REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 161/CAC/Feb18

In the matter between:

THE COMPETITION COMMISSION **APPELLANT**

and

PRIMEDIA (PTY) LTD T/A STER-KINEKOR THEATRES **FIRST RESPONDENT**

AVUSA LIMITED T/A NU METRO CINEMAS **SECOND RESPONDENT**

J U D G M E N T

Mnguni JA (Davis JP and Unterhalter AJA concurring)

[1] This appeal is a sequel to an application for immunity from prosecution and fine by Avusa Ltd trading as Nu Metro Cinemas (Nu Metro) in terms of the Competition Commission's (the Commission) Corporate Leniency Policy (the CLP) brought about in January 2009. In its application, Nu Metro purported to furnish the Commission with evidence pointing to the existence of collusion in the cinema exhibition market involving itself and Primedia (Pty) Ltd trading as Ster-Kinekor Theatres (Ster-Kinekor) at the Victoria & Alfred Waterfront (Pty) Ltd (the shopping complex) in Cape Town. Nu Metro offered to disclose the extent of its involvement and participation in the alleged cartel activities in return for immunity from prosecution. On 8 May 2009 the Commission granted Nu Metro conditional

immunity. On 22 May 2009 the Commission initiated a complaint against Ster-Kinekor and Nu Metro (collectively referred to as the two entities) for alleged market allocation between them in the market for film exhibition. On finalisation of its investigation, the Commission concluded that the evidence in its possession established that the two entities, being firms in a horizontal relationship in the market for films exhibition, had engaged in a market allocation agreement limiting the genre of films each firm was entitled to exhibit in the shopping complex, so as to avoid competing with each other in contravention of s 4(1)*(b)*(ii)[1] of the Competition Act 89 of 1998 (the Competition Act).

[2] On 14 March 2012 the Commission amended its complaint by including an allegation that the conduct forming the subject matter of complaint was still continuing at the time of the referral. On 29 March 2012 the Commission referred the complaint to the Competition Tribunal (the Tribunal) in terms of s 50(1) of the Competition Act read with rule 14(1)(a) of the Rules for conduct of the proceedings in the Competition Tribunal. The Commission cited Primedia and Nu Metro respectively as the first and second respondents.

[3] At this stage a little more needs to be said about the structural changes each of the respondents has undergone culminating in the present entities. Ster-Kinekor is the film and digital division of Primedia, which is the successor-in-title of Ster-Kinekor (Pty) Ltd (new Ster-Kinekor) and Ster-Kinekor Films (Pty) Ltd (old Ster-Kinekor). Primedia is currently a leading South African media group with interests in amongst other things broadcasting, advertising, marketing and promotions. Old Ster-Kinekor was a party to the settlement agreement and the tenant under the resultant lease with the landlord.

[4] On 29 September 2007 the film exhibition business of Ster-Kinekor was sold to the first respondent (Primedia). In 2007 Primedia purchased the businesses of all the companies in the Primedia Group including the businesses of old Ster-Kinekor. New Ster-Kinekor is the division within new Primedia that carries on the business

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[1] '4. Restrictive horizontal practices prohibited. - (1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of firms, is prohibited if. . .
(b) it involves any of the following *restrictive horizontal practices*:
(i). . .
(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*. . . .'

acquired from old Ster-Kinekor. Although Ster-Kinekor carries on business as Ster-Kinekor Theatres, it is in fact not a separate corporate entity.

[5] Avusa Ltd is a public company duly incorporated in terms of the laws of the Republic of South Africa. Avusa Ltd was the then holding company of Nu Metro Theatres (Pty) Ltd, which has since been deregistered and made a division of Avusa Ltd known as Nu Metro Cinemas. Nu Metro now forms part of the Avusa retail division.

[6] The two entities are the major competitors in the film exhibition market in South Africa. Nu Metro showcases all the existing new cinematic products on the big screen and operates about 24 cinema multiplexes across South Africa with approximately 196 screens. Ster-Kinekor is the largest cinema exhibitor with approximately 33 Junction value cinemas and 15 Classic cinemas nationwide and a total of over 400 screens and 60 000 seats.

[7] The issues arising in this appeal will be better understood against the background that follows. On 30 April 1992 the shopping complex and Nu Metro concluded a lease relating to Nu Metro's occupation of 11 motion picture theatres in the shopping complex. The lease was to endure for an initial period of 15 years with an option to renew the lease for two further periods of five years each. At the time Nu Metro was the only operator of cinemas in the shopping complex. In 1994 Transnet Limited sold the V&A Waterfront to Transnet Pension Fund. With effect from 1 April 1994, V&A Waterfront ceded to Transnet Pension Fund all its rights, title and interest under the existing Nu Metro lease. Since then multiple entities have succeeded one another as landlord (the landlord).

[8] In the mid-1990s Ster-Kinekor approached the landlord with the view of establishing an art cinema in the shopping complex. Nu Metro became aware of the negotiations and on 30 July 1997 it addressed a letter to the landlord objecting to the proposed introduction of the Ster-Kinekor art cinema. Nu Metro claimed that it had an enforceable oral right of first refusal in its favour with the landlord over any additional theatres which might be developed in the shopping complex. Nu Metro also threatened to take legal action against the landlord to protect and enforce its alleged right should the landlord proceed and conclude a lease with Ster-Kinekor.

[9] The landlord and Ster-Kinekor did not heed Nu Metro's threats of litigation and the negotiations continued unabated. That decision provoked Nu Metro to institute action against both the landlord and Ster-Kinekor in the then Cape of Good Hope Provincial Division (high court) predicating its cause of action on an alleged enforceable oral right of first refusal foreshadowed in its letter of objection of 30 July 1997. In that action Nu Metro sought an order interdicting and restraining the landlord from concluding or giving effect to any lease of the new cinema in the shopping complex to any person other than itself. Nu Metro joined Ster-Kinekor in the action because of an interest it had in the relief that Nu Metro sought against the landlord. Consequently, Nu Metro's action became an obstacle that prevented the proposed introduction of Ster-Kinekor's art cinema.

[10] Subsequently the parties entered into tripartite negotiations to unlock the deadlock caused by Nu Metro's court action. The negotiations culminated in the parties concluding a settlement agreement on 11 May 1998. In its relevant parts the settlement agreement provided:

'2 A1. Ster-Kinekor shall not show any films identified in the industry as commercial films. Without limiting the definition of what constitutes a non-commercial film, the parties agree that for the purposes of this agreement inter-alia the following categories of film shall be agreed not to be commercial films:

A1.1 sub-titled foreign language films (other than English and Afrikaans);

A1.2 English or Afrikaans language films scheduled for "limited release" (as generally accepted in the film industry from time to time-currently 7 prints) on the South African exhibition circuit;

A1.3 Any film that is classified by Movieline Magazine as an "art film".

A2. Should a particular film be shown at either (or both) the Rosebank Mall and/or Cavendish Square Cinema Nouveau complexes, then, provided that it is not a commercial film, Ster-Kinekor shall be entitled to show this film at the V & A Cinema Nouveau;

A3. In the event that a commercial film is show at either (or both) the Rosebank Mall and/or Cavendish Square Cinema Nouveau complexes, then notwithstanding this fact, Ster-Kinekor shall not be entitled to show this film at the V & A Cinema Nouveau complex and this commercial film will be shown by Nu Metro in one or more of its theatres at the V & A Waterfront.

A4. Nu Metro undertakes not to show, in its V&A Waterfront cinemas, any films of the genre reserved to Ster Kinekor as described under 2 above, unless Ster Kinekor has elected not to show it at its Cinema Nouveau complex in the V&A Waterfront.'

[11] On 29 September 1998 the settlement agreement was made an order of the court. As agreed, the two entities incorporated the settlement agreement and the restraints in their respective leases with the landlord, all of which occurred before the Competition Act came into operation on 1 September 1999. These restraints were destined to take centre stage in the dispute that subsequently arose between the Commission and Primedia.

[12] I return to the chronological sequence of the complaint. In its answer to the complaint, Ster-Kinekor denied the allegations levelled against it and raised three defences. The first defence was that on a proper characterisation of the settlement agreement, it was not an agreement between the two entities in a horizontal relationship. Ster-Kinekor contended that it was an agreement between the parties to an action which adjusted the landlord's vertical relationships with Nu Metro on the one hand and Ster-Kinekor on the other. This is because the settlement agreement culminated in an amendment to the leases between the landlord and Ster-Kinekor and the landlord and Nu Metro regarding the nature of the films that each cinema house could exhibit. It contended that it was the leases that imposed the restraints, and therefore, the agreements that divided markets were the vertical leases with the landlord. The settlement agreement merely aligned the landlord's two agreements with Nu Metro and Ster-Kinekor respectively, to ensure that the landlord's lease with Ster-Kinekor did not breach the landlord's obligations to Nu Metro. Ster-Kinekor did not willingly agree to any division of markets between the two entities. Ster-Kinekor asserted that it entered into competition with Nu Metro at the shopping complex on the only basis available to it. It's only alternative was not to compete with Nu Metro at the shopping complex at all.

[13] The second defence was that it was not competent for the Tribunal to grant relief against new Primedia because even if its predecessor had contravened s 4(1) *(b)*(ii) of the Competition Act, new Primedia had not done so. Ster-Kinekor contended that new Primedia purchased the business of Ster-Kinekor in 2007 and it only succeeded Ster-Kinekor as tenant in 2012, which was long after the two entities had abandoned the settlement agreement.

[14] The third defence was that Ster-Kinekor and Primedia were at all times bound by and obliged to obey the court order which incorporated the settlement agreement.

As a result Ster-Kinekor contended that the conduct of the two entities in doing so was lawful and not in breach of s 4 of the Competition Act. Ster-Kinekor also pointed out that it never implemented the settlement agreement after the Competition Act came into force and that its responsible officials were initially ignorant of the agreement altogether.

[15] None of these defences found favour with the Commission and it refused to withdraw the complaint. The Commission referred its finding to the Tribunal for adjudication in terms of s 50(1) of the Competition Act read with rule 14(1)(a) of the Rules for the conduct of proceedings in the Competition Tribunal. In the complaint referral the Commission sought, inter alia, an order declaring that the respondents committed prohibited practices in contravention of s 4(1)*(b)*(ii) of the Competition Act; directing the respondents to refrain from engaging in the aforesaid restrictive horizontal practice to the extent that the conduct continues, and imposing an administrative penalty against Primedia in an amount equal to 10 per cent of its annual turnover in the country during the preceding financial year.

[16] During the hearing the Commission adduced evidence of two witnesses namely, Glen Edwin Clack (Mr Clack) and Mark Harris (Mr Harris) in support of its case whilst Ster-Kinekor adduced evidence of three witnesses namely, Isabel Rao (Ms Rao), Fiaz Mohamed (Mr Mohamed) and Nicolette Scheepers (Ms Scheepers) in its defence. Mr Clack was employed by Nu Metro during the period 1993 to 2001, first as Operations Director and from 1996 as Managing Director. Mr Harris was employed by Nu Metro as Product Manager from July 2002 and as its Content and Marketing Executive from 2008. Ms Rao has been with Ster-Kinekor Distribution since 1988 and has been its Chief Executive Officer since 2000. Mr Mohamed was the Chief Executive Officer of Ster-Kinekor Theatres. He worked as its Chief Operating Officer from 2006. Ms Scheepers was employed by Ster-Kinekor Distribution from 1997 to 2016 and was under the direct supervision of Ms Rao.

[17] After analysing the evidence in relation to the provisions of s 4(1)*(b)*(ii), the Tribunal dismissed the complaint on 5 February 2018. In the course of dismissing the complaint the Tribunal reasoned as follows:

'The settlement agreement was concluded before the Competition Act came into operation. Therefore, there can only be a contravention of section 4(1)(b)(ii) if there were actions or

discussions between the parties directed at implementing the agreement after the Competition Act came into force. . . .'[2]

Alive to the Commission's contention that 'although the settlement agreement was concluded before the commencement of the Competition Act, there was continuing conduct regarding the implementation of the agreement after the Competition Act came into force', the Tribunal found that the Commission's allegation was not borne out by the facts. The Tribunal then concluded that Ster-Kinekor did not contravene s 4(1)*(b)*(ii).

[18] Aggrieved by this outcome the Commission launched this appeal contending that the Tribunal either erred or misdirected itself in its finding on the following five grounds:

(a) in its interpretation and application of s 4(1)*(b)* of the Act that there can only be a contravention of s 4(1)*(b)*(ii) of the Competition Act if there were actions or discussions between the two entities directed at implementing the settlement agreement after the Competition Act came into force;

(b) in not making any determination regarding the existence of the agreement after the Competition Act came into operation;

(c) in not making any determination whether the settlement agreement constituted division of markets within the contemplation of s 4(1)*(b)*(ii) of the Competition Act;

(d) in its finding that Ster-Kinekor's exhibition of art films at the shopping complex could plausibly be as a result of implementation of Ster-Kinekor's business strategy and model and not the settlement agreement; and

(e) in not making any determination regarding Primedia's liability for purposes of the Competition Act.

[19] I shall deal with these grounds shortly but first, at the hearing of this appeal on 12 December 2018, this court mero motu raised the question whether the parties had considered the implications of GN 801 published in *GG* 10211 of 2 May 1986 on the lawfulness of the restraints contained in the settlement agreement promulgated under the Maintenance and Promotion of Competition Act 96 of 1979 (the 1979 Act) before the Competition Act was enacted. Both counsel were not adequately

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[2] Para 41 of the Decision and Order of the Tribunal, vol. 9 of the Record at 832.

prepared to deal with this question and were afforded time to file additional heads dealing with this question. The additional heads have since been filed and the court is grateful to counsel for their input. Counsel hold divergent views on this question. The Commission's counsel contended for an answer in the affirmative whereas Primedia's counsel contended otherwise.

[20] In its relevant parts regulation 2(d) of GN 801 provides:

'Subject to the provisions of paragraphs 8 and 9 no person shall enter into, be a party to or continue to be party or continue to be a party to any agreement, arrangement, understanding, business practice or method of trading which in terms of this notice constitutes –

. . .

(d) horizontal collusion on market sharing. . .'

Regulation 6 of GN 801 defines "horizontal collusion on market sharing" as follows:

'"Horizontal collusion on market sharing" referred to in paragraph 2 (d) –

(a) means any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, having the effect of dividing wholly or partially the market for such commodity or commodities between or among them-

(i) territorially;

(ii) in respect of customers or classes of customers;

(iii) quantitatively, by reference to the quantities or share to be produced or supplied by each such supplier or by reference to any limitation of production facilities; or

(iv) in respect of technical factors relating to the commodities concerned; and

(b) includes the use of an association or of a company, close corporation or other juristic person in which such suppliers have an interest, to effect horizontal collusion on market sharing in any way.'

[21] The Commission and Primedia are not in agreement on a proper characterisation of the settlement agreement and the restraints contained therein. In *American Natural Soda Ash Corporation v Competition Commission (Ansac)*[3] the Supreme Court of Appeal said that where the prohibition is decreed by legislation rather than by judicial intervention, the prohibited form of conduct must be

[3] *American Natural Soda Ash Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA) para 44.

established between the parties to two vertical relationship by construing s 4(1)*(b)*. Accordingly, the first step to that enquiry must involve the determination of whether the relationship between the two entities in relation to the settlement agreement and restraints was a horizontal or vertical one.

[22] An appropriate starting point in assessing the competing arguments of the parties is the definition of "horizontal relationship" in s 1 of the Competition Act. Section 1 of the Competition Act defines "horizontal relationship" to mean 'a relationship between competitors'. The determination whether a restraint is a horizontal or a vertical one involves a legal and factual consideration. In *Competition Commission v South African Breweries Limited & others* (*SAB)* this court said:[4]

'[36] Our legislature, when it passed the Act, did not favour a judicially constructed rule. By contrast, it provided expressly, in terms of s 4(1)(b), that any direct or indirect fixing of a purchase or selling price or the dividing of markets by allocating customer, suppliers, territories or specific types of goods or services or collusive tendering constituted an agreement which was prohibited.

[37] Thus, the "characterisation" that is required under our legislation is to determine (i) whether the parties are in horizontal relationship, and if so (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of s 4(i)(b). However, since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.'

[23] In *SAB* this court concluded that '[t]he true economic nature of the relationship, which the characterisation principle seeks to unlock, was, in this case, a vertical relationship between a producer and distributors of the former's product'. (para 43)

[24] In *Dawn Consolidated Holdings (Pty) Ltd & others v Competition Commission*[5] this court, after considering the approach articulated in the European Commission's General Guidelines relating to the concept of ancillary restraints, neatly summed up the position on the issue as follows:

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[4] *Competition Commission v South African Breweries Limited & others* 2015 (3) SA 329 (CAC).
[5] *Dawn Consolidated Holdings (Pty) Ltd & others v Competition Commission* (155/CACOct 2017) [2018] ZACAC 2 (4 May 2018) para 32.

'The requirement that the restraint should be objectively "necessary" may, however, be too strict. The appropriate test, in my view is the following:
(a) Is the main agreement (ie disregarding the impugned restraint) unobjectionable from a competition law perspective?
(b) If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement?
(c) If so, is the particular restraint reasonably proportionate to the requirement served?'
This court stressed that this test is an objective one, and that the fact that the parties subjectively believed that a restraint was reasonably required does not suffice.[6]

[25] The first respondent contended, that while Nu Metro and Ster Kinekor were competitors in a horizontal relationship, each was also in a vertical relationship with the landlord. It contended further that the settlement only made adjustments to the two vertical relationships to allow the landlord to establish a second vertical relationship with Ster Kinekor alongside its existing vertical relationship with Nu Metro

[26] Notwithstanding this submission I am prepared to assume in favour of the Commission that when these restraints are objectively assessed they are arrangements which are independent of the leases and reflect the consensus of two entities in a horizontal relationship to divide film exhibition in the shopping complex.

[27] Having assumed in favour of the Commission that the settlement agreement was an agreement between the two entities in a horizontal relationship, I turn to deal with the question which this court raised as foreshadowed in para 19 above. The Commission's counsel contended that the settlement agreement and the restraints fall within the scope of the prohibition of horizontal collusion on market sharing contained in regulation 2(d) of GN 801 and were unlawful prior to the promulgation of the Competition Act. He submitted that the settlement agreement and the restraints constitute 'an agreement, arrangement, or understanding, business practice or method of trading' as contemplated in regulation 2(d). Allied to this submission he pointed out the definitions of the words "commodity" and "supplier(s)" in regulation

[6] *Dawn* para 33.

10(b)[7] and (f)[8] are sufficiently broad to include a provider or the provision of any service including the exhibition of films. He submitted that the restraints have the effect of dividing the market for the exhibition of film in the shopping complex as contemplated in regulation 6. Further, the restraints were not excluded from the application of the prohibition in regulation 2(d) by virtue of the provisions of regulation 8,[9] and have not been excluded by the Minister in terms of regulation 9 read with s 14(5)*(b)* of the 1979 Act.

[28] By contrast Primedia's counsel advanced two reasons why he submitted that the settlement agreement and the restraints did not contravene GN 801. The first reason was that on its proper characterisation the settlement agreement was an agreement governing two vertical relationships. He contended that it was merely the settlement of a dispute between the parties to two vertical relationships. He submitted that the restraints imposed on the two entities were imposed on them by the terms of their leases in their respective vertical relationships with the landlord.

[29] The second reason was that the relevant provisions of GN 801 require the prosecuting authority to prove *mens rea* on the part of Ster-Kinekor beyond

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[7] Regulation 10(b) defines a "commodity" as follows:
'"commodity" includes any make or brand of any commodity, any book, periodical, newspaper or other publication, any building or structure and any service, whether personal, professional or otherwise, including storage, transportation, insurance or banking service;'.

[8] Regulation 10(f) defines a "supplier" as follows:
'"supplier" includes, unless the context indicates, the manufacturer, producer, seller, and reseller of goods, any supplier of goods by way of lease or hire or otherwise and the provider of any professional, financial or other service.'

[9] Regulation 8 excludes certain specific transactions from the application of the prohibition in regulation 2. Regulation 8 provides:
'The provisions of this notice shall not be so construed as to apply in respect of any agreement, arrangement, understanding, business practice or method of trading between or among -
(a) a holding company and its wholly-owned subsidiary or between companies which are the wholly-owned subsidiaries of the same holding company;
(b) close corporations which have only the same person or persons as members;
(c) companies of which all the shares are held by the same person or close corporation, or between such close corporation and such companies; or
(d) persons in relation to-
  (i) goods which are to be exported to any county other than Botswana, Lesotho, Swaziland, a state the territory of which formerly formed part of the Republic of South Africa and any territory within the Republic of South Africa in respect of which a Legislative Assembly has been established in terms of the National States Constitution Act, 1971 (Act 21 of 1971); or
  (ii) any service to be rendered in any country other than the Republic of South Africa or those countries, states or territories referred to in (i) above,
or in respect of any agreement, arrangement, understanding, business practice or method of trading authorised by the provisions of any law.'

reasonable doubt, before Ster-Kinekor could be found to have contravened the regulations in question.

[30] He pointed out that the Commission did not adduce evidence on a proper characterisation of the settlement agreement for the purposes of the contravention created by GN 801. Whilst accepting that the two entities were competitors in a horizontal relationship, he submitted that each of the two entities was also in a vertical relationship with the landlord. He elaborated on this by submitting that the settlement agreement merely made adjustments to the two vertical relationships to allow the landlord to establish a second vertical relationship with Ster-Kinekor alongside its existing vertical relationship with Nu Metro.

[31] He argued that the settlement agreement was an incidental by-product of the fact that Nu Metro had contended that it was a term of Nu Metro's vertical relationship with the landlord that the latter could not enter into a vertical relationship with Ster-Kinekor because of Nu Metro's alleged enforceable right of first refusal. He pointed out that the same outcome would have been achieved without any horizontal agreement, even if the landlord had negotiated separate settlements with each entity. He submitted that the economic substance of the relationship between the parties was that the two entities had separate vertical relationships with the landlord.

[32] Primedia's counsel made two important submissions, the first being that the only conduct by which Primedia was said to have contravened s 4(1)*(b)*(ii) was its alleged implementation of the settlement agreement. The nub of the submission was that once Primedia had been shown to be innocent of the charges actually made against it, it was not open to the Commission to enquire into the possibility of a contravention on some other basis including contravention of GN 801.

[33] The second was that, even if this court were to find that the settlement agreement constituted a restricted practice under GN 801, the settlement agreement was lawful because it was sanctioned by an order of the high court. As authority for this submission he relied on the judgment of Froneman J (as he then was) in *Bezuidenhout v Patensie Sitrus Beherend BPK*[10] where the learned judge said:

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[10] *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229B-C.

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A – C)'.

Primedia's counsel correctly observed that regulation 8 exempted any agreement, arrangement or understanding 'authorised by the provisions of any law'. I agree with counsel that such exemption should include an agreement authorised by order of high court otherwise any other interpretation would lead to unpalatable consequences.

[34] Primedia's counsel further contended that it would be unfair to adjudicate the appeal on the basis of contravening GN 801 because, at this stage, it is no longer open to Ster-Kinekor to recast its defence in order to effectively deal with this accusation. In my view, the proper course to follow would be to adjudicate the appeal under s 4(1)*(b)*(ii) of the Competition Act.

[35] There was a suggestion advanced on behalf of the Commission that Ster-Kinekor had contractually adopted the restraints in the lease shortly before the Competition Act came into operation, when Ster-Kinekor and the landlord entered into a lease for the new cinema complex in the shopping complex which restricted Ster-Kinekor's use of the cinema complex in accordance with the court order and the settlement agreement. The basis of this contention was said to be the following: The lease restraints were incorporated in clause 5 of the lease between Ster-Kinekor and the landlord. The first act of contractual adoption of the restraints by Ster-Kinekor perpetuated the unlawful restraints contractually for a period of at least 10 years from 1999 which straddles the period shortly before the Act came into operation and a considerable period after the Act came into force. The restraints were not varied or changed in the first addendum and remained in force and effect as contemplated in clause 3 of the first addendum. Ster-Kinekor's exercise of the first option to renew the lease agreement and the first addendum constitutes Ster-Kinekor's second act of contractual adoption of the restraints which preserved the restraints for a further period of five years. The sale of business agreement between new Primedia and new Ster-Kinekor also contains an express contractual acknowledgement and acceptance that the transfer of the business and assets of Ster-Kinekor to Primedia on 28 September 2007 was an intra-group transaction. The sale of business agreement makes it clear that the transfer of business of Ster-Kinekor to Primedia

was an internal re-organisation as the seller and the purchaser acknowledged and accepted that they form part of the same group of companies for purposes of s 45(1)*(a)* of the Income Tax Act.

[36] As correctly submitted by Primedia's counsel the issues which the Commission is now raising under this heading were never pleaded by it or canvassed at the hearing in the Tribunal. Critically, no invitation was extended or leave granted to the parties by this court to address these issues after the hearing. Oddly enough, the Commission did not put clause 16 of the sale of business agreement to Ster-Kinekor's witnesses.

[37] For reasons that I shall now develop, there is no need to decide these questions. This then is thus the convenient stage to deal with what, in my view, is the critical argument upon which the Commission bases its challenge on the findings of the Tribunal, particularly in the light of my assumption that Primedia and Ster Kinekor were in a horizontal relationship.

Interpretation and application of s 4(1)*(b)* of the Competition Act

[38] The Commission's primary contention was that the jurisprudence of this court does not require an act of implementation in order to establish the existence of an "agreement" as defined in the Competition Act. Section 1 of the Competition Act defines '"agreement", when used in relation to a *prohibited practice*, includes a contract or understanding, whether or not legally enforceable'. The case for an agreement focuses on whether consensus sufficient to constitute a 'contract, arrangement or understanding' has been proved on a balance of probability. In *Nestar (Pty) Ltd & others v Competition Commission of South Africa & another*[11] this court distinguished the definition of "an agreement" and a "concerted practice". In relation to the definition of "an agreement" it held:

'By contrast, an agreement arises from the actions and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus. No doubt, in many cases the same evidence may be relied upon as pointing towards either an agreement

[11] *Nestar (Pty) Ltd & others v Competition Commission of South Africa & another* 2011 (3) SA 171 (CAC) para 25.

or a concerted practice. However, sight should not be lost of the fact that they are different. The definition of an agreement extends the concept beyond a contractual arrangement. However, what it requires is still a form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement. Absent such an arrangement, there is no agreement, even in the more extended sense embodied in the definition.'[12] (Footnote omitted)

[39] As concisely held in *Nestar*, this court held that the basis for an agreement in competition law is consensus. This simply requires 'a form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement'.[13] In *MacNeil Agencies (Pty) Ltd v Competition Commission*[14] this court held that '[c]onsensus sufficient to constitute a "contract, arrangement or understanding" must be proved on a balance of probability (see s 68) before a finding can be made in terms of s 4(1) that the firms have committed a prohibited practice in the form of an "agreement"'. In *Reinforcing Mesh Solutions (Pty) Ltd & another v Competition Commission & others*[15] this court endorsed the European Commissions' position that implementation is not a requirement to found a contravention of s 4(1)*(b)* of the Competition Act. As aptly observed in *MacNeil* the definition of an agreement extends to the concept beyond a contractual agreement.

[40] On the strength of these authorities, the Commission's counsel submitted that the settlement agreement was preceded by negotiations that took place early in 1998 between the two entities, which involved discussions on avoidance of competition between their respective cinemas in the shopping complex. He submitted that the settlement agreement reflected the consensus of the two entities in terms of which Ster-Kinekor would only screen art films and Nu Metro would only screen commercial films.

[41] The Commission contended that the Tribunal misdirected itself in its approach which requires actions or discussions between the parties directed at implementing the agreement after the Competition Act came into force in order to found a

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[12] *Nestar* para 25.
[13] *Nestar* para 25.
[14] *MacNeil Agencies (Pty) Ltd v Competition Commission* (121/CAC/Jul 12) [2013] ZACAC 3 (18 November 2013) para 56.
[15] *Reinforcing Mesh Solutions (Pty) Ltd & another v Competition Commission & others* (84/CR/DEC09) [2013] CAC Case No. 119/120/CAC/May 2013 para 31.

contravention of s 4(1)*(b)*. The Commission's counsel submitted that this approach was inconsistent with this court's jurisprudence for two reasons. The first reason was that the Tribunal's approach conflates an inquiry into the duration of an agreement (ie whether the agreement remained in force after the Competition Act came into operation) with an inquiry into the implementation of an agreement. He submitted that while an inquiry into the implementation of an agreement may, in appropriate cases, assist in determining the duration of an agreement, where duration of an agreement is in dispute, these remain distinct and separate inquiries.

[42] The second reason was that the Tribunal's approach conflates the requirements for establishing a concerted practice with the requirements for establishing an agreement by focusing solely and exclusively on the conduct of the parties in establishing an agreement, which is an exercise that is essential in the establishment of a concerted practice. He submitted that the Commission's case was based on an agreement not a concerted practice. He submitted that consistent with this court's jurisprudence on the interpretation of an agreement as contemplated in s 4(1)*(b)*, the proper approach the Tribunal ought to have followed was to determine whether, after the Competition Act came into operation, the settlement agreement and the respective leases of the two entities incorporating the restraints in the settlement agreements remained in force.

[43] Obviously, the existence of the settlement agreement is not at issue in this appeal. As I see it, the proof of the existence of the settlement agreement per se does not assist the Commission in the circumstances of this case. I say this because the case which the Commission advanced in its complaint referral was that the conduct which was the subject of the complaint referral continued at the time of the referral. The success of this submission depends on the evidence presented regarding the conduct of the respondents

Nature of the market division and conduct of the parties

[44] The Commission contended that settlement agreement was principally aimed at defining and demarcating the respective roles of the two entities in respect of the exhibition of films of "commercial" and "art" films in the shopping complex. It was aligned with and protected the business models of the two from competition with each other. Ster-Kinekor was only interested in establishing a cinema nouveau and

not a commercial cinema complex. The art film concept was not Nu Metro's business model. Ster-Kinekor had developed the "cinema nouveau" concept at Rosebank Mall and later expanded the concept to Cavendish Square. Ster-Kinekor developed the definition of "non-commercial film" genre which was subsequently incorporated into the settlement agreement.

[45] The Commission's counsel submitted that, after the settlement agreement was concluded, Nu Metro believed that the two entities complied with its terms and that there was no need for further discussion in relation to its implementation. He submitted that even after the Competition Act came into operation, Nu Metro still considered the two parties to be bound by its terms. He submitted that when Mr Harris was appointed as Product Manager at Nu Metro in July 2002, his predecessor made him aware of the settlement agreement, provided him with its copy as well as a copy of the letter dated 26 November 2001 from Nu Metro's attorneys, Thomson Wilks, addressed to Frisky Domingues of Ster-Kinekor relating to Ster-Kinekor's non-compliance with the terms of the settlement agreement. He expressed a view that the letter clearly evidences the fact that Nu Metro still considered the two entities to be bound by the terms of the settlement agreement even after the Competition Act came into operation.

[46] The sufficiency or otherwise of the meagre and imprecise evidence adduced on behalf of the Commission with regard to this critical issue in the case was the matter chiefly debated during argument in this court. To resolve that question it is necessary to look more closely at this evidence.

[47] Mr Clack testified that until his departure from Nu Metro in 2001, Ster-Kinekor fully complied with the settlement agreement. However, in cross-examination he readily conceded that he did not personally monitor Ster-Kinekor's compliance with the settlement agreement. He also readily conceded that one could not infer that Ster-Kinekor adhered to the settlement agreement merely because it screened art films, because from the outset and before the settlement agreement was concluded, Ster-Kinekor's strategy, which was based on its art nouveau business model, was to screen only art films in the shopping complex.

[48] Mr Harris testified that he was responsible for monitoring the implementation of the settlement agreement from the time he became the Project Manager until 2009. When he took over the position as Project Manager, his predecessor handed him a copy of the settlement agreement and took him through its terms. He testified that if he discovered that Ster-Kinekor was in breach of the settlement agreement he would bring that to the attention of the relevant personnel at Ster-Kinekor's Distribution. He testified that he successfully invoked and enforced the settlement agreement against Ster-Kinekor on multiple occasions. Oddly enough in cross-examination, he readily conceded that he only ever made one unsuccessful attempt at enforcing the settlement agreement in December 2008.

[49] As stated, Ster-Kinekor adduced evidence of three witnesses during the hearing. Ms Rao's evidence was that they never implemented the settlement agreement in their distribution of Ster-Kinekor's films. She was not even aware of its existence until Mr Harris drew her attention to it in December 2008. Ms Scheepers corroborated Ms Rao's evidence in this regard in all material respect. She confirms that they did not know of the settlement agreement's existence. The evidence of Ms Rao and Ms Scheepers was borne out by their email correspondence with Nu Metro's Mr Harris in December 2008. When he invoked the settlement agreement, they told him that they knew nothing about it and asked him for a copy of the agreement. Mr Mahomed testified that they never implemented the settlement agreement. He was not aware of its existence until the Commission referred to it in 2009. His evidence was that Ster-Kinekor regularly screened films in breach of the settlement agreement and Nu Metro rarely did anything to enforce it. His evidence was that on the odd occasion when Nu Metro attempted to enforce it, its attempts failed. He testified that Ster-Kinekor consistently defied the settlement agreement.

[50] With regard to Mr Harris' evidence that the two entities only abandoned the settlement agreement in January 2009, Primedia's counsel pointed out that all three witnesses who testified on behalf of Ster-Kinekor were clear that Ster-Kinekor had never implemented the settlement agreement or the restraint in its lease at all and there was nothing to abandon. He submitted that Ster-Kinekor had screened art movies in conformity with their art nouveau business model and that that did not suggest that it implemented or adhered to the settlement agreement.

[51] Before the Tribunal, Ms Rao produced a list of all the films distributed by Ster-Kinekor Distribution and screened by the two entities at the shopping complex from 1998 to 2013 which highlighted all the films screened at both entities in breach of the settlement agreement. From the analysis of the list, it is clear that Ster-Kinekor frequently acted in breach of the settlement agreement.

[52] The available evidence reveals that Nu-Metro did little to enforce the agreement. To the extent that the Commission sought to rely upon the letter dated 26 November 2001 mentioned in para 45 above, it remains to observe the following:

(a) it was an incomplete letter of demand from Nu Metro's erstwhile attorneys, Thomson Wilks, addressed to Ster-Kinekor demanding Ster-Kinekor to immediately cease its screening of two movies (Moulin Rogue and Captain Corelli's Mandolin) in the shopping complex;

(b) no evidence was led that this letter was ever received by Ster-Kinekor; and

(c) in any event, the letter gives credence to Ster-Kinekor's version that it never implemented the settlement agreement.

Economic successor liability

[53] New Primedia only purchased the business of old Ster Kinekor in 2007. The Commission's contention on this ground was that new Primedia should be held liable for old Primedia's misconduct as it is the economic successor to old Primedia. The Commission contended that the transfer of the business of old Ster-Kinekor to new Primedia was a transfer of a business between entities with substantially the same control structure.

[54] Primedia's counsel submitted that new Primedia only purchased the business of old Ster-Kinekor in 2007. It did not immediately succeed to the rights and obligations of old Ster-Kinekor under its lease with the landlord. Old Ster-Kinekor could not transfer those rights and obligations without the landlord's consent. In any event, the agreement by which old Ster-Kinekor transferred its rights and obligations under its lease to new Primedia was only concluded on 3 February 2012. He submitted that, even if its predecessors had contravened s 4(1)*(b)*(ii), new Primedia never did so. He pointed out that new Primedia is not the company that concluded or implemented the settlement agreement. He also pointed out that the Commission

relies on a schematic presentation of the structure of Primedia pre-2007 and post-2007 which it took from the evidence in another case and that evidence was never adduced before the Tribunal at the hearing.

[55] It is common cause that the Commission neither pleaded nor adduced evidence to support an argument for the economic continuity between old and new Primedia or for the structural link between new Primedia and old Ster-Kinekor. It did not adduce evidence that justifies the contention that new Primedia should be held liable to the extent of any wrongful conduct which was shown to occur before it new Primedia entered on the scene. In the circumstances, neither the Tribunal nor this court has the necessary evidence before it to make such a finding.

[56] In summary, even on the basis of an assumption in favour of the Commission that Primedia and Ster Kinekor were in a horizontal relationship which fell within the scope of s 4(1) (b) of the Competition Act, the Commission failed to make the required showing that the settlement agreement was implemented. The evidence presented by the Commission manifestly failed to negotiate the requisite threshold to show, on the probabilities that the settlement agreement was implemented which action, may have triggered the application of s 4(1) (b) of the Competition Act.

[57] hence the appeal cannot succeed. What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule.

Order

[58] In the result the following order is made :

(a) The appeal is dismissed with costs such costs to include costs of two counsel.

Mnguni JA

Davis JP and Unterhalter AJA concurs

Appearances

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Delivered:	02 July 2019
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