COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: RVW11Oct21

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED	Applicant
and	
COMPETITION COMMISSION OF SOUTH AFRICA	First Respondent
MPACT LIMITED	Second Respondent

Panel:	Y Carrim (Presiding Member) I Valodia (Tribunal Member) S Goga (Tribunal Member)
Heard on:	06 June 2022
Order and Reasons Issued on:	22 September 2022

REASONS AND ORDER FOR DECISION

Introduction

[1] This matter concerns an application by Caxton and CTP Publishers and Printers Limited ("Caxton") to review the decision of the Competition Commission ("Commission") dated 17 August 2021 (the "decision") in which the Commission denied Caxton permission to file a separate notification of a proposed merger between Caxton and Mpact Limited ("Mpact") in terms of Commission Rule 28(1)(a)[1] ("CCR28").

[1] Rules for the Conduct of Proceedings in the Competition Commission (the "Commission Rules").

[2] Caxton had applied for a separate filing of its transaction after the target firm Mpact refused to agree to a joint merger filing.

[3] The Commission refused Caxton's application on the basis that it would not be just and reasonable to permit a separate filing.

[4] Caxton now seeks to review/appeal the Commission's decision under section 27(1)(c) of the Act[2] alternatively review under the Promotion of Administrative Justice Act 3 of 2000, as amended ("PAJA") or the principle of legality.

[5] Mpact was cited as a party to the proceedings and opposed this application. The Commission made submissions but will abide by the decision of the Tribunal.

Background

[6] The chronology of events is well set out by the Commission in its written submissions and is common cause. We reproduce the key milestones here for purpose of context. To avoid repetition, the details of the parties' submissions are dealt with later in these reasons where appropriate.

[7] On 24 June 2021, Caxton, as the primary acquiring firm, applied to the Commission for permission to make a separate filing for a merger in terms of which it sought to acquire majority control over Mpact, the target firm ("CCR28 application").

[8] At the date of submission of its CCR28 application Caxton had not made any formal offer, whether binding or non-binding, to the Mpact Board of Directors or shareholders.

[9] When the CCR28 application was filed, Caxton held approximately 32% of the issued share capital in Mpact. Caxton currently holds 33.95% but has still not acquired 35% of interest in Mpact, the level of shareholding, that would trigger a

[2] Competition Act, 89 of 1998, as amended.

mandatory offer to all Mpact shareholders as required by the provisions of section 123 of the Companies Act.[3]

[10] Caxton's intention to acquire Mpact has become public knowledge through SENS notifications by both firms[4] and media reports.[5]

Legal Framework

[11] Commission Rule 27 and CCR28 are the two mechanisms by which a merger approval process may be commenced.

[12] Commission Rule 27 is the usual mechanism for the filing of a merger notification and applies in circumstances where the merging parties are agreeable to a merger and therefore submit a joint merger notification.

[13] CCR28 is a departure to this general practice. CCR28 provides a primary acquiring firm with a mechanism to apply to the Commission for permission to file a separate notification of a merger.

[14] Separate merger filings are usually requested by an acquiring firm in the context of hostile mergers i.e. when the target firm is hostile to the merger or for some other reason does not agree to a joint merger notification.

[15] CCR 28 states:

> "***28. Separate merger notification***
>
> *(1) A primary firm may apply to the Commission for permission to file*

[3] Companies Act No. 71 of 2008 (as amended).

[4] SENS announcements can be accessed at https://irhosted.profiledata.co.za/Mpact/2017_feeds/SensPopUp.aspx?id=389228; https://senspdf.jse.co.za/documents/SENS_20220817_S464627.pdf and https://senspdf.jse.co.za/documents/SENS_20220812_S464482.pdf

[5] *Caxton poised to acquire a controlling stake in package maker Mpact* accessed at https://www.news24.com/fin24/companies/caxton-poised-to-acquire-a-controlling-stake-in-package-maker-mpact-20210630 and *Tensions between Caxton and Mpact boil over* accessed at https://www.moneyweb.co.za/news/companies-and-deals/tensions-between-caxton-and-mpact-boil-over/

separate notification of a merger and, on considering an application under this sub-rule, the Commission –

(a) may allow separate filing if it is reasonable and just to do so in the circumstances;

(b) may give appropriate directions to give effect to the requirements of the Act and in particular, specifying which primary firm must satisfy which of the requirements set out in Rule 27; and

(c) in an appropriate case, may further permit the applicant to file any document on behalf of the other primary firm."

[16] Thus CCR28(1) entails a two-stage inquiry:

16.1. It first requires the Commission to assess whether a merger or proposed merger is in existence (the "threshold enquiry"); and

16.2. Once the threshold issue has been met, the Commission may inquire into whether it is reasonable and just to allow a separate filing in the circumstances.

[17] CCR28, understood in the context of the Act as a whole, recognises that firms may engage in takeover strategies as a feature of normal – even if hostile - competitive dynamics.

[18] A merger notification triggers the Commission's investigative powers to assess the impact of the transaction on competition. However, merger investigations, whether agreed or hostile, consume vast public and private resources and time. In the case of large mergers and complex markets, the scope and duration of an investigation would be expanded.

[19] Once a target firm becomes the subject of a proposed acquisition, its management becomes engrossed in the investigation and it consumes management time and resources, which can be a distraction from management's core functions. More importantly a merger investigation creates a great amount of uncertainty for the

target firm, its employees, management, customers, and shareholders alike. The firm's future commercial strategy may be placed in limbo and in the event of it being a listed firm, its share price may be affected.

[20] Where the filings are incomplete or inadequate in the sense that a lot more information has to be sought by the Commission, the merger investigation process can be prolonged thus heightening the uncertainty for firms, key staff or customers.

[21] This would be the case in the context of both separate and joint filings. In the context of a hostile merger, where there is no agreement between firms to merge, the merger investigation is likely to be prolonged due to separate engagements with managements hostile to each other. The uncertainty surrounding the target firm would be even more pronounced.

[22] In an ideal world, a merger approval by the competition authorities is a regulatory matter which should sequentially follow the conclusion of a transaction that has clear terms and processes, save for whether the merger will pass the competition assessment of the Commission and the Tribunal. In practice, however, these processes are more complex in the context of hostile mergers or where there is no agreement between parties to merge.

[23] This is why, CCR28 provides the Commission with a discretion to assess whether a notifiable transaction (merger or proposed merger) has come into existence before expending scarce public resources on an investigation in which firms are hostile to each other.

[24] CCR28 has been the subject of previous Tribunal decisions.

[25] In *Freeworld Coatings Ltd v Competition Commission & another ("Freeworld"),*[6] the Tribunal recognised that the mere intention of a firm in the 'air' was not sufficient to bring a merger or proposed merger into existence. More than intention was required from a firm to demonstrate that it intended to achieve this objective. At the same time when considering the "intention plus" steps taken by a firm it was not always

[6] *Freeworld Coatings Ltd v Competition Commission and another* [2010] 2 CPLR 409 (CT).

easy to delineate in difficult cases at what point a proposed merger could come into existence. The Commission ought not to adopt a too strict and mechanistic legal test but should have regard to the cumulative weight of the intention plus factors in determining whether a transaction constitutes a merger or proposed merger.[7]

[26] However, the Tribunal recognised that this enquiry would leave the Commission with an invidious task:

"If the law assumes that there comes a moment when a proposed merger comes into being, but cannot determine it with much precision, then it is difficult for the Commission to be expected to divine it, especially in circumstances when two putative merging parties contest the significance of their every act and utterance. For this reason, the Commission may wish to place more emphasis on the second part of the enquiry in terms of Rule 28. In that event to assume that a merger exists where there is a body of cumulated facts to suggest this "intention plus", albeit to some extent contested, and then consider if it should be notified i.e. move from the enquiry as to whether there exists a proposed merger, to an enquiry as to whether there exist grounds to apply Rule 28."[8]

[27] The Tribunal goes on to state that in assessing whether there are grounds to apply CCR28, the Commission should have regard to a number of submissions:

"Here it should consider not only the submissions made to date by Freeworld on the papers, but any from Kansai, as well as the implications for third parties who may be required to provide information to the Commission if the investigation commences, as well as the implications for the resources of the Commission. Also, relevant would be whether merger control will be effective; for instance, if undertakings are to be sought from the acquirer in respect of competition or public interest issues and the acquiring firm is not a willing party to the filing."[9]

[7] *Freeworld* at para 25.
[8] Ibid at para 26.
[9] Ibid.

[28] Thus, the Tribunal provided guidance to the Commission on how to approach its CCR28 assessment in difficult cases. However, *Freeworld* must be understood in context and on its own facts. As we show later, the cumulative facts in *Freeworld* on which a merger could be assumed to come into existence were very different to the cumulative facts in this case.

The Commission's decision

[29] On 25 August 2021, the Commission provided a written document which sets out the approach it had taken and the basis of the decision not to grant Caxton's CCR28 application ("reasons").

[30] On the threshold issue of whether there was a merger or proposed merger, the Commission, relying on the approach of the Tribunal in *Freeworld,* found that Caxton had displayed sufficient intention plus factors which may suggest a firm intention by Caxton to acquire control of Mpact.

[31] The Commission then moved onto an assessment of whether it was just and reasonable to permit Caxton to notify a separate merger filing and found that it was not so on the basis that:

31.1. The uncertain nature of the transaction. Here the Commission found that '*the uncertainty surrounding the nature of the proposed transaction is manifest. Despite attempts to clarify what the nature and extent of the transaction is with Caxton, all that can be ascertained is that the transaction will be affected "by way of an acquisition of shares as contemplated in section 12(1)(b)(i) of the Competition Act, No. 89 of 1998"*[10]*… This response still leaves the Commission unclear as to the nature of the proposed transaction';*[11]

31.2. A strong likelihood of an incomplete filing. Here the Commission found that *"In the current context, it appears that a notice of incomplete merger filing CC13(2) will be inevitable in this case because the Statement of Merger*

[10] Commission's reasons at para 75.
[11] Ibid at para 76.

Information will be materially incomplete";[12]

31.3. Prejudice to Mpact. The Commission found that should it permit a separate filing Mpact had a right to information and to know what the Commission's investigation entailed. As it stood, the Commission found that "*Pertinently, the prejudice potentially occasioned by Mpact were it to be subjected to an investigation at this stage, in circumstances where the nature of the transaction is obscure to them are manifest. Mpact has indicated that it is not in a position to appreciate or assess the nature and terms of the potential transaction, owing to the uncertain nature thereof";*[13] and

31.4. Impact on customers. Related to the issue of prejudice was Mpact's concerns about the impact on its customers ("customer flight"). The Commission noted that "*Concerns have also been raised as to the impact such an investigation would have on Mpact's employees, customers, and suppliers. Chief among these concerns example highlighted by Mpact in relation to one of its largest* [redacted] *customers,* [redacted] *has indicated to Mpact that it has a strong objection to the possibility of Caxton controlling Mpact,* [redacted][14]

[32] In summary, the Commissions' reasons for dismissing the CCR28 were based on its concerns with the nature of the transaction, incomplete filing, prejudice to Mpact and customer flight.

Standard of review

[33] Before turning to deal with the Commission's reasons in detail, we turn to deal with the debate as to the standard of review the Tribunal should adopt.

[12] Commission's reasons at para 78.
[13] Ibid at para 73.
[14] Ibid.

[34] Caxton argued that the Tribunal's own jurisprudence,[15] provides that the Tribunal can apply the standards of review drawn from PAJA which includes procedural fairness, legality, and reasonableness. The Tribunal has also held that under section 27 it could apply the legality standard of review.[16]

[35] The debate about the standard of review is linked to the debate about whether a decision of the Commission amounts to administrative action as defined in section 1 of PAJA.

[36] In section 1 of PAJA, administrative action is defined as: "any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power or performing a public function in terms of any legislation, which adversely affects the right of any person and which has direct, external legal effect."

[37] Such decisions can be reviewed on the basis of the grounds set out in section 6 of PAJA and which include procedural fairness, legality and reasonableness.

[38] While the Commission, as a regulator is an administrative body, it makes many different decisions when fulfilling its mandate under the Act. For example, the Commission's decisions in large mergers have the status of recommendations to the Tribunal and not final decisions. Its decisions in small or intermediate mergers on the other hand are final in effect and are capable of being reconsidered by the Tribunal under section 16 of the Act.

[39] This is why the Supreme Court of Appeal in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC ("Seven Eleven")*[17] held that the merger recommendation of the Commission did not constitute administrative action and was not reviewable under PAJA.

[40] But this did not mean that the Commission's decisions, even if they did not fall within the definition of administrative action under PAJA, were not subject to the constitutional standard of review of legality or lawfulness.

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[15] *Coca-Cola Beverages Africa (Pty) Ltd And Competition Commission* (RVW150May20).
[16] *Sibanye Gold v Competition Commission* (LM131Oct13/RVW174Dec14) at paras 32 and 34.
[17] *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] 2 All SA 256 (SCA).

[41] The Commission is subject to the Constitution[18] and the Tribunal is required to conduct its proceedings in accordance with natural justice.[19] Fairness is the bedrock of the Tribunal's approach to many interlocutory matters.[20]

[42] When dealing with a rationality test, it means all that is required of the Commission is that its decision must be rationally connected to the information before it at the time and the reasons advanced for issuing it.

[43] The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Other*[21] held that the grounds of review articulated in the well-known case of *Shidiack v Union Government (Minister of the Interior) ("Shidiack")*[22] are consistent with the foundational principle of the rule of law enshrined in our Constitution and that the rule of law also requires rationality as a prerequisite for the validity of the exercise of all public power.

[44] In *Shidiack*, the court held that there are circumstances in which "*interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief*".[23]

[45] However, CCR28 itself requires that the Commission may allow a separate filing if it is "*reasonable and just to do so in the circumstances*". Hence it would seem the appropriate test is to assess whether the Commission's decision was reasonable 'in the circumstances' of this case.

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[18] Section 20(1)(a) of the Act.

[19] Section 52(2)(a) of the Act.

[20] *Afrocentric Health Limited v Discovery Health Medical Scheme and Others; In re: Afrocentric Healthcare Limited v Discovery Health Medical Scheme and Another* (CP003Apr15/Joi120Sep15)*; Competition Commission vs Eldan Autobody CC and Precision and Sons (Pty) Ltd* (CR024May15/ PPA259Feb19); *Pickfords Removals SA (Pty) Ltd v Competition Commission* (CR129Sep15/PIL162Sep17).

[21] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Other* 2000 (3) BCLR 241 (CC).

[22] *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642.

[23] Ibid.

[46] On what constitutes 'reasonableness', the Constitutional Court held that this depends on the facts of each case. In *Bato Star Fishing (Pty) Ltd v Min of Environmental Affairs and Tourism & Others ("Bato Star"),*[24] the Constitutional Court held that what would constitute a reasonable decision will depend on the circumstances of each case, in the same way that what constitutes a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.[25]

[47] Where the boundaries between the standards of review lie is a matter of great legal debate.[26] However, the guiding lights in the complex exercise of reviewing administrative action or decisions of state agencies are the notions of fairness and rationality.

[48] The factors relevant to whether a decision is reasonable are not a closed list, but one would expect that at the heart a 'reasonable' decision has to be a rational one.

[49] We note that Caxton has raised several review grounds such as irrationality, unreasonableness, bias and procedural unfairness. With this in mind, we turn now to consider the each of the factors listed by the Commission which it relied on at the time to refuse a separate filing.

Analysis

Threshold enquiry

[50] It is important at this point to emphasise again that the purpose of a CCR28 enquiry

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[24] *Bato Star Fishing (Pty) Ltd v Min of Environmental Affairs and Tourism & Others* 2004 (7) BCLR 687 (CC).

[25] Ibid at para 45.

[26] See C Hoexter *Administrative Law in South Africa* (2ed) and *Eston Brick & Tile (Pty) Ltd v Commissioner of the Competition Commission and Others; In Re: Competition Commission v Corobrik (Pty) Ltd and Another* (CR098Jul17/RVW131Aug17) at para 58.

is for the Commission, as regulator for merger enforcement, to assess whether there is a proposed merger or a transaction that lays a sufficient basis for the Commission to commence a process of merger approval. The merger approval process consumes significant public resources and the Commission has to be satisfied that a notifiable transaction has come into existence before it warrants expending scarce public resources to yield meaningful outcomes under section 12A(3) of the Act, namely the transaction's impact on competition and the public interest.

[51] In *Freeworld*, the Tribunal provided some guidance for the Commission to apply in difficult cases, suggesting that it could on the basis of cumulative facts assume that a merger came into existence and focus its enquiry on the second leg.[27]

[52] In this enquiry the Commission is required to consider *relevant* cumulative facts. What these relevant facts might be can be gleaned from *Freeworld* itself and earlier decisions of the Tribunal.

[53] We turn now to consider the cumulative facts the Commission took into account in this threshold enquiry.

[54] When Caxton submitted its CCR28 application, the 'proposed transaction' sought to be notified consisted of the following:

54.1. The Chairman of Caxton Mr Jenkins met with the Chairman of Mpact Mr Phillips on 20 May 2021 and discussed *inter alia* Caxton's desire to increase its shareholding in Mpact. This included a preliminary request by Mr Jenkins that Mpact co-operate with Caxton in the submission of a joint filing to the Commission;

54.2. It had sought to engage the Mpact Board through its Chairman, regarding a possible joint merger notification to the proposed transaction; and

54.3. It had made similar requests to Mpact to co-operate on a joint filing to the Commission.

[27] *Freeworld* at para 26.

[55] The Commission approached Mpact for its views. Mpact expressed its opposition to the application on the basis *inter alia* that Caxton had not made an offer to shareholders containing price, terms and conditions to Mpact. It was unclear whether Caxton had the necessary finances in place and whether Caxton, as a listed company, had obtained the approval of its shareholders as it was required to do. It also highlighted the fact that Caxton was a listed company and an offer for all the Mpact shares not already held by Caxton would be a category 1 transaction requiring Caxton shareholder approval which could not be taken for granted. It was therefore unclear whether an offer will be made by Caxton at all, let alone when it will be made and on what terms.

[56] In Mpact's view *any* merger filing, whether joint or separate, would be premature because simply put there was no "proposed merger" that could be investigated by the Commission.

[57] Mpact submitted further that Caxton had not established a sufficient basis for the Commission to expend its limited resources on investigating a transaction in respect of which there was such uncertainty at this stage.[28]

[58] The Commission then held a virtual meeting with Caxton on 15 July 2021, wherein the Commission re-echoed its initial view that that more than an intention is required to meet the proposed merger threshold, and that an offer would meet the requirements of Rule 28(1). Caxton conversely indicated that, what is required, as set out in the *Freeworld* decision, is "intention plus factors", it submitted that it had met this threshold by inter alia engaging Mpact's board, securing shareholder support and sourcing financing.

[59] On 3 August 2021, the Commission requested Caxton to submit "*information as to the exact nature of the transaction before it can make a final determination on your client's Rule 28 application*".

[60] By this time Caxton had advised the Commission that it had obtained approval of

[28] Commission reasons at para 24.

the transaction by its major shareholder and that it had secured funding in the amount of R2 billion and secured an offer of finance for the transaction from Nedbank.[29]

[61] Caxton responded to the Commission's request on 12 August 2021, disclaiming that the Commission needed to know the exact nature of the transaction before determining whether a separate filing should be permitted but went on to indicate that the proposed acquisition will take place through an acquisition of shares either by way of mandatory offer under section 123 of the Companies Act or through a general offer by Caxton to all Mpact shareholders (other than Caxton) under section 121 of the Companies Act. It also confirmed in that letter that it had acquired approximately 32% shareholding in Mpact.

[62] Caxton further attached a report by Bravura (its corporate advisors) in support of its serious intention to proceed with the transaction.

[63] In its response, Caxton said nothing about whether an offer was a prerequisite for a proposed merger to come into existence.

[64] The Commission also requested Mpact to provide legal submissions on whether an offer (binding or otherwise) is a pre-requisite in a CCR28 application.

[65] On 12 August 2021, Mpact made several submissions in response, the core of it being they were unaware of any cases in which it has been held that in a public offer context a proposed merger can arise without the acquirer making a binding or at least indicative offer containing pricing and other material terms of the proposed offer.

[66] It also emphasised once again that a separate filing would cause immense prejudice to it because it would be required to respond to an offer of which the details were completely unknown.[30]

[29] 3 March 2021.

[30] Legal submission by Mpact to Commission on 12 August 2021 at para 54 of Commission's reasons.

[67] The Commission, at its meeting of 17 August 2021, decided the CCR28 application by Caxton to be premature at that stage. The minutes of that meeting do not disclose the nature of the discussion or the basis on which the Commission had come to this conclusion. All that is recorded that "*The Commission accepted the team's recommendation that the Rule 28 application is still premature and that the Commission entertain further consideration of the matter only once conditions change*".[31]

[68] The details of its approach are provided in the Commission's reasons document.

Relevant cumulative facts

[69] The Commission was clearly concerned that Caxton had not made an offer to Mpact from the outset. Indeed, the absence of an offer was of such significant concern to the Commission that it specifically requested Caxton and Mpact to make legal submissions on whether an offer (binding or otherwise) is a pre-requisite in a CCR28 application.

[70] Caxton's explanation for why it had chosen not to make an offer at this stage is that following advice from its corporate advisor, Bravura, that there are two potential routes to acquire further shares in Mpact, i.e., a mandatory offer subject to a competition filing and approval or Caxton could make a general offer to shareholders subject to a competition filing and approval; or Caxton could submit its competition filing to seek regulatory approvals before acquiring a shareholding over 35% and making a mandatory offer, or making a general offer to shareholders. Bravura had also indicated that there are material considerations which would render the second option more favourable, that they view it as preferable and that commercially the most feasible route to achieve an acceptable and risk-managed transaction for all parties is to file for competition approvals before Caxton executes on a transaction.

[71] Caxton further noted it was concerned that the competition authorities could impose conditions on the transaction which could impact the commerciality of the deal and

[31] The minutes are at paginated page 454 of the review record.

thus the price that Caxton would be willing to pay. Caxton would not be able to reduce the offer price after making a binding offer to Mpact's shareholders (whether a general offer or a mandatory offer). Caxton wishes to be in a position to factor conditions so imposed by the Commission (if any) into the price that it is willing to offer. Although Caxton has been advised that there are no material competition or public interest hurdles to obtaining approval, the fact that Mpact is the subject of a cartel referral adds complexity to this process.

[72] In Caxton's view, the ability to procure competition approval in advance provides certainty to Caxton as well as to Mpact's shareholders and share price volatility in relation to Mpact shares means that the price offered may no longer be the correct price after waiting for competition approval. If the share price moves up between the offer and receipt of competition approval, it is unlikely that many of Mpact's shareholders would accept Caxton's offer at that price. Conversely, if the Mpact share price drops in the period, Caxton will still be obliged to buy shares at the price so offered and would thus have paid too much for its controlling interest in Mpact, an inefficiency that may take years to correct. The longer the period between the offer and implementation, the greater the uncertainty.[32]

[73] It bears mentioning that the cumulative facts set out by Caxton here were for the most part internal to Caxton namely whether it had shareholder approval for its intention, the financial means for the acquisition, that it had appointed an advisor and that it might acquire the shares through two possible means. Caxton had only engaged with the Mpact board to indicate its intention to acquire control.

[74] Mpact's submissions on this issue set out in detail that an offer (binding or otherwise) is essential for a proposed merger or merger to come into existence.

[75] Mpact submitted that the decisions in *Goldfields* and *Freeworld* are consistent with their interpretation that it would be premature for the Commission to investigate without "*any kind of offer having yet been made by Caxton to the shareholder of Mpact which sets out the nature and material terms of such an offer*".

[32] Commission reasons at para 39.

[76] Mpact submitted that to the best of their knowledge, in all CCR28 cases, a firm or at the very least an indicative offer has been made by the acquiring party. Absent such offer, they submit there is just an intention to acquire by Caxton, which they indicate is precisely what the case law deems insufficient.

[77] Mpact submitted that, Caxton has refused to make any public offer, either binding or non-binding and has not made the pricing or other relevant terms known. All that it has done is send correspondence indicating the intention to acquire control of Mpact and to claim (without substantiation) that "*finance and shareholder approval for the transaction have been obtained."*[33]

[78] It submitted that *"There is accordingly nothing for Mpact shareholders to consider, or even for the board of Mpact to consider and direct and independent board for purposes of its consideration and recommendation to shareholders."*

[79] The submissions made by Mpact are not radical in any respect. A cornerstone of any sale transaction, whether for shares, goods, or services, is offer and acceptance. The law of contract provides for recissions in circumstances where agents might have contracted without authority or where there is failure to comply with payment terms or delivery. But without an offer and an acceptance, a contract cannot come into existence.[34]

[80] Offer and acceptance are the nuts and bolts of commercial transactions. Without a firm offer on the table how is the offeree to know whether the offeror is indeed serious and committed to concluding such a transaction and whether the price or terms proposed by the offeror would be beneficial to it? In the context of listed firms, how is a Board expected to advise shareholders of an offer when there is no such offer on the table?

[81] But an offer and the terms on which it is made are not only the nuts and bolts of commercial deals – they are also *relevant facts* for the Commission to take into

[33] Commission reasons at para 50.

[34] Christie, RH *The Law of Contract in South Africa* 8ed 2022; *LAWSA* Third Edition (Vol 9, paras 295–433) and Kerr, A *Principles of the Law of Contract* (6ed) Durban LexisNexis 2002.

account when it considers the impact of a transaction on competition, whether in a joint or separate filing.

[82] The impact of a transaction on competition has to be assessed in the context of the competitive dynamics of the relevant market and because markets are dynamic and competitive conditions can change over time, a transaction's impact must be evaluated in a defined or foreseeable period of time. Thus, the impact of a transaction on competition and the public interest is assessed in both time and space.

[83] In this assessment, factors such as price, terms and conditions and the strategy of the acquiring firm have competitive relevance. For example, price may be relevant to understanding whether a firm is paying a premium to acquire another firm as a pre-emptive move to exclude competing bids, or to gain a greater share of the market in the same or adjacent product markets, or to consolidate an already dominant position in a market, or to remove an effective competitor.[35] Similarly, implementation of a transaction by a particular date has relevance because market conditions change over time. An acquiring firm's post-merger strategy has relevance because it might lead to concentration or job losses.

[84] All of these factors bear competitive relevance even in hostile mergers and all of these factors would be taken into account by competition regulators the world over when assessing the impact of a transaction on competition and in the case of South Africa, on the public interest.[36]

[85] When firms seek approval for their transactions in competition law, they cannot obtain such approval without providing a degree of predictability as to how and when that transaction would be implemented because market conditions change over time. Competition approval for a transaction that is assessed in current market

[35] *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa And We Buy Cars (Pty) Ltd (Case No:* LM183Sep18). Also, see R Whish and D Bailey *Competition Law* 10 ed 2021 (Oxford University Press: New York).

[36] ICN *Merger Guidelines Workbook* April 2006 available: https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/05/MWG_MergerGuidelinesWorkbook.pdf

conditions but implemented years later or in different market conditions would simply amount to undermining the objectives of the Act.

[86] Thus, firms cannot approach the agencies for a blank cheque of competition approval based on a theoretical possibility that they *might* acquire control of another firm at an *undetermined time* in the future on terms that are *non-existent*. (Of course, a firm is always entitled not to implement a transaction for commercial reasons even if after it has obtained competition approval).

[87] This is why form CC13(2) requires a party to provide details such as the nature of the transaction structure and in filing a merger under form CC(4)(2), the statement of merger information requires the party filing (in the case of separate filings - both the acquirer and target) to attach to the form "the most recent version of all documents constituting the merger agreement" and provide at Schedule 4 ("Transaction Information") which spans from question 9 to 13 and requires details about the transaction.

[88] The Commission highlights that in this case it appears that a notice of incomplete merger filing with form CC13(2) will be inevitable because the Statement of Merger Information will be materially incomplete.

[89] The reason why the incomplete filing would occur is precisely because the Caxton transaction lacks details such as offer, terms and conditions and likely post-merger market strategy.

[90] Given the Commission's specific concern whether an offer was a prerequisite for purposes of CCR28, and its detailed engagements with the parties one would have expected it to have arrived at some definitive position on the threshold question.

[91] Instead, what we see is the following conclusion on the first leg of the enquiry namely that Caxton had displayed sufficient intention plus factors to allow the Commission to "*on a balance of probabilities come to the conclusion that one could assume that, on the basis of the cumulated facts ...there appears to be intention plus factors which may suggest a firm intention by Caxton to acquire control of Mpact*". (our emphasis) *In this case, the intention plus factors which the Commission considered to be*

present include, inter alia, that engaging Mpact's board, secured shareholder support, sourcing financing, and Caxton's letter to Mpact dated 15 July 2021."[37]

[92] On a plain reading of the Commission's conclusion on the threshold enquiry, the reader is left uncertain whether there was an *assumption* that a merger was in existence or that there was a *conclusion* that a merger was in existence or that the cumulative facts *might only suggest* that a merger had come into existence or only that Caxton *may* be serious about acquiring control of Mpact.

[93] The confusing nature of this finding by the Commission was further borne out by the debate that subsequently occurred during these proceedings. Mpact argued that the Commission had not in fact made a 'decision' on the threshold issue. The Commission argued that it had merely 'assumed' this in accordance with the guidance provided by *Freeworld*. Caxton argued that the Commission could not reach the second leg of the enquiry without deciding the threshold issue and that effectively it had decided that a merger had come into existence.

[94] The Commission's ambiguous conclusion on the threshold enquiry leaves Caxton, and similarly situated firms, without any guidance as to what the Commission would consider as essential and/or relevant elements of a transaction before triggering the merger approval process. The Commission, in its merger enforcement function, is required to provide guidance to firms as to how it would approach matters. In keeping with its mandate, the Commission has published and continues to publish guidelines for firms on a number of merger related issues. An ambiguous decision like this falls short of its duty to provide such guidance.

[95] But of greater concern is that the Commission, while relying on the approach of the Tribunal in *Freeworld* ignored the relevant cumulative facts that were present in *Freeworld* and which itself had identified as being absent in this case.

[96] In *Freeworld,* the cumulative facts "*to assume that a merger exists where there is a body of cumulated facts to suggest the intention plus"* were very different from the

[37] Commission reasons at para 59.

facts in this case.

[97] Kansai first approached Freeworld in a letter on 30 April 2010 in which it expressed an interest in a potential combination of Freeworld and Kansai. This happened on the same day that Freeworld posted a circular in relation to another potential bid to its shareholders initiated by a consortium led by Brait SA, through Saphirefield Investments (Pty) Ltd ("Saphirefield").

[98] On 6 May 2010, Kansai again wrote a lengthy letter which stated, amongst other things, that Kansai was considering making an indicative offer to Freeworld's shareholders to acquire all of Freeworld's issued shares at a specified cash price per share, that Kansai's approach to Freeworld was *bona fide* and that its proposed offer would be fully funded.

[99] Following this, Kansai and Freeworld, through their senior management and legal advisors, had been in constant contact via letters and various meetings. Freeworld raised some competition concerns before giving Kansai access to any information because Freeworld was in a joint venture with DuPont, a competitor of Kansai. In order to allay the competition concerns, Kansai undertook to dispose of Freeworld's interest in the joint venture with Du Pont, if the merger occurred. This did not satisfy Freeworld which continued to resist Kansai's efforts to access the due diligence information. For this reason, Kansai withdrew its offer on 20 May 2010.

[100] On 14 June 2010, Freeworld shareholders voted down the Saphirefield offer.

[101] On 23 August 2010, Kansai acquired a 25.03% shareholding in Freeworld from Brait SA. Subsequent to acquiring these shares, Kansai reconsidered its offer and on 24 August 2010, delivered a letter to Freeworld which contained a *second* indicative non-binding proposal to acquire a majority shareholding in Freeworld. This offer was subject to certain pre-conditions which included a due diligence, engagement on competition issues, an approach to Freeworld's joint venture partner DuPont, financing, the approval of Kansai's Board to the making of a formal offer, an intention to seek shareholder support from Freeworld's shareholders and a board recommendation from Freeworld's Board. Thus, the cumulative facts

before the Commission included a non-binding proposal including an indicative share price.

[102] The issue of whether a merger or proposed merger has come into existence under consideration by the Tribunal in *Freeworld* must also be understood in the context of an earlier judgment of the Competition Appeal Court ("CAC") namely *Goldfields Ltd v Harmony Gold Mining and Another ("Goldfields")*.[38]

[103] In *Goldfields,* the CAC was also seized with the issue of whether on the facts of that case, there was a proposal to implement a transaction that will involve the acquisition of control by Harmony. The CAC found on the facts of that case there was a notifiable transaction.

[104] The matter had come on appeal from an earlier decision of the Tribunal in which the Tribunal had found that there was no need to notify because in its view a merger had not come into existence.[39]

[105] The background to *Goldfields* is as follows. Harmony, in a circular issued on 18 October 2004, had made an offer that was structured in two separate stages. This structure was adopted in order to comply with the regulatory requirements in the United States, in terms of which no offer can contain an option which would allow early settlement of some shares before all the conditions of the offer were satisfied.

[106] In the first stage, which Harmony called the early settlement offer, it offered to acquire up to 34.9% of the share capital in Goldfields. Harmony would not acquire any more shares at this stage and, if more shares are tendered, a pro rating mechanism was to be used to scale back the shares accepted to this number, namely 34.9%. This offer was subject to certain resolutions to be passed at a general meeting of Harmony. The early settlement offer was open for acceptance from 20 October 2004 and closed for acceptance on 26 November 2004.

[38] *Goldfields Ltd v Harmony Gold Mining Company Ltd and Another* (43/CAC/Nov04) [2004] ZACAC 5 (26 November 2004).

[39] *Gold Fields Limited v Harmony Gold Mining Company Limited and Others* (86/FN/Oct04).

[107] The price offered by Harmony was a specified amount of its shares for each Goldfields share.

[108] The subsequent offer would commence after the consideration was settled in respect of the early settlement offer. According to the Harmony circular, this date was set as being at the earliest 29 November 2004 but no later than 3 December 2004. The subsequent offer was open for acceptance until 4 February 2005 and was subject to a number of conditions, *inter alia* that Harmony receives valid acceptances for over 50% of Goldfield's entire issued share capital, the transaction proposed to be implemented between Goldfields and IAMGold Corporation Inc ("IAMGold proposal")[40] is not implemented for whatever reason including that the shareholders do not approve it at the general meeting on 7 December 2004 and that the merger is approved by the relevant regulatory authorities including the competition authorities.

[109] During this period Harmony had also concluded a voting arrangement with another shareholder in Goldfields, MMC Norilsk Nickel ("Norilsk"), in which it had undertaken to vote against the IAMGold proposal.

[110] The early settlement offer which Harmony claimed was not subject to regulatory approval, and the subsequent offer were the subject of the *Goldfields* decision in the Tribunal and the CAC.

[111] Goldfields had sought to interdict Harmony from voting its shares in Goldfields on the basis that the two offers constituted a single transaction and that Harmony - by voting on the first lot of shares acquired through the early settlement offer - would be implementing a merger without prior notification to the Commission.

[40] On 11 August 2004, Goldfields announced that it had entered into an agreement with Canadian mining company, IAMGold Corporation Inc ('IAMGold'). In terms of this agreement, Goldfields and IAMGold agreed to a pooling of Goldfields' assets located outside SADC area with the assets of IAMGold. In consideration for the purchase of these assets, IAMGold would issue shares to Goldfields resulting in Goldfields owning about 70% of IAMGold.

[112] The Tribunal held that they did not constitute a single notifiable transaction.

[113] The CAC on appeal found that the early settlement offer and the subsequent offer in substance formed part of a single transaction to acquire control of Goldfields and, therefore, interdicted, and restrained Harmony from voting its shares in the share capital of Goldfields prior to the final determination of the merger by the Tribunal in terms of section 16(2) or the CAC in terms of section 17 of the Act.

[114] On 8 November 2005, at the same time that Harmony announced the commencement of its early settlement offer, it also filed its merger notification with the Commission. Goldfields responded on 15 December 2005, informing the Commission that it is a hostile take-over.

[115] Thus, in both *Freeworld* and *Goldfields*, essential to the cumulative facts were clear offers made by the acquiring firm to the target firm, whether via a circular or in private correspondence. In *Freeworld*, Kansai had made two offers that contained price, terms and conditions. In *Goldfields,* Harmony had made two offers that contained price, terms and conditions.

[116] Even where acceptances have not been made, one would think that offers (indicative or binding) to shareholders, whether in public circulars such as in the case of *Goldfields* or in private correspondence as in *Freeworld*, would constitute a highly relevant factor to such determination.

[117] Indeed, as discussed earlier, the Commission itself identified this issue as a highly relevant factor.

[118] But then after requesting and receiving detailed submissions from both Caxton and Mpact on the issue of an offer, which it itself identified as a relevant matter of concern, the Commission *ignored* this fact. The Commission, while citing the lack of an offer and the uncertain nature of the transaction throughout its reasons, does not provide an explanation for why it ignored a fact that it itself considered as being highly relevant for the threshold enquiry. In our view this alone would be a sufficient basis to set aside the decision of the Commission for irrationality and/or

unreasonableness.

[119] Not only did the Commission ignore highly relevant facts in its assessment, but it also then proceeded to arrive at an incomprehensible decision as discussed above.

[120] The fact that the Commission's finding on the threshold issue could be interpreted in so many ways, suggests that it is vague and ambiguous. The Commission's decision does not guide Caxton or similarly situated firms as to what would constitute essential relevant factors for the Commission to meet the threshold enquiry.

[121] In our view, this would also constitute sufficient grounds for setting aside the Commission's decision.

Just and reasonable leg

[122] We now move to assess the Commission's approach to the second leg of the enquiry.

[123] Recall that the Commission's reasons for dismissing on the just and reasonable grounds were based on its concerns with the nature of the transaction, incomplete filing, prejudice to Mpact and customer flight.

Nature of transaction

[124] Under the second leg of the enquiry the Commission repeats its concerns with the nature of the transaction which it had raised in the threshold enquiry as well.

[125] The three grounds namely nature of transaction, prejudice to Mpact and incomplete filing are inextricably linked in the Commission's reasoning.

[126] In its decision,[41] the Commission records that there are factors which militate

[41] Commission's reasons at para 75.

towards the granting of separate filings,[42] but "*the uncertainty surrounding the nature of the proposed transaction is manifest*".

[127] The Commission notes that despite attempts to clarify what the nature of proposed transaction is with Caxton, all that can be ascertained is that the transaction will be by way of an acquisition of shares or by way of a mandatory offer and that this response "*still leaves the Commission unclear as to the nature of the proposed transaction*".

[128] In this enquiry, the Commission points to the uncertainty of the nature of the transaction on its part (not that of Mpact) but fails to expand what more it would need in order to be satisfied before it decides to trigger a resource intense merger approval process.

[129] It concludes that that the uncertainty surrounding the transaction would inevitably lead to an incomplete filing.

[130] The uncertainty surrounding the transaction for the Commission (not for Mpact) as expressed by the Commission in the threshold enquiry was its concern about the lack of an offer and terms and conditions attached thereto.

[131] In other words, in this enquiry the Commission reaches back to the threshold enquiry namely whether there was a transaction that it could meaningfully investigate.

[132] While the two legs of the enquiry under CCR28 cannot be surgically cleaved, it is important to distinguish between the questions that would guide the two enquiries.

[133] In the first enquiry, the question a regulator has to ask is whether there is a transaction that would result in a productive use of scarce public resources and yield meaningful results under section 12A(3). This concern would be relevant not only to the issue of a separate filing but also to that of a joint filing. It is the gateway question for the Commission to deal with in any type of filing: What would the

[42] Commission's reasons at para 74.

Commission's investigation yield were it to investigate this uncertain, vague transaction whether in a separate case or joint filing? By its very nature, a merger investigation is a probabilistic assessment of the likely impact in the future. That makes it, by definition, an uncertain process. For that reason, the assessment requires a baseline of facts and detail that allows the Commission to conduct the investigation with some degree of certainty. If the transaction does not contain details that enable the Commission to conduct a meaningful investigation, there would be no utility in expending vast resources on an investigation that would yield very little.

[134] In the second enquiry, what are the circumstances of this case that justify a separate – as opposed to a joint – filing.

[135] By coming back to the nature of the transaction in the second enquiry the Commission has conflated the two enquiries and has demonstrated some circularity in its reasoning.

Prejudice to Mpact

[136] The other significant ground relied upon by the Commission is the prejudice that would be caused to Mpact if a separate filing was permitted given the nature of the transaction.

[137] We have already discussed the importance of the nature of the transaction and incomplete filing in the threshold enquiry, and do not repeat the discussion here save to emphasise them for the context in which we assess prejudice to Mpact.

[138] The Commission's reasoning here was that Mpact, as a target firm would be subject to investigation, as if it were a firm being investigated for a prohibited practice case. The Commission submits that a respondent in a prohibited practice or a firm being investigated for contraventions of the Act, has the <u>right to know</u> what such investigation is about. Likewise, Mpact the target firm, in the context of a merger investigation being conducted by the Commission has rights to know

details about the investigation and because the nature of the transaction is so vague and contains no offer, terms or conditions, Mpact would be prejudiced.

[139] The Commission's extension of information rights to a target firm in the context of a merger investigation, as if such a firm was the target of an investigation in a prohibited practice amounts to conflating the nature of the investigation with the nature of the transaction.

[140] The objective of merger investigations is not to determine whether the Act has been contravened but whether a merger between two firms would lead to a substantial lessening or prevention of competition. Merger investigations by their very nature are not usually adversarial. The investigation by the Commission is necessarily inquisitorial. In this investigation the Commission usually obtains information from the acquiring and target firms, customers, employees and competitors, other sector specific regulators (where appropriate) and possibly economists. Depending on the nature of the transaction, the Commission might request large volumes of data from the merging parties. Ultimately it would have to arrive at an assessment of the impact the transaction would have on competition and the public interest having regard to the factors set out in section 12A of the Act. This does not mean that firms do not enjoy rights of information and the right to respond where there are objections to the merger from third parties.

[141] Mpact is the target of a hostile takeover by Caxton. That fact would not change even if Caxton had made an offer, as was done in *Freeworld* and *Goldfields*. As a target firm, it would be seriously impacted by a merger investigation as discussed earlier.

[142] But a target firm does not by virtue of a *merger investigation* become the *target* of the investigation. A merger investigation involves an investigation of the impact of a *proposed transaction* on *competition and the public interest*.

[143] Mpact in its submissions of 12 August 2021 pointed to the fact that it would be difficult for Mpact to file a *separate merger filing* in the context where it had no idea of the price, timing or manner in which Caxton sought to acquire control, and that

the impact of a merger investigation on its operations, employees and management in such circumstances would be prejudicial to it. What would its separate filing look like if it has no information of how and by when Caxton intends to acquire control, what that control structure would look like, the composition of its Board and senior management, what impact it would have on the relevant markets of Mpact's business and on its employees and customers alike.

[144] In our view the Commission's concern about prejudice to Mpact under the second leg is rational and justified. Without further details of the transaction Mpact will be constrained in submitting a *meaningful separate* filing.

[145] However, the Commission's reasoning that Mpact would be prejudiced because its rights to information would be breached, as if it were the target of the investigation, amounts to conflating the nature of the investigation with the nature of the transaction. In other words, Mpact would be prejudiced because the transaction does not contain details that would permit it to file a meaningful separate filing, not because it, Mpact, was the target of the investigation.

Customer flight/diversion

[146] In Mpact's submissions, it raised concerns as to the impact such an investigation would have on Mpact's employees, customers, and suppliers.

[147] In this submission Mpact claimed that [redacted] one of its largest customers, had [redacted] were Caxton allowed to file a separate merger filing and that this would lead to immense prejudice to Mpact.[43]

[148] [redacted] reasons for [redacted] from Mpact were based on serious concerns about the possibility of Caxton, [redacted] acquiring control of Mpact.

[43] Mpact letter dated 12 August 2021.

[149] The Commission reasons,[44] reflect Mpact's concerns and state that *chief among these concerns* was the concern that one of its largest [redacted] customers, [redacted] would [redacted] should Caxton be allowed to file a separate merger filing.[45]

[150] During the Commission's engagement with the parties, this fact had not been shared with Caxton but became known to Caxton's legal advisors under an agreed confidentiality framework after the Commission issued its reasons.

[151] Mpact in its answering affidavit and supplementary answering affidavit repeated this concern as one of the grounds for opposing the review application and claimed confidentiality over parts of the affidavit that dealt with this issue. [redacted] filed a supporting affidavit to that effect and claimed confidentiality over its affidavit.

[152] Until this point in time, Caxton's lawyers had dealt with the matter. However, when these affidavits were filed, Caxton launched a section 45 application for access to a range of documents that had been claimed confidential, including aspects of the Commission's reasons. This application was granted largely in Caxton's favour save for the identity of [redacted][46] However, Caxton ultimately came to know of [redacted] identity from other sources.

[153] Caxton challenged the Commission's reliance on the issue of customer flight in arriving at a decision to refuse the CCR28 application on two grounds. The substantive ground was that the Commission had conflated the enquiry into whether a separate filing should be permitted into an assessment of the impact of Caxton acquiring control which was the subject of merger investigation. In this the Commission had ventured into a relevant market definition exercise and had arrived at conclusions of supply and demand.

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[44] Commission's reasons at para 73.

[45] Ibid.

[46] See Tribunal order dated 13 May 2022 in Caxton and CTP Publishers and Printers Ltd v Mpact Ltd and [redacted] RVW110Oct21/CNF197Mar22).

[154] The second ground was procedural unfairness in that Caxton had not been granted an opportunity to respond to this issue at the time to rebut these misplaced concerns. On this latter ground, while Caxton itself was denied an opportunity to make submissions on the concern during the Commission's investigation, it was eventually afforded an opportunity to respond to [redacted] submissions in its replying affidavit in these proceedings.

[155] On the substantive ground, namely whether there was elision on the part of the Commission between its CCR28 enquiry and the enquiry into the merits of the merger under section 12A, we agree with Caxton.

[156] The *impact* of Caxton acquiring control of Mpact would be a matter for investigation in a merger investigation, whether such investigation occurred under a separate or joint filing under the rules. It has no relevance to the enquiry whether a separate filing ought to be allowed or not.

[157] In order to find, as the Commission did, that [redacted] would severely prejudice Mpact, the Commission had to make a range of positive findings about questions of fact, law and economics. Those findings, however, could only ever be properly answered pursuant to a full-scale merger analysis, and it is common cause that no such investigation was conducted. None of those questions were asked nor answered by the Commission and nor could they have been because the CCR28 process does not create any mechanisms for making those kinds of complex determinations as all of these questions could only ever have been properly asked and answered by a full merger investigation.[47]

[158] The Commission in relying on this factor has elided two enquiries and has relied on irrelevant factors for the CCR28 enquiry. On this basis the Commission's decision stands to be set aside.

Decision not final

[159] This leaves us to deal with a remaining issue that arose during the hearing.

[47] Caxton's Heads of Argument at para 70.

[160] The first of these was a suggestion by both the Commission and Mpact that the Commission's decision was not final and therefore not reviewable because the Commission had stated that the application was not allowed "at this stage".

[161] This argument sought to rely on the minute of the Commission's meeting of 17 August 2021 which states, "*entertain further consideration of the matter only once conditions change"* and the second last sentence in paragraph 79 of the reasons which reads:

> "*The Commission is therefore of the view, at this stage, cognisant of the cumulative set of submissions, and the facts of the matter, a separate filing should not be allowed*".

[162] But this argument immediately gives rise to a series of questions. What is meant by "this stage"? What more would be required and at what stage?

[163] Even if we assume that somehow the Commission had intended this to be an interim decision, as it stands what remedy was available to Caxton? Should Caxton bring a fresh or new CCR28 application? Should it provide more information, on specific issues, by a certain date?

[164] If this was indeed an interim decision, one would expect as a matter of fairness for the Commission to provide some guidance to Caxton of what more was required and by some date by which to make further submissions.

[165] Notwithstanding the words of the minute or "*at this stage*" in paragraph 79 of the reasons, the only certainty Caxton has is that a separate filing is not allowed.

[166] Accordingly, this argument has no merit and is dismissed.

[167] Nevertheless, the argument does lend emphasis to the difficulties we highlighted earlier about whether the Commission in failing to make a definitive decision on the threshold question and in its circular reasoning, failed to provide Caxton with

guidance on not only what is required for a firm to meet the threshold enquiry but also what other circumstances would lead to a successful CCR28 application.

Conclusion

[168] In conclusion, we find that the Commission's decision under the threshold leg of the enquiry is vague and ambiguous and, on this basis alone, stands to be set aside.

[169] Furthermore, the Commission failed to have due regard to the absence of relevant cumulative facts such as offer, price and terms in the threshold enquiry, facts that it itself had identified as being relevant. In doing this, the Commission misapplied itself.

[170] In the context of this CCR28 application, the Commission has failed to provide guidance to Caxton and similarly situated firms as to what elements of a transaction the Commission would consider essential for triggering its merger investigatory powers under a separate filing.

[171] In its decision on the second leg of the enquiry, the Commission relied on irrelevant factors such as customer flight, elided the enquiry under merger investigation with the enquiry under CCR28, and conflated the nature of merger investigation with the nature of the transaction.

[172] The Commission was however justified in having regard to Mpact being prejudiced if it were required to make a separate filing. However, this again was linked to the vague nature of the transaction, a matter that was the subject of the threshold enquiry.

[173] Accordingly, the Commission's decision is found to be irrational and/or unreasonable and set aside.

Remedy

[174] While Caxton has asked that we substitute the Commission's decision with our

own decision to allow it to file a CCR28 application, we find that a more appropriate remedy would be to remit the decision back to the Commission for it to reconsider the facts and the submissions it has received from the parties.

[175] Apart from the fact that the merger filings and investigations are functions clearly allocated to the Commission by the Act, in our view the Commission as regulator of first instance is required to provide guidance to parties on what types of transactions it would consider appropriate for a CCR28 application.

Order

[176] Accordingly, we make the following order:

176.1. The Commission's decision to dismiss Caxton's application for permission to file a merger notification in terms of CCR28 is set aside.

176.2. The Tribunal refers the Commission's decision back for the Commission to reconsider.

176.3. The application sought by Caxton in terms of prayers 1.1, 1.2 and 1.3 of its notice of motion, namely for the Tribunal to grant Caxton permission in terms of CCR28 to file notification of a merger between Caxton and Mpact Limited is dismissed.

176.4. There is no order as to costs.

Signed by:Yasmin Tayob Carrim
Signed at:2022-09-22 09:00:15 +02:00
Reason:Witnessing Yasmin Tayob Carri

22 September 2022

Ms Yasmin Carrim **Date**

Prof. Imraan Valodia and Ms Sha'ista Goga concurring

Tribunal Case Manager:	Juliana Munyembate
For the Applicant:	Adv Tembeka Ngcukaitobi SC and Adv Shannon Quinn *instructed by* ENS Africa
For the First Respondent:	Bukhosibakhe Majenge assisted by Maya Swart and Luke Rennie

For the Second Respondent:	Adv Wim Trengove SC, Adv Jerome Wilson SC, Adv Peter Smith and Adv Thabang Pooe *instructed by* Webber Wentzel Attorneys