to take up the opportunities, despite their disproportionate access to financing and business experience.<sup>9</sup> Not surprisingly, the sector received a shake-out with many exiting, (both large and small) whilst other firms already invested in one licence, decided to take up the opportunity afforded by this exodus to invest in other licences. This was not that simple. In the first place the regulator had a policy of not wanting to licence the 'usual suspects', but to encourage new entry. In the second place, the regulator's discretion was constrained by ownership rules that restricted how many licences a firm was allowed to control.

[12] In terms of the Independent Broadcasting Act ('IBA Act'), no person could exercise control over more than two commercial FM radio licences.<sup>10</sup> Furthermore no person could be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial radio stations.<sup>11</sup> No person could be in a position to exercise control over two or more commercial radio stations and be a director of any company which is in

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9 At one stage Independent Newspapers, a large media company, had 17,8% of Kaya whilst Makana Investments (Pty) Ltd, a new entrant empowerment vehicle for former political prisoners held, via a special purpose vehicle, Motsamai Media, 22,4%. (See Kaya shareholders' agreement, clause 3.2, Commission record file 4, page 19)

10 Section 49(2)(a). Similar restrictions were in place for AM services in s 49(4) and 49(5).

11 Section 49(2)(b).

a position to exercise control over any other commercial radio license.<sup>12</sup>

[13] In that Act, a person was deemed to be in 'control' or being in a position to exercise 'control' over a company, if he or she had a shareholding exceeding 25% or had other financial interests therein, equal to at least 25% of its net assets.<sup>13</sup> This is one of the reasons why we find the commercial radio sector replete with equity shareholdings that do not exceed 24,9%, which are relatively easy to discern. However, control exercised by "*other financial interests equal to at least 25% of net assets*" would be more difficult to ascertain, without evidence of the finances of the company or the economic interests held by shareholders. (Similar limitations on ownership and control are carried through into sections 65 and 66 of the newly promulgated Electronic Communications Act No. 36 of 2005 ('ECA').<sup>14</sup> (Unlike the IBA Act, the ECA does not define control.<sup>15</sup> However, in section 66(5), which deals with limitations on cross-media ownership (between radio and newspapers), a twenty percent (20%) shareholding in a commercial radio license is defined as constituting control. The date of commencement of the ECA was 19<sup>th</sup> July 2006.<sup>16</sup>)

[14] Changes in shareholding have to receive the approval of the regulator as well. Since most licencees were owned by private companies, the shareholders also placed their own restrictions on sales of equity, requiring shareholders that wanted to sell shares to respect pre-emptive rights in favour of the existing shareholders. Since certain existing shareholders were always in the market for increasing their stakes, the likelihood that a third party would enter to replace an existing shareholder was reduced, as the third party would not only have to get the green light from Icasa, but

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12 The same person referred to above could not be in a position to control two commercial radio licenses in the FM service which either had the same license areas or substantially overlapping license areas. The last provision sought to limit control to only *one* radio license in a particular license area or in substantially overlapping license areas. Any person, on application to the regulator and on good cause shown, could be exempted from any of these limitations. (Section 49(6)). The IBA Act also restricted cross-media ownership between newspapers (print) and radio and television. (See section 50). The purpose of these provisions was obviously to ensure that there was a diversity of ownership and views in the mass media which included print, television and radio broadcasting. (Similar restrictions applied to television broadcasting services.)

13 See item XX schedule 2.

14 See sections 65 and 66 of the ECA. These provisions also permit the regulator to exempt persons from these limitations.

15 The definitions section.

16 GG 18<sup>th</sup> July 2006, PR 29.

also depend on existing shareholders not following their rights.

[15] But companies that wanted to invest in the industry were not always able to get opportunities to buy equity because of the complexities referred to. At the same time those enjoying ownership of equity have not always found it easy to pay for, particularly the new empowerment entrants.<sup>17</sup> This need for assets and the need for finance led to new innovations. Firms with the finance did deals with firms with the equity by way of complex funding structures where the existing holder of equity and its voting control remained intact but it issued preference shares and other instruments to industry players on the hunt for assets. This did not it seems trigger a change in control from the view of the shareholders' agreements and, although this is less clear, nor from the regulator's point of view, as we discussed above, but because of the opaqueness of these arrangements it was not always clear to an outside observer if the "other financial interest" consideration had been triggered.<sup>18</sup>

[16] This explains the recent history of Kaya and why the present merger has taken the form it has. The Kaya shareholders' agreement that presently serves is largely as it was when its licence was acquired in 1997. Although most of the founding shareholders have exited, the basic structure of the agreement remained intact. For this reason, Nail, although not a founding shareholder, as a listed firm, enjoyed a right of exemption from the shareholders pre-emption requirements, in the event of a change in control.<sup>19</sup> This meant that if there was a change in control of Nail this would not trigger the pre-emptive rights of other shareholders. In contrast if a private company shareholder in Kaya underwent a change of control, the rights of pre-emption were triggered. Thus Nail has since its inception undergone various changes in its shareholder base, without threatening its rights in Kaya. It also explains the fight over Nail, waged between two rival consortia whose battle has featured in previous decisions of the Tribunal and may have reached finality in the current merger before us. The consortia really wanted Nail's assets, not Nail, but

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<sup>17</sup> See the comments of Makana Investments in their application for the amendment of the Kaya licence, Intervenor's File 2, page 1210.

<sup>18</sup> The Kaya amendment application, which we refer to later, is testimony to this difference of opinion on the subject.

<sup>19</sup> See shareholders' agreement, clause 8.33.1 - Commission's record file 4, page 33.

they needed to keep the shell of Nail alive, to own those assets, to avoid the pitfalls of regulatory and shareholder consents, that a change of direct ownership would trigger.

[17] The reason Nail was so attractive to predators was that it had, at one time, ambitions to be a media conglomerate and the new broadcasting dispensation offered opportunities to a company with an empowerment profile. Over time it had acquired, as a result of this profile, *inter alia*, an attractive and diverse portfolio of radio assets. Because of the broadcasting regulatory environment, which we referred to above, these stakes were significant, but not controlling.

[18] Sometime in early 2003, Investec and Primedia discussed a possible takeover of Nail. Mr. Kirsh of Primedia and Mr. Kerr from Investec were the respective principals for their firms in these discussions and the subsequent events that took place over the next few years. As to whose initiative this was, Investec or Primedia, the evidence is not entirely clear, but both are agreed that it was driven by the belief that Nail's parts were considered to be worth more than the sum of the whole. Following these discussions, Primedia held exploratory talks with the Nail board with a view to buying some of its assets or the shares in Nail.<sup>20</sup> The upshot was that the Nail board decided to offer its shares for sale and called for bids. Two consortia were formed to bid.

[19] One, known as the Tiso Consortium, was composed of various investors, Capricorn, Investec, Safika (the latter at that stage the holder of high voting shares in Nail as a partner in another consortium that controlled Nail called Phaphama), the Mineworkers Investment Company ('MIC') and Multi-Direct Investments Limited, alias Tiso, hence the eponymous name of the consortium.<sup>21</sup> At the same time the Tiso Consortium had entered into a side agreement with Primedia, which provided that if the bid were successful, they would sell certain media assets to Primedia at an agreed price. Amongst these assets were the radio interests of Nail, namely stakes

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20 See Kirsh testimony, transcript page 291 onwards. Again it is not clear who attended this meeting only Primedia or Primedia and Investec. Mr. Kirsh and Mr. Kerr of Investec have different recollections. See Kerr's testimony, transcript pages 678-679.

21 We use the word Tiso to refer to this company and any other in the Tiso Group in contradistinction to the Tiso Consortium which we use to refer to the members of that consortium as a whole.



in Jacaranda (a 37,2% stake), Kaya (a 29,4% stake) plus the financing arrangements extended to other shareholders), KFM (a 66,5% stake plus the financial interests in another shareholder Broadcape Investments (Pty) Ltd), and Radmark ( a 37,1% stake).<sup>22</sup> In relation to Kaya FM however Primedia had agreed to share this asset three ways with Tiso and Safika. Although Primedia was only going to get one-third of the Kaya FM asset, which at that time included both the shares and the loans to other shareholders, in terms of the agreement, the Tiso consortium and Phaphama, undertook, that to the extent that Primedia was the purchaser of a media asset they would *“use their respective best endeavours to procure that Primedia shall have management control of such media asset from the effective date subject to the approval of the necessary regulators to the extent required.”*<sup>23</sup>

[20] Primedia gave undertakings to the consortium of what was termed underpin values. What this meant was that Primedia undertook to buy these assets from the Consortium if its bid was successful at these values. The benefit to the consortium was it knew in advance what value it could expect to realize from these assets and hence how high to pitch its bid for Nail. Note of course that Nail comprised many other assets as well, so this was just one factor in assessing the bid price. The structure of this arrangement gave rise to technical legal difficulties. The consortium could not bind the Nail board. The consortium if successful might be able to control the appointments to the board, but it was the Nail board that made the decision on which assets to sell to whom, and as Kerr points out in his affidavit, not all the sales contemplated in the consortium agreement took place or were sold to the identified parties.<sup>24</sup>

[21] Primedia was not a member of the consortium. The MIC however is one of the controlling shareholders in Primedia.<sup>25</sup> It seems fairly clear that Primedia exercised enormous influence over the consortium despite not being a member and probably

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22 See Kerr's affidavit, exhibit 9 and Tiso Consortium agreement, clause 1 File 1 of the intervenor's bundle.

23 See Consortium agreement, paragraph 3.13.3.

24 See Kerr's affidavit, exhibit 9.

25 The evidence of Mr. Kirsh is that Primedia is jointly controlled by MIC and the Kirsh family. See transcript of 30 October 2006, page 289. This is also confirmed by Mr Dan Moyane during his cross-examination by the Intervenor's Counsel, transcript, page 200.

stayed on the sidelines to avoid regulatory controversy through its presence.<sup>26</sup>

[22] The other consortium was known as the Kagiso Consortium and comprised Kagiso Media Limited ('Kagiso Media'), Caxton and Johncom. Like Primedia, Kagiso Media is a company seeking to expand on its existing interests in radio. The Kagiso Consortium made the more financially attractive bid, and this bid was approved by the Nail board.<sup>27</sup>

[23] Unfortunately for them it was less attractive to Nail shareholders as it required the prior approval of the competition authorities. The Tiso Consortium compensated for the lower value of its bid, by persuading shareholders it would result in immediate payment, because unlike the Kagiso bid, its had been structured in such a way, as to obviate the necessity for regulatory approval, and thus uncertain delay. The Tiso Consortium had done this by implementing its plan in discrete phases. The first, and most delicate one, from a commercial point of view, entailed gaining control of Nail, as once this had been achieved, the ambitions of the Kagiso Consortium would have been frustrated. The Tiso Consortium had stated that notification would take place when the subsequent carve ups of the Nail assets took place as contemplated in the consortium agreements. Here there would be regulatory delay, but the consortium would have already won the keys to the palace. Thus the burden of regulatory delay would be borne by the members of the consortium, who now owned the majority of Nail stock, and not the erstwhile Nail shareholders, no doubt anxious to exit a company whose break-up value was worth more than reflected in the share price.

[24] Not all agreed that the Tiso bid had been structured in such a way as to obviate the need to get regulatory approval for its first phase. The Kagiso consortium brought an urgent application to the Competition Tribunal attempting to interdict the Tiso Consortium offer, on the basis that it constituted the unlawful implementation of

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<sup>26</sup> Kerr suggests that the consortium needed a merchant banker partner because of the size and complexity of the assets. Primedia was willing to give back to back undertakings in respect of the radio assets that made the bid more attractive to a financier as radio stations had little tangible assets and therefore could not be asset stripped. (Transcript, page 683) Kerr says to justify why Primedia was not part of the consortium - it was not an investment banker and the consortium had to have partners that made sense. When challenged further as to the presence of other members who were not seemingly investment bankers, Kerr stated that the consortium needed empowerment credentials and that accounted for their presence. (See transcript, page 688)

<sup>27</sup> See evidence of Kerr, transcript page 689.

a merger without approval. When the Tribunal got to hear the matter, it decided that even if it found for the Kagiso Consortium, the matter had become moot, as sufficient shareholders had already sold shares to the rival consortium in market trades.<sup>28</sup> The Tiso Consortium had shrewdly read that the market was more anxious to cash out of its Nail stock, than to wait for approval of the higher priced, but more sluggish, Kagiso Consortium bid.

[25] The Commission, which had been drawn into these proceedings as an interested party, expressed the view that the Tiso Consortium acquisition was a merger and should have been notified. The Tiso consortium having won the prize, control of sufficient Nail shares to thwart the Kagiso bid, then decided to notify the merger and agreed to pay an administrative penalty for failure to notify.<sup>29</sup>

[26] When the merger came before the Tribunal – i.e. the acquisition of control of Nail by the Tiso Consortium, the Commission and the merging parties agreed to defer any controversy over Primedia's ownership of any of the Nail media assets by imposing a condition that stated the Tiso Consortium was obliged to notify the Commission of the sale of any of the affected assets (defined as Nail's interests in Jacaranda, KFM, Nail Outdoor and Kaya FM), regardless of whether they fell below the threshold for notification. Tiso was precluded from appointing Primedia to dispose of the affected assets and from granting Primedia a veto over their sale. A third condition provided that no other firm was to be given any form of control including managerial control over any asset that Nail controlled pending competition approval. In addition, because of the conflict of interest of MIC, it was required to abstain from influencing the asset sale.<sup>30</sup>

[27] These conditions effectively immunized the "Primedia factor" from a competition analysis of the Tiso Consortium bid, as appears from that decision.

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28 See our decision which is reported as *Johnnic Communications Ltd and others v New Africa Investments Ltd and others* [2003] 2 CPLR 394 (CT).

29 The Tiso consortium persists to this day to assert that the payment of the administrative penalty was a pragmatic approach to resolving this dispute with the Commission, and that it has never admitted that its actions were unlawful. Kerr's evidence in the hearing reaffirms this belief.

30 See the order of the Tribunal in the large merger between the *Tiso Consortium et al and Nail*, Case number 59/LM/Oct03, dated 28 January 2004, exhibit 8; also reported as *The Tiso Consortium / New Africa Investments Ltd* [2004] 1 CPLR 302 (CT)..

[28] The Tiso Consortium, now ensconced as the controller of Nail, proceeded to implement its agreement with regard to the division of the spoils i.e. the various businesses, and bits and pieces of businesses, owned by Nail that the respective consortium members had had their eye on. This was not to be entirely the case of 'to the victor the spoils'. Interestingly, the Tiso and Kagiso consortia entered into negotiations which saw the losers gain some of the spoils for themselves.<sup>31</sup> An agreement was entered into between the consortia in December 2003. Note that this agreement preceded the approval of the Tiso consortium's acquisition of Nail by the Tribunal, but not the date of notification of the merger to the Commission – the Kagiso Consortium did not object to the Tiso Consortium taking over Nail, despite a history of vigorous opposition to it previously, because it had given undertakings to the Tiso consortium, not to do so, in terms of the agreement. Whether the Tiso consortium agreed to deal with the losing adversary on the eve of its victory, because it was worried that victory might be transitory or whether some other self-interest impelled them to do so, is something we do not know. The line of cross-examination from counsel for AME in our present hearing was strongly suggestive of the fact that the Tiso Consortium had traded assets in return for an unopposed ride through the regulatory hurdles the deal still had to cross.

[29] The Tiso consortium half-heartedly concedes this. Kerr, in his evidence, talks of the fact that Kagiso was a logical buyer for the assets as they had certain pre-emptive rights to shares in Jacaranda and Radmark, and that 'testing the pre-emptives' would take time. But he did concede that it was also a pragmatic decision as it would "settle all the noise" that they (i.e. Kagiso) were causing around the transaction.<sup>32</sup>

[30] Members of the Kagiso Consortium were given rights to the Nail interests in Jacaranda and Radmark, although ultimately they landed up with Kagiso Media.<sup>33</sup> There were other allocations to members of the Kagiso Consortium but they did not concern the radio assets.<sup>34</sup> Signatories to this 'Treaty of Versailles' which carved up

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31 See Kerr's evidence, transcript page 691.

32 Transcript, page 700.

33 See Kerr's evidence, transcript, pages 715-716.

34 Johncom another Kagiso consortium member was given a stake in the Sowetan newspaper. (See

what remained of the Nail empire, were not just the members of the two consortia, but Primedia - recall not a member of either - and curiously, in his personal capacity, Terry Moolman the chief executive of Caxton.<sup>35</sup> In return for the assets that they gained, the Kagiso consortium and Moolman, agreed to keep the peace and not to litigate against the implementation of the Tiso take-over any further, either before ICASA, the SRP or the competition authorities. (By implication this means Kaya FM and KFM in relation to the competition authorities and the two are mentioned by name explicitly in relation to the Icasa proceedings.)

[31] The deal however was to change the ownership patterns in radio broadcasting significantly, as Jacaranda now became the undisputed subject of Kagiso Media's control, while KFM acquired a similar status in respect of Primedia. Primedia acquired KFM by agreement with Nail, on 22 April 2004.<sup>36</sup> Thus two successful private radio stations that once were not subject to the control of any single controller, were now subject to an identifiable controller, and in both cases the controllers were players in the radio industry.

[32] No agreement between the consortia was reached in respect of Nail's loan and shares in Kaya FM. Recall that the Tiso Consortium had made its own arrangement that the Kaya stake would be shared three ways between Primedia, Tiso and Safika. Thus at this stage of the history this arrangement in respect of Kaya FM still holds. We will see later that this changes, and why.

[33] In time the agreement and carve between the two consortia proved to be an illusory peace. The terms of the agreement did not stop Primedia from objecting to proposed changes in the Kaya licence, which favoured Kagiso Media and Caxton, since Primedia had given no reciprocal undertakings not to engage the regulators. Nor did it prevent AME, which although a Caxton associated company was not a party to the agreement, from objecting to the present merger.<sup>37</sup>

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transcript, page 702)

35 See Exhibit 7 paragraph 8.1. Whether Moolman does indeed give this undertaking which is contained in annexure B to Exhibit 7, is unclear as our copy is not signed.

36 See Kerr's affidavit, paragraph 3 (Exhibit 9 of the record).

37 It also did not prevent Kagiso Media from objecting to Primedia's application to amend Radio 702's licence to migrate from AM frequencies to FM. See Commission record file 6, page 50 Decision of Icasa in respect of that application paragraph 29.2 page 67. The application was made in June 2005

[34] We deal with the Primedia objections to Icasa first. Sometime in June 2004, Kaya FM applied to Icasa to amend its licence in order to increase its coverage area. In effect, this meant the allocation of additional available frequencies. Primedia, despite aspirations to being a Kaya FM shareholder opposed the move vigorously. In a hard hitting letter to Icasa dated 6 July 2004, Pheladi Gwangwa (the then Regulatory Affairs Manager of Primedia – presently 702 Talk Radio’s Station Manager) suggests Icasa should not grant applications for additional frequencies “*mero motu*” but should allow all interested parties to apply.<sup>38</sup>

[35] Primedia argued that awarding the frequencies to Kaya would set a bad precedent for the industry. Primedia alleged that Kaya FM was a station that was punching well below its weight when one compared its advertising (modest) with its audience size (relatively large). In contrast the Primedia stations (Highveld and 702) were punching above their weight and enjoyed a much higher ratio of advertising to audience size.

[36] In an internal company report Gwangwa describes the purpose of the opposition – as a:

*‘concern that the application for additional frequencies would enhance its [Kaya’s] competitive edge over Highveld’.*<sup>39</sup>

[37] What this stratagem by Primedia does indicate is that when its prize asset is threatened, Primedia will take the necessary steps to protect it without regard to the fact that Kaya FM, in which it expected to have a future investment in, might be adversely affected.

[38] A second foray before Icasa over Kaya FM was to take place the following year precipitated by changes in the shareholding profile of Kaya’s other shareholders. The battle for Nail appears to have created some discomfort among the shareholders who were the recipients of the Nail loans. According to documentation in the Icasa records, Thebe Convergence Technology Holdings (Pty)

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and the Icasa decision is dated March 2006

38 See merging parties’ bundle, page 254.

39 See file 7 page 334, Regulatory Affairs report, Second Quarter.

Ltd ('TCT') and Makana Investment Corporation ('Makana'), two of the shareholders in Kaya who were recipients of Nail financing, were concerned as to who might win this battle and so, via Nail, control the loan agreements.<sup>40</sup> Hence they decided to find new financiers.<sup>41</sup> Presumably they believed that they could repay the loans to Nail and renegotiate better terms with a new financier. This assumption seems to have proven correct. When word had got out that the shareholders wanted to change funders, there was no lack of suitors. Primedia too, it is alleged offered to help as well.<sup>42</sup> In the end it was Kagiso Media, Tiso and Caxton who landed up as the bankers. They did this through a fairly intricate structure of funding, so as not to disturb the shareholding foundations, and thus compromise the position in respect of Icasa and trigger the pre-emptive rights contained in the shareholders' agreement. The present position is set out in Appendix 3.

[39] The chronology of how Kaya FM arrived at these new arrangements is not clear from the Icasa record as we are presented with the outcome and not the negotiations that preceded them. Prior to the restructuring that occurred, Kaya had four shareholders - Nail (24,9%), TCT (45,2%), Makana (24,9%) and Mokgosi SPV (5%).<sup>43</sup>

[40] Sometime between mid 2004 and early 2005, various agreements were concluded, resulting in the new shareholding set out in Appendix 3. The crucial changes are that a company called Shanike, is insinuated into the structure, as a

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40 The extent of Nail's involvement as the deep pocket of other Kaya shareholders is evident in the submission to Icasa for the amendment where it is stated "*It is public knowledge that Nail had an interest in Thebe Convergent Technologies to acquire shares in Kaya. In terms of the 2004 transaction, Kagiso and CTP Limited merely replaced Nail as the financier to Thebe. It is also public knowledge that Nail fully financed the acquisition of Motsamai Media and Makana SPV of their shares in Kaya. The proposed transaction is merely an attempt by [Makana] to rearrange its affairs by redeeming the financial arrangement with Nail.*" See record file 2, page 147. Response of Makana et al to the submission by Primedia.

41 According to Yaseen Bhayat from TCT at the hearing, "*I suppose similar to Makana, the result of this application when Nail decided to unbundle, rather than having a shareholder foisted on us as the majority shareholder and in the interests of the stability of the station. Thebe [TCT] made an opportunity available to Kagiso Media and to Caxton CTP who could provide a better strategic solution at the time being media players.*" See transcript of Icasa hearing December 2005 Record, page 1213.

42 See transcript of Icasa hearing December 2005 Record page 1211 where Mr. Ngwenya from Makana states "*We engaged with a number of players including Primedia to restructure our interest in Kaya. And settled on Tiso and Kagiso Media because the terms of the engagement suit us better.*"

43 Mokgosi is a special purpose vehicle constructed to house the interests of Lawrence Dube.

direct shareholder to replace Makana. To avoid comprising the original licensing policy, Shanike has Makana as its majority shareholder (50,2%), but Kagiso and Tiso each have 24,9% of its ordinary shares. Shanike in turn has 50% of the preference shares in TCT, whilst Caxton has the remaining 50%. (It is not clear when the Caxton deal is consummated, but it seems to be known by the time of the hearing before Icasa, as Primedia's legal representative refers to the fact that "at some time Caxton and Kagiso acquired B ordinary shares and preference shares in Thebe [TCT]", as does the spokesman for TCT.<sup>44</sup> Lest this intertwining of interests were not sufficiently complicated, TCT in turn has 100% of the preference shares in Mokgosi SPV. Thus the funding would suggest that Nail stands on the outside of a closely linked shareholder structure, in which each of the remaining three is linked to the other by way of the issue of preference shares. Primedia's view is that through these preference shares and Kagiso Media's ordinary shares in Shanike, Kagiso Media and Caxton control Kaya FM.<sup>45</sup>

[41] As the introduction of Shanike required an amendment to Kaya's licence, Icasa's approval was required and hence the application to Icasa, and the hearing before it in December 2005. Primedia objected to the amendment and made written and oral submissions opposing it. Why Primedia should be there at all is challenged by counsel for Makana, who suggested that it was only there because it had lost in its bid to become his clients' funder. This is denied by Mr. Kirsh, who testifies at the hearing that his concerns are again related to the integrity of the regulatory system. His comments and understanding of what is going on are very interesting, and worth quoting at length:

*"The transference of economic ownership to different entities, sp[itting] out the equity ownership or controlling stake and entering into a whole set of convoluted transactions which give effect to essentially the circumvention of pre-emptive rights and an unregulated control of the broadcasting industry. At*

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44 See transcript of Icasa hearing December 2005 Record, pages 1213 and 1236.

45 "Furthermore, the evidence is of an alignment of interests between CTP(Caxton) and Kagiso, in an adversarial relationship against Primedia, which would even more firmly entrench the power of Kaya in Primedia unfriendly hands." (See merging parties Heads of Argument paragraph 130 and the references to the record contained there..



*its worst, councilors, that if you allow this transaction to go through, you could in fact find one company controlling the entire broadcasting industry by securing the economic ownership of all broadcasters and leaving the residual sub-equity with the original shareholders. Primedia's interest in this transaction, we will, you know, in terms of our involvement from an economic point of view, we are in the process of securing control over Nail which will secure us our 24,9% stake in Kaya, obviously subject to Icasa's approval and Competition's approval to the extent that it buys. This is not from a radio point of view a big deal in Primedia's life. The issue is, is the principle and precedent that you set here because Primedia has always played by the rules."*<sup>46</sup>

[42] Thus Kirsh is advancing the argument that control is opaque and that Icasa must be alive to the possibility that business people can find ways to exercise it, through the construction of complex relationships. It is this insight that comes back to haunt him in this application, where AME suggest that Primedia plays the same game – i.e. that it is capable of exercising control in an opaque manner.

[43] These comments indicate that the players in this market do not view the complex funding arrangements as mere transactions which one might do with one's bank. All the players in the market for radio assets which had deep pockets saw granting loans to weaker shareholders as strategic. Recall that the broadcasting legislation has as one of its definitions as to what constitutes control, "other financial interests equal to at least 25% of the net assets". We are not in a position to conduct a detailed analysis of the funding arrangements nor for the purpose of this transaction do we need to do so – but what is clear is that players in the industry associate the ability to fund a shareholder, with some ability to control it.

[44] Hence from the beginning of the Nail takeover battle, Primedia wanted to keep these loans within the Nail it inherited, and even when the carve up with the Kagiso Consortium took place, did not renounce them, with one minor exception, whilst Kagiso Media, for its part, seems to have done some exceptional maneuvering

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<sup>46</sup> See Kirsh's testimony, Icasa transcript, page1228.

to ensure that these did not fall into the hands of Primedia, post take-over.<sup>47</sup> This has important implications for our analysis of who controls Kaya FM if this merger is approved, which we consider later.

[45] Meanwhile, subsequent to concluding the agreement with the Kagiso Consortium, the Tiso Consortium went further with its own arrangements. Capricorn and Primedia put in a bid to the Tiso Consortium in respect of the remains of Nail, which following the agreements with the Kagiso consortium and related deals now only had Kaya FM as an asset.

[46] Capricorn and Primedia agreed to go 50-50 on Nail, but agreed that Primedia would have control over the media assets, (what this meant, become a subject of later controversy) and that in relation to Kaya, the split would not be 50-50, but that Primedia would have 18,1% and Capricorn the balance, 6,8%. This is a change to the original consortium arrangements in respect of Kaya, where Primedia, Safika and Tiso had agreed to cut this asset and the loans three ways amongst themselves. This consensus, according to Kirsh, broke down when Fani Titi of Tiso had held a meeting with Kagiso and Caxton, and the latter had informed him, that via their funding arrangements with Thebe, they now controlled Thebe Convergent Technologies (TCT), the largest shareholder in Kaya. Kirsh says this seems to have upset Tiso who lost interest.<sup>48</sup> Kerr states that Safika and Tiso gave up their rights to acquire their respective 1/3 interests after they were unable to come up with an offer within a period acceptable to the other consortium members.<sup>49</sup>

[47] Thus Primedia's expectations in respect of the extent of its stake in Kaya continually seesaw over time. Now that it had finality with the Kagiso Consortium and the Tiso consortium over Kaya, it still had to deal with the Nail board. Until this merger is approved the board of Nail whilst dominated by the appointees of the Tiso consortium cannot be regarded as its mere mouthpiece. In addition, contrary to what one may have expected, the consortium's members have not all acted as one. Kerr asserts in his affidavit that several of the Tiso Consortium's arrangements were not

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47 Nail had loans in Kaya Fm, and the P4 stations in Durban and Cape Town.

48 See Kirsh's testimony transcript page 302-303.

49 See Kerr's affidavit, and paragraph 3 of the annexure thereto, Exhibit 9 of the record.

implemented by the Nail board.<sup>50</sup> Division of opinion occurred it seems over the disposal of the Kaya asset. AME decided to put in a bid to the Nail board to buy the Kaya asset and some of the Nail directors were keen to entertain it, presumably because they saw value in a third party having a bidding war with Primedia for it. AME is the owner of radio stations.<sup>51</sup> AME in turn may be controlled by Caxton, at least that is what Primedia suggests.<sup>52</sup>

[48] The AME bid failed, according to Kerr, when Nail raised certain fiscal questions concerning the bid and these questions were never answered by AME. The Nail board did not entertain the bid and have co-operated in seeking approval of the present deal. AME then emerged during the notification process as an objector. It may well be that AME strategy is to have the bid blocked on regulatory grounds so that the Nail board is forced to reconsider selling to it.

### **Who controls Kaya FM pre-merger?**

[49] Mr. Kirsh was certainly correct when he warned Icasa of the opaque nature of control that had come about in this industry. It is this opaqueness that belies the issue of who controls Kaya FM.<sup>53</sup> At least three theories emerge in the record before us. Primedia allege the controllers are Kagiso and Caxton, who have since the days of the Kagiso consortium been allies in hunting media assets. AME does not theorise

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50 See Kerr's affidavit, and paragraph 3 of the annexure thereto, Exhibit 9 of the record. He mentions that the Kaya SPV loans were not sold to Primedia/Tiso/Safika, the P4 Durban loans were not sold to Tiso, MIC and Primedia and the P4 Cape Town loans were not sold to Johncom Radmark was not sold to Tiso.

51 Algoa FM (which broadcasts live from The Boardwalk in Summerstrand, Port Elizabeth) and Free State's OFM are two private commercial radio stations owned by AME. In fact these two stations are two of the four subsidiaries of AME. The other two AME subsidiaries are United Stations (Pty) Ltd and Radio Heads (Pty) Ltd, both involved in radio advertising.

52 According to Mr. Kerr a Mr. Inez Prinsloo whom Kerr describes as Moolman's right hand man sits on the AME board. Transcript page 674

53 Even as sophisticated an observer such as Mr. Kerr is unclear. Remarking on the Shanike transaction he said it was a bit unclear what it was or wasn't from the outside.

on who controls now, but suggests that if the merger is approved it will be Primedia. During the course of hearings before Icasa, TCT, a wholly owned subsidiary of the Thebe Investment Corporation, suggested that *“we have not relinquished and do not intend to relinquish our control over Kaya”*. That seems the least likely scenario. Throughout the proceedings before us, Icasa, and in the documents discovered, the hand of TCT is invisible. Mr. Kerr suggests in cross-examination that Tiso will have considerable influence, because Fani Titi, a senior member of Tiso, has considerable experience in radio.<sup>54</sup>

[50] Another complicating feature is the role of agencies that sell station advertising. In the Primedia stable this is a function that the group does in-house. Kagiso Media, however, has a stake in a business called Radmark that has served various other private players other than those owned by Primedia or the SABC. When Primedia acquired control over KFM one of the changes it introduced was to end its relationship with Radmark. At present Radmark services Kaya, but whether this will change post merger is unclear. Radmark does seem to have some influence over advertising strategy, if only because as the seller of advertising it has contact with agencies and thus has an information advantage over station management.

[51] We are not in a position to determine who controls Kaya FM presently. Perhaps Kerr was correct when he asserted that due to the uncertainty in respect of the Nail stake “Kaya has been in limbo”. He said that the pressures that a shareholder would normally put on management have not been at play because of that. It is thus likely that incumbent management have been left in control of the station for some time.

### **Will Primedia post merger control Kaya FM?**

[52] The merging parties argue that if Primedia were directly acquiring the Nail

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<sup>54</sup> See Transcript, page 714 Kerr’s testimony. Tiso has been the one firm whose loyalties in the battle have never been certain. On the one hand it is a member of the Tiso consortium, the allied camp of Primedia. On the other its shareholdings in radio assets in particular in funding Kaya suggest that it is more likely to have similar interests to Kagiso Media.

stake in Kaya FM the merger would not be notifiable as Primedia cannot control Kaya FM with only 24,9% of the equity. This argument is not raised as a point *in limine*, but as part of the factual enquiry into the substantive effects of the merger.

[53] We have jurisdiction over the enquiry into whether Primedia can control Kaya FM through Nail for two reasons.

[54] Firstly, there is no dispute that we have jurisdiction over the acquisition of control over Nail – that is the direct acquisition. But the definition of what constitutes a merger also implicates the indirect acquisition of control of a business.<sup>55</sup> Translated into the facts of the present merger, if Primedia through acquiring joint control over Nail acquired indirect control over Kaya FM, we would have jurisdiction to examine that acquisition of control as part of the present notification.

[55] Secondly, in terms of our previous merger decision in relation to the Tiso Consortium's takeover of Nail, Nail was required to notify any subsequent disposal of the so-called affected assets. The stake in Kaya FM was one of the defined affected assets.

[56] This does not dispense with the necessity to enquire as a matter of fact, rather than one to found jurisdiction, whether the acquiring firm's acquisition of the interest of the stake in Kaya FM would enable it to control it. If a firm cannot control another then it is unlikely to be able to alter its behavior to produce anticompetitive effects *qua* merger. This situation must be contrasted to one in which a firm can still influence the competitive posture of another, but has this influence irrespective of the merger.

[57] It follows then as part of our substantive enquiry into what the likely post merger effects are that whether the acquirer will indirectly control the asset is the first enquiry. Since control may dress itself in many guises this becomes an enquiry that does not rest at where control may be found to exist for company law purposes, but must go further into what constitutes the boundaries for competition law purposes,

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<sup>55</sup> See section 12(1)(a) of the Act which states "*For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm*".

which in many cases may be set far beyond those acceptable to company law.

[58] In this case it is common cause that Nail, and behind it lurking Primedia, will not be able to command a majority of votes at a shareholders meeting or at meetings of the board. Nail is neither the largest shareholder nor is its assent required to pass any resolution nor can it veto any resolution. In the language of company lawyers it has neither positive nor negative control. The present constellation of shareholdings in Kaya is this:

<b>Shareholder</b>	<b>Percentage</b>
Nail	24,9 %
Shanike	24,9%
Thebe Convergent Technologies	45,2%
Motsamai	5%

[59] Nail is entitled in terms of the shareholders agreement to appoint one member to the board of directors. The board is composed of not less than five (5) directors who vote pro-rata to the number of shares held by the shareholder appointing the director in question.<sup>56</sup> Thus, at board level, the Nail interest is not a controlling one, nor does the shareholders agreement confer upon it so-called ‘positive’ or ‘negative’ control.

[60] The Commission and AME accept this; they also appear to accept that pre-merger, the current controllers of Nail do not exercise control over Kaya; so why do they consider that Primedia, via Nail, can exercise control over Kaya post merger, when its rights as shareholder remain unaltered? Primedia does not independently hold any interest in Kaya or any entity with an interest in Kaya. The answer appears to be that while Nail thus far has been a supine shareholder of Kaya because its

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<sup>56</sup> Clause 5.1 of Kaya Shareholders Agreement provides that: “subject to the provisions of this agreement, the management control of Kaya shall vest in its board. Resolutions of the board of directors of Kaya shall be validly passed if a quorum is present and by majority vote in favour of such resolution as set out in 5.3, save where otherwise provided in this agreement”. Clause 5.2 provides that: “unless otherwise agreed by the shareholders in writing, the number of directors of Kaya shall be not less than 5”. (See page 1299-1300 of the Intervenor’s Trial Bundle and Index).

shareholders have been investors in media assets run by others, Primedia is the controller of everything in its domain.<sup>57</sup> This seems to suggest that the Nail stake had within it a latent potential for control not exercised by Primedia's predecessors who were happy to leave the management of a broad spread of holdings to others.<sup>58</sup> Primedia will not suffer from such passivity - its share of voice at meetings, to borrow from radio station jargon, will be disproportionately louder than its share of vote would suggest it should be. To get to this the opponents of the merger go into the history of the acquisition of the stake, statements made by Primedia executives about their intentions toward Kaya, and the strategic imperative facing the company presently.

[61] However the opponents also suggest that the merger will lead to a change in incentives amongst the shareholders in Kaya, who now, faced with Primedia having a significant stake in one of their prized assets, will be more inclined to co-ordinate their behavior with the former than they would have had any incentive to do post merger. We now turn to examine whether Primedia will be able to exercise indirect control over Kaya either on its own or through joint control with one or more of the other shareholders in Kaya.<sup>59</sup>

### **Sole control**

[62] Although Primedia and Capricorn exercise joint control over Nail there is no dispute that it is Primedia which will control the Nail rights in Kaya. This is because of the agreement between Primedia and Capricorn which provides:

*“Capricorn recognizes Primedia’s expertise in the management of Media Assets. Accordingly, Capricorn in its capacity as a shareholder in Nail, will promote and support the appointment by Nail of Primedia to*

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57 Mr. Kirsch for Primedia concedes this and admits to only a minority stake in Kaizer Chiefs football club. See transcript of 30 October 2006, page 318.

58 At its height, Nail owned interests in Kaya, Jacaranda, KFM and loans in shareholders of radio stations. See Kerr affidavit, Exhibit 9

59 Note that acquiring even joint control as opposed to sole control would be considered a change of control. See *Iscor Limited and Saldanha Steel* CT Case No. 67/LM/Dec 01.

*manage the Media Assets on Nail's behalf.*<sup>60</sup>

[63] This paragraph as we indicated earlier has created much controversy. Why has Primedia inserted this clause to its benefit in relation to assets, which on its own version, are not controlling stakes? The Primedia response is that management of the asset in this instance amounts to taking over the duties of Nail *qua* shareholder, in appointing the director, presumably getting feedback from that person and attending to the exercise of any rights the shareholder may have to assert from time to time.

[64] The case for the Commission and AME is that Primedia has reserved these rights for itself precisely because it knows it can exercise some form of control over the media assets, which at this stage consists of only the Kaya shares.

[65] While the language of this clause may support either contending interpretation, what we have to resolve is the question of whether Primedia can exercise these rights in such a way as to exercise control over Kaya. We know that Nail does not control Kaya by virtue of any of the other deeming provisions or the so-called bright lines in section 12(2)(a – c). It can only vote 24,9% of the votes at shareholder and a board meeting. This does not give it either a majority of votes or the power to veto a resolution or require its consent for resolution to be valid. Simply put, Nail can be ignored at both shareholder and board level.

[66] Secondly, Nail is not the largest shareholder, TCT with, 45,2%, is. TCT does not require Nail's assent to assert control and has a ready ally in Shanike, which, as we suggested earlier in our discussion of the funding arrangements, is intertwined with it and Mokgosi. Shanike and TCT are funded by sophisticated media players in the form of Kagiso Media, Tiso and Caxton which means that Nail cannot expect their support merely because it brings the voice of Primedia to the table. Both these firms' funders, who may even be their controllers, have fought Primedia in the past when it suited their interests to do so, and there is nothing to suggest that they will roll over and do its bidding now. In short Primedia even with indirect control of a

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60 Merging parties' bundle pages 71-72. The Media assets are defined as the equity and loans in Kaya and the P4 loans. See the merging parties' bundle, pages 42-43.



significant chunk of Kaya and the right to appoint a director to its board, cannot on its own exercise sole control over the company.

[67] We find that Nail and hence Primedia will not be able to exercise sole control over the station in terms of sections 12(2) (a) to (c). There remains of course the more difficult section 12(2)(g) which provides that:

*“A person controls a firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)”*

[68] On the facts before us it is unlikely to be able to do so in terms of this subsection either. In the first place the shareholding constellation and the nature of the other shareholders as discussed above makes the exercise of sole control depend on shareholder apathy or naivety. Neither is likely here. This means that Primedia must be able to rule through some other means, ability to provide finance, know-how etc. We do not know enough at the moment to conclude that it can use this leverage sufficiently to bend the board to its will. The other shareholders have controllers which have both expertise in the sector and access to finance. Then too, no one has asserted that to date, Nail, even through its numerous incarnations whilst it has been a shareholder in Kaya, has ever been able to exercise control. If it had, no doubt AME, with its ear close to the ground in the radio industry would have been able to bring evidence of this. It has not.

[69] The next consideration, is the case largely of AME which amounts to this – Primedia will exercise control because it has said it will. For this AME relies on statements made by Primedia and its executives during the battle for Nail which we outlined earlier. Mr. Kerr from Investec although called by Primedia as a witness to the deal history confirms this.

[70] According to Kerr, Kirsh had described the business as a potential jewel that had not been appropriately managed and that with the right management it could be

turned around into a significant asset.<sup>61</sup>

[71] At some stage Kirsh is alleged to have said variously, that we (i.e. Primedia) will turn Kaya around, will make it another Highveld, etc. All these are the comments of someone who has ambitions to be a controller not an investor in “complementary media assets” the latter sound bite being the description Primedia offers to its audience when they are regulators. Kirsh did not deny making these remarks, but maintained his position that they could only exercise ‘persuasion’ over the board not ‘significant influence’.

[72] While Primedia has been inconsistent on its ability to exercise control, this is not, absent any other evidence of how it can bring about this control without the contrivance of the other shareholders, sufficient evidence that it can exercise sole control.

[73] It is quite possible that when Primedia embarked on this venture in 2003, it had ambitions of controlling Kaya FM, if it acquired the equity as well as the strategic loans in respect of the other shareholders as was its original intention in terms of the agreement with the Tiso consortium. However as we have seen, Primedia had to make many compromises on the way, and it seems that control over Kaya FM was one it had to make, in order to gain on the other fronts. What is noteworthy as well is that Primedia has been more interested in ‘influence over’ than economic benefit out of Kaya FM. From the first agreement with the Tiso consortium it was willing to share the stake three ways, but it insisted on management control. When the re-arrangement was done with Capricorn, it did not take up the full extent of the 24,9% stake leaving something on the table for Capricorn, but again as we have seen, it retained the right to manage the media asset. This would suggest that Primedia would be content to have influence that is disproportionate to its economic stake. This in some way supports 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 that station. However without the ability to exercise even disproportionate control this

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61 See transcript, page 675.

remains at present an unachievable goal.

[74] The fact that Nail has a right to appoint an employee to the Kaya staff, in terms of the shareholders agreement, whilst a factor that may be taken into account in assessing as a matter of fact whether control can be exerted, does not constitute a sufficient reason for altering this conclusion, in the light of the other factors we have considered.<sup>62</sup> Indeed Primedia has inherited a considerably more diminished stake in Kaya FM, than the one Nail once enjoyed, before its erstwhile rivals in the Kagiso consortium, contrived to re-arrange the funding of Makana, TCT and Motsamai.<sup>63</sup>

[75] What then motivated Primedia to expend as much as it has in management time and legal expenses in fighting for Kaya? Perhaps, as Mr. Kerr suggests, Primedia is pleased just to have its foot in the door because if other shareholders sell it would have pre-emptive rights which it may think later the authorities would allow it to acquire.<sup>64</sup>

[76] We find that there is no evidence that Primedia can exercise sole control over Kaya FM by virtue of section 12(2)(g).

## **Joint control**

[77] For the purpose of the Act, a firm may still be able to control another, if it is able to do so by joint control with one or more others. In this case if Primedia were able to ally itself with another shareholder it might be able to do so. The question is: whether any of the other shareholders have an incentive to co-operate with it? Primedia's choice of allies are either TCT, with 45,2%, or failing TCT, it would, in order to get a majority of votes, need the support of both Shanike and Motsamai.

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62 In terms of clause 9.6 of Kaya shareholders agreement. This clause provides as follows:

"The shareholders shall have the right to provide personnel to participate in the management and day-to-day operations of KAYA pursuant to agreements which will be concluded between KAYA and such parties or their nominee on such terms as the board of directors of KAYA by the majority vote may agree". See page 31 of Kaya shareholders agreement.

63 See earlier the funding arrangements Nail had in place.

64 See transcript page 713 of Kerr's evidence.

Neither, on their own, would give Primedia a voting majority. However as we have made the point earlier, an examination of the interlinked shareholdings of the three firms suggests that if there is to be any alliance it is likely to be between Shanike and TCT, through whom the tentacles of both Kagiso Media and Caxton protrude. Thus if Primedia wants allies, it needs both Kagiso and Caxton to buy into its strategy. The evidence of the merging parties is that Kagiso and Caxton are an alliance in Kaya and there is no evidence from the Commission or AME to rebut this. Therefore in order for joint control to be a likely post merger outcome, one would have to show that post merger co-ordination between the Primedia, Kagiso Media and Caxton was a likely outcome.

[78] Because the case made for co-ordination has been given less attention by the opponents of the merger, no clear theory of the rationale for co-ordination has been suggested. Three possibilities have been presented at various times. We discuss each one in turn.

1) that the 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. It 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 hike, 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%.<sup>65</sup> 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.

2) that Kagiso Media and Primedia will co-ordinate the positioning strategies of the three stations to ensure that they minimize competition between one another and in a sense constitutes a form of market division albeit of a subtle variation.

Primedia may view the acquisition as a defensive one i.e. to prevent Kaya attacking its Highveld market and profile it away to attack Metro FM or the youth stations 5Fm.

This prospect is hinted at by Rivak Bunce, the managing director of AME's two radio subsidiaries United Stations and Radio Heads, who in his statement to the Tribunal states that:

*"Primedia will also be able to be in direct contact with Kagiso through Kaya since Kagiso owns a stake in Shanike...There is a strong*

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<sup>65</sup> See merging parties' bundle, page 260 and Intervenor's File 2 page 783, Kaya submission to Icasa for the amendment of its licence. It is possible that this discrepancy is due to the fact that Kagiso Media's interest evolved during the process and that the 12,5% figure is the correct one at present.

*incentive for these two stations to collude in decision making concerning Kaya in order to make sure that Kaya does not compete with Jacaranda and Highveld. Kagiso adopted a similar strategy with P4 in Durban when it acquired a minority holding in it.*<sup>66</sup>

However AME chose not to call Bunce and the prospects for this theory, intriguing as it sounds, were not explored.

There is a Kagiso Media board presentation which describes Kaya FM and Jacaranda “as a powerful combined force against competitors especially Highveld”, the implication being that each is well situated to attack the crown jewel of Primedia from a different vantage point.<sup>67</sup> 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 lose 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.

The dispute between Kaya and Primedia over the former’s application for frequencies is an example of where Kaya, and hence its controlling shareholders’ strategy and those of Primedia would diverge. Despite knowing it would one day acquire a stake in Kaya, Primedia fought to prevent it getting access to new frequencies. It thus thought as an owner of Highveld and not a potential “controller” of Kaya. In contradistinction it seems that the other shareholders in Kaya wanted it to take the frequencies.<sup>68</sup>

The other problem with the both the price and market division co-ordination theories, is how they account for the incentives of Caxton and Tiso. Kagiso Media does not appear to have more control over Kaya than the latter, and

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66 See witness statement of Rivak Bunce, paragraphs 22-3. Witness Bundle, Record page 144.

67 See Merging Parties bundle page 248. The evidence of all three economists who testified would tend to suggest that Highveld is a more direct competitor of Jacaranda and Kaya than either would be of one another.

68 We are not certain of this from the record, but in an industry where parties are not slow in coming forward to the regulator it is likely that they would have surfaced as objectors if their other interests were threatened by the application.

would appear to require the consent of at least Caxton to a co-ordinated strategy. Caxton's investments in radio fall outside of the Gauteng market and hence there is little to gain in a co-ordinated strategy for them if it benefits Highveld and Jacaranda, the two crown jewels of the respective co-ordinators, but not Kaya FM.<sup>69</sup>

**3)** that the co-ordination will not take place among the radio stations but will be among the owners, Kagiso Media, Caxton and Primedia who will divide up opportunities in the market as and when they arise be they new licences or new shareholdings in existing stations that come onto the market, among themselves so as to ensure that there is an allocation of the opportunities among themselves and not as the Nail conflict exhibited initially a war of attrition.

The acquisition and the right to control the appointment of a director to the board will enable Primedia to get information on the direction of Kaya in advance of this becoming known to the market. This may not facilitate co-ordination, but may enable it to adopt the necessary defensive moves in advance of what it may have done pre-merger. Whilst this is a corporate governance problem it is not necessarily a competition problem.<sup>70</sup>

The other possibility is that Primedia sees the stake in Kaya, as a strategic bargaining chip in some future negotiation with Kagiso Media over other media assets, as and when the time comes. We know that both the regulatory environment and the sale of assets have been very fluid thus far. It is not beyond the realms of possibility that Kagiso Media may be willing to sell a stake in another market in return for acquiring the Nail stake in Kaya. Kagiso we know had ambitions to buy that stake and lost, while Primedia sees the stake as one they are willing to sell in return for some other stakes in markets

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69 Caxton's investments in electronic media via AME are Algoa FM and OFM.

70 Note that in a previous version of the Kaya shareholders agreement, the director could not be a person who was a director or officer of a company which operated a competing radio station within the territory. (clause 5.5 of original agreement) This clause was removed in terms of an addendum entered into in March 1997. (See Commission record File 1 page 314 and a reference to this in the statement of Mr Kirsh, witness bundle page 97)

where they are not yet present, such as KZN.

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.

A toehold for Primedia in Kaya does open up the possibilities of a future carve up. We need only to examine the Nail carve up to see how this comes about. Neither Primedia nor Kagiso got exactly what they had wanted when the battle began, but both emerged stronger having cleaned out some of the messier interests in key stations. Kagiso got control over Jacaranda and Primedia over KFM. Viewed in that way, Kaya has ended up a draw. Both firms had greater ambitions for their stake in Kaya, but the chess game over this station has led to a stalemate. Kagiso failed to acquire the Nail stake, but did manage to ensure that the Nail loans, and thus its leverage over the other shareholders ended, and were replaced by its own and Caxton's.

Thus Primedia did not acquire a Kaya stake that was as strong as the one Nail had once enjoyed. This suggests that when another window of opportunity opens an asset swap may occur. However this does not imply that co-ordination is inevitable – indeed Primedia may have an interest in making sure Kagiso is aware of its nuisance value to tempt the asset swap that may come later, given that, to quote Mr. Kirsh, Kaya is not a big deal in its life.<sup>71</sup>

[79] 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. It is worth noting that when we record a lack of evidence this is not due any lack of diligence on the part of the Commission and AME. A very thorough process of discovery was undertaken prior to our hearing - third parties

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<sup>71</sup> See transcript of Icasas hearing into the amendment of the Kaya broadcasting licence 5 December 2005 at page 23 contained in the Record in intervenor's trial bundle volume 2, page 1228.



were subpoenaed to provide documents and witness statements were taken from all the *dramatis personae* that have featured in this saga. At one stage AME, who were at their most assertive in the trial preparation process, had indicated that they intended to call a number of witnesses some of which were required to produce certain documents.<sup>72</sup> In the end they called only one, James Hodge an economic witness. We can safely assume that if Primedia intends to exercise control over Kaya it has not left any fingerprints behind in advance of this approval process. As Primedia have argued if there was any prior evidence of an intention to control by Primedia doubtless this would have emerged from this process.

## Conclusion

[80] We conclude that Primedia's acquisition of a stake in Kaya FM, via Nail, will not give it sole or joint control over the latter station. Given this conclusion, it is unnecessary for us to consider, whether, if it had acquired control, this would lead to an anticompetitive outcome. We wish to make it quite clear that this decision simply approves the acquisition of control by Capricorn and Primedia over Nail. It does not consider that there has been an indirect change of control in respect of Kaya, as Nail never had such control and the merger will not change that position. However, if Nail or Primedia ever acquires control over Kaya, it will be required to notify that to the Competition Commission as a merger assuming it meets the threshold of notification. As this is an obligation required by law there is no reason to make it a condition of the present merger.

[81] Since Primedia does not enjoy control over Kaya, there is no justification for imposing conditions on the acquisition. Had Primedia been able to exercise control over Kaya, it may well be that prohibition or the imposition of conditions may have been justified. Absent proof of an ability of control we cannot justify coming to such a conclusion. We wish to make it clear that although we heard extensive evidence on

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<sup>72</sup> These included: Rivak Bunce who sits on the AME Executive Committee); James Hodge (an economic expert); Fani Titi (from Tiso Private Equity); Kevin Kerr (Joint Head of Corporate Finance, Investec); Charlene Deacon (Managing Director of Kaya FM); Saki Macozoma (from Safika Holdings (Pty) Ltd); Edward Scholz (from Shanike Investments No. 42 (Pty) Ltd).

the merits we have come to no conclusion on this, because we do not need to.

## **ORDER**

[82] Having considered the merger in terms of section 16(1)(a) we approve the merger unconditionally in terms of section 16(2)(a).

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**N. Manoim**

**Concurring: D Lewis and Y Carrim**

**Tribunal Researcher: T Masithulela**

For the merging parties / appellants: Adv. JJ Gauntlett SC (with him Adv. F Snyckers instructed by Edward Nathan Sonnenbergs

For the Commission : Adv. DN Unterhalter SC (with him Adv. NH Maenetje) instructed by AMMM Inc.

For the Intervenor : Adv. JWG Campbell SC (with him Adv. MA Wesley) instructed by Zenwill Lacob Attorneys.

## **APPENDIX 1**

### **Conditions recommended by the Competition Commission<sup>73</sup>**

The Commission considers that the following condition addresses the competition concerns raised by the transaction and therefore approves the transaction subject to the following conditions, which shall remain effective as long as Primedia directly or indirectly holds shares in Kaya FM:

1. Primedia and/or any of its shareholders, and/or any firm in which it or any of its shareholders has a significant interest, shall not appoint, nominate, influence or vote on the appointment of any director to the Kaya FM board;
2. Primedia and/or any of its shareholders, and/or any firm in which it or any of its shareholders has a significant interest, shall have no involvement, either directly or indirectly in the management and/or business operations of Kaya FM;
3. Primedia and/or any of its shareholders, and/or any firm in which it or any of its shareholders has a significant interest, shall have no access to any competitively sensitive business information of Kaya FM, including but not limited to business plans, marketing and sales strategies, competitive strategies, budgets, minutes of management meetings and board minutes; and
4. Primedia and/or any of its shareholders, and/or any firm in which it or any of its shareholders has a significant interest shall not acquire any further equity in Kaya FM, without the consent of the Competition Commission. Any proposed acquisition of shares must be notified to the Commission in a manner similar to the procedures prescribed in the Competition Act 89 of 1998, as amended, for a merger. Should the

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<sup>73</sup> See pages 2 and 34 of the Commission Recommendation.

acquisition of shares fall within the definition of a merger as defined then the normal notification and approval procedures shall apply.

## **APPENDIX 2**

### **Conditions recommended by the Merging Parties**

“In the event of the merger being approved, the merging parties tender the following conditions:

1.

1.1 any representation that New Africa Investments Limited (“Nail”) may secure on the board of Kaya FM (Proprietary) Limited (**“Kaya FM”**) shall continue to be Mr Raymond Kevan (or such other substitute in due course nominated by Nail, and approved by the Competition Commission within one week of being informed of such nomination, and which approval shall be based only on the independence of such nominee from Primedia Limited (“Primedia”).

1.2 For the purposes of 1.1, “independence” shall bear the meaning stipulated in 269A(2)(c)(ii) of the Companies Act 61 of 1973 (as amended).

2. Subject to 1 above, Primedia, any person or entity holding a controlling interest in Primedia, including the Kirsh Consortium as defined in the filing (“Kirsh Consortium”) and Mineworkers Investment Company (Proprietary) Limited (“MIC”), and any entity in which Primedia holds a controlling interest, shall not be given access or insight (beyond such access or insight as Primedia, or such person or entity, may enjoy its capacity as shareholder of NAIL or of an entity that is a shareholder of Kaya FM) into any competitively sensitive business information of Kaya FM.

3. Subject to 1 above, Primedia, any person or entity holding a controlling interest in Primedia, including the Kirsh Consortium and MIC and any entity in which Primedia holds a controlling interest, shall have no involvement in the

management of Kaya FM or its operation as a radio station.

4.

(a) Primedia, any person or entity holding a controlling interest in Primedia, including the Kirsh Consortium and MIC, and any entity in which Primedia holds a controlling interest, other than NAIL, shall not acquire any further share equity in Kaya FM without the consent of the Competition Commission.

(b) Should NAIL itself acquire further share equity in Kaya FM, such acquisition shall be made known to the Competition Commission and Primedia shall, if required to do so by the Competition Commission after hearing representations from Primedia, within a period of 90 days dispose of such shares in NAIL as would result in the economic interest in NAIL held by Primedia immediately upon implementation not being increased.

5. Primedia, any person or entity holding a controlling interest in Primedia, including the Kirsh Consortium and MIC, and no employee, manager, consultant, contractor, financier, agent, representative or assistant of Primedia or such person or entity shall be engaged in the sale of, or negotiation of the sale of, advertising on Kaya FM.





## APPENDIX 3<sup>74</sup>

### KAYA PREMERGER SHAREHOLDING AND FUNDING

Key:

- The providers of the loan finance and according to Primedia, the alleged controllers of Kaya FM
- The direct shareholders
- The owner of the Kaya FM licence
- The interlinking funding chain

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<sup>74</sup> See Exhibit 2, page 2, entitled “Annexure B” – “DAD2”.

## **APPENDIX 3 (Black & White version)**

### **KAYA PREMERGER SHAREHOLDING AND FUNDING**

Key:	The providers of the loan finance and according to Primedia, the alleged controllers of Kaya FM
	The direct shareholders
	The owner of the Kaya FM licence
	The interlinking funding chain