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SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM247Jan19/JUR262Feb19

In the complaint referral between:

Mondi Limited	First Applicant
Mondi PLC	Second Applicant
And	
The Competition Commission	Respondent

Panel	: Enver Daniels (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Andreas Wessels (Tribunal Member)
Heard on	: 03 and 13 May 2019
Order issued on	: 27 May 2019
Reasons issued on	: 9 July 2019

REASONS FOR DECISION

Introduction

[1] Mondi Limited and Mondi PLC ("the Applicants") seek an order:

1.1 setting aside the opinion of the Commission ("the Respondent") that the restructuring of the applicants' business is a merger as defined in

section 12 of the Competition Act, 89 of 1998 ("the Act") that falls within the jurisdiction of the Act;

1.2 declaring that the proposed simplification is not a merger as defined in terms of section 12 of the Act that falls within the jurisdiction of the Act;

1.3 ordering the Respondent to

1.3.1 refund the filing fee paid in respect of the proposed simplification to the first applicant; and

1.3.2 return the merger Notice in respect of the proposed simplification to the applicants;

1.4 granting costs against the respondent.

[2] This application is an appeal against the opinion of the Respondent, brought in terms of Rule31(1)(c) of the Tribunal Rules.

[3] The only thing that we are required to do is to determine whether or not the proposed restructuring is a notifiable merger.

[4] In *Africa Media Entertainment Ltd vs Lewis NO and Others*,[1] the Competition Appeal Court ("CAC") provided guidance as to how the competition authorities should set about considering mergers. In that case, the Tribunal had, when it approved the merger in question, only considered the question of control, although it was obliged to also consider whether the merger would lead to any anti-competitive outcomes.

[5] The CAC noted, with reference to section 12(2)(g) that: *"a person controls a firm if it has the ability to materially influence the policy of the firm in a manner comparable to a person who in ordinary commercial practice can exercise an element of control as set out in the balance of the section."*

[6] The CAC then goes on to say that:

> *"This section, is a gateway section: it asks of the Tribunal that it examine whether "one or more firms directly or indirectly acquire or establish a direct or indirect control over the whole or part of the business of another firm". This*

[1] [2008] 1 CPLR 1 (CAC) ('Africa Media')

is a first order question which is necessary to determine the existence of a merger. Only when it has been established that a merger as defined constitutes the transaction before the Tribunal, is there a need to examine the factors in section 12A.[2]

...

Section 12 defines a merger: section 12A deals with the competitive considerations and evaluations of a merger as defined. In this case the Tribunal had jurisdiction, in that it was accepted that there was a merger. The reason why this was common cause between the parties is comprehensively set out in the Tribunal's decision. There is no reason to recapitulate.[3]

...

Once that determination has been made, the enquiry shifts to one in terms of section 12 A...." [4]

[7] We are not being asked to consider whether the proposed transaction should be approved as a merger. We only have to decide whether this is a merger which is notifiable and, if it is, then the Competition Commission, the Respondent, will have to examine the merger fully with reference to section 12A.

[8] Our consideration of the matter requires us to have regard to Section 12 which provides as follows:

12. Merger defined —

(1) (a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through—

(i) purchase or lease of the shares, an interest or assets of the other firm in question; or

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[2] Ibid. Para 47.
[3] Ibid. Para 48.
[4] Ibid. para 49.

(ii) amalgamation or other combination with the other firm in question.

(2) A person controls a firm if that person—

(a) beneficially owns more than one half of the issued share capital of the firm;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1 (3) (a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

[9] A "firm" is defined as including a person, partnership or a trust.

[10] In order to determine whether the proposed transaction is notifiable we must examine the current control structure and the control structure which will come into existence after the proposed transaction has been implemented.

[11] The CAC made it clear in *Africa Media*[5] that two separate enquiries are provided for in the Act. The first is the determination of whether the transaction amounts to a merger and the second is whether the merger is likely to substantially prevent or lessen competition and / or have an effect on the public interest in terms of section 12A(3).

[12] For the purposes of this application, we need only consider whether the proposed restructuring of the Applicant's business (the proposed simplification) is a merger in terms of the Act.

The Application

[13] In support of the application, Mr Philip Albert Laubscher deposed to the Founding Affidavit on behalf of the Applicants.

[14] According to him, Mondi operates under a dual listed company ("DLC")[6] structure comprising Mondi Limited ("MLTD"), incorporated in South Africa with a primary listing on the JSE and holding African assets and Mondi plc ("MPLC"), incorporated in the UK with a premium listing on the LSE and a *secondary* listing on the JSE and holding mainly non-African assets.

[15] His understanding is that a DLC structure is an arrangement by which a single unified economic enterprise conducts its business through two separately listed legal entities. A DLC structure is achieved through contractual arrangements,

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[5] Ibid.

[6] According to JSE statistics, the share of companies with dual listings increased from 14 per cent of all companies listed on the JSE in January 2006 to about 24 per cent in July 2016. Remarks by Mr. Daniel Mminele Deputy Governor, South African Reserve Bank at the Launch of the T+3 Equity Market Settlement Cycle Johannesburg, 4 August 2016. https://www.resbank.co.za/Site Assets/speeches. Downloaded 17 May 2019.

special shareholding arrangements and provisions in the constitutions of the two entities.

[16] Mondi wants to create a single holding company which will result in MPLC holding all the shares in MLTD.

[17] Mondi was originally part of Anglo-American plc ("Anglo") which controlled it through various subsidiaries. It operated, at the time, in 36 countries in approximately 113 locations. The Anglo subsidiaries which held the Mondi business were re-organised under two holding companies: MLTD and MPLC. The Anglo shareholders received both MLTD and MPLC ordinary shares in proportion to their holdings of existing Anglo ordinary shares. No single shareholder-controlled Anglo at the time and no single Anglo shareholder controlled MLTD or MPLC. The effect of this arrangement is that the shareholders who own MLTD also own MPLC.

[18] We pause to mention that according to Keeton, Mondi (pulp and paper) was not listed, but made up a substantial part of Anglo's industrial operations. In the early 2000s it was the largest contributor to Anglo's overall earnings.[7] It was clearly in its own right a very large business and presumably, before Anglo American PLC was created, a completely South African entity. Whilst we do not have the details, it is safe to assume that a large proportion of the Mondi assets were transferred to MPLC, which became the new owner of those assets. This is evident from Mr Labuschagne's statements in which he also indicates that since the listing Mondi has achieved very strong growth and its non-South African assets have grown faster than its South African interests.[8]

[19] The then South African based Anglo-American Corporation of which Mondi was a part, has been described as being a central pillar of Apartheid.[9] Summa states

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[7] The impact of volatile commodity prices, exchange rates and interest rates: reflections of a former business economist. SARB Biennial Conference: October 2016 Gavin Keeton Department of Economics and Economic History Rhodes University. https://www.resbank.co.za/Research/Documents. Downloaded 17 May 12019.

[8] Paragraphs 8 and 13 of the Founding Affidavit.

[9] See The Multinational Monitor. September 1988 – Volume 9 – Number 9. "Anglo- American Corporation: A Pillar of Apartheid. John Summa.

that at the time Anglo-American controlled 85% of the companies quoted on the Johannesburg Stock Exchange and according to a 1987 report, controlled 47 per cent of the country's gold production, a quarter of its coal, more than half of its platinum, virtually all its diamonds and crucial parts of the South African banking, insurance, food-processing, brewing, steel, auto, electronics and other industries."[10]

[20] In 1999, Anglo American South Africa was combined with Minorco[11] to form Anglo American Plc with its primary listing in London, while retaining a significant presence in South Africa.[12] In effect, Anglo American disavowed its South African roots. Through this primary listing, the ownership of Anglo-American South Africa's assets was transferred to Anglo American plc.

[21] What is important to note is that originally, when the then Anglo-American Corporation was still a South African company, the Mondi business was a South African business. When the Mondi business was reorganised under MLTD and MPLC, MLTD became (or, perhaps remained) a South African company owning its South African and other African assets, while MPLC became a British company owning Mondi's non-African as well as limited African assets. The African (including the South African) and non-African assets are not owned jointly but separately by the two individual companies. Whilst much of the history of Anglo American is not entirely relevant to these reasons, what is relevant is that following the combining of Anglo American South Africa with Minorco, ownership of South African assets belonging to the former were transferred to London. Anglo American appears to have wanted to do the same with Mondi, but for the conditions imposed by the Reserve Bank in 2007.

[22] We requested and received from the Applicants, a letter dated 20 February 2007 addressed by the Reserve Bank to Mr A J Trahar, the then Chief

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https://www.multinationalmonitor.org/hyperissues/1988/09/mm0988_08.html. Downloaded 13 June 2019.

[10] Ibid.

[11] Ibid. According to Summa, Minorco was a Luxembourg-based subsidiary of Anglo American.

[12] https://www.angloamerican.com/about-us/history#/EN/category-complete-history/detail-the-global-anglo-american. Downloaded 14 June 2019.

Executive Officer of Anglo American plc which approved the unbundling of the Mondi Group by Anglo American Plc subject to various conditions.[13] This letter makes it clear that the proposed DLC structure will result in the then current Mondi South African assets remaining domiciled in South Africa and primary (sic) listed on the JSE LTD.[14] In other words, MLTD is a South African company listed on the JSE and the owner of its South African assets – a truly South African entity.

[23] In addition, the letter records that the inward listed MPLC shares on the JSE (secondary listing) will be treated as foreign assets in the hands of South African investors to ensure the integrity of the regulatory system.[15]

[24] We'll return to these issues later in our reasons.

[25] We now return to Mr Labuschagne's statements.

[26] Mr Labuschagne explains that the dual-listed structure was completed through the conclusion of various agreements in order to maintain the single economic group structure (our emphasis). Those agreements resulted in:

26.1 the Mondi Group operating as a single economic structure;

26.2 the boards of MPLC and MLTD comprised the same persons;

26.3 a unified management structure;

26.4 the ordinary shareholders in both entities having the same effective rights in the Mondi Group;

26.5 the shareholders of both entities vote on matters affecting them in similar ways as a single, unified decision-making body, with one vote per ordinary share, whether that is a MPLC or MLTD ordinary share.

[27] According to him, the dual-listed company was, at that time, a structure through which the South African Reserve Bank permitted businesses to have a direct

[13] This letter was signed by Mr C T Grové, Deputy General Manager of the South African Reserve Bank.
[14] See first paragraph of the letter.
[15] Ibid. para a. It should be noted that para a is one of seven conditions imposed to ensure the integrity of the regulatory system.

primary listing through a foreign company and a direct domestic listing on the JSE.

[28] He also alleges that Mondi, under this structure, operates as a single unified economic structure structurally, through two separate parent entities MPLC and MLTD. We shall examine this in more detail later.

[29] According to Mr Labuschagne, the boards of MPLC and MLTD set the strategic objectives of the Mondi Group and determine investment and performance criteria, as well as being responsible for the proper management control, compliance and ethical behaviour of the business under its direction.

[30] Although the two companies have their own boards, the boards are comprised of the same individuals. The boards must manage Mondi as a unified economic enterprise, and, in the discharge of their respective powers and duties, must have regard to the interests of both the MPLC and MLTD shareholders as if the two companies were one.

[31] Any ordinary share held in either MPLC or MLTD gives the shareholder an equivalent economic and voting interest in Mondi.

[32] Special voting arrangements are in place to ensure the shareholders of both companies effectively vote together as a single decision-making body on matters affecting the shareholders of each company in similar ways ("**Joint Electorate Actions**"). These actions must be submitted to both MPLC and MLTD shareholders for approval at separate meetings but acting as a joint electorate. We'll turn to this later.

[33] According to Mr Labuschagne, certain actions termed "Class Rights Actions," which the company wishes to carry out must be approved by that company's own shareholders and also the approval of the shareholders of the other company voting separately.

[34] In terms of deed poll guarantees, each company unconditionally and irrevocably guarantees the other company's obligations to its creditors, where the obligation has been notified by one company to the other.

[35] Finally, according to Mr Labuschagne, no person may gain control of one company without having made an equivalent offer to the other company.

[36] Annexures FA4 and FA5 to Mr Labuschagne's Founding Affidavit are important as they provide more information on the matters dealt with by Mr Labuschagne in the Founding Affidavit.

[37] FA4 is the Articles of Association of MPLC. Clause 46.1.1 states that the directors' report, the audited financial statements for the immediately preceding financial year as well as the audit committee report must be presented to an Annual General Meeting.

[38] FA5 is the Memorandum of Incorporation of MLTD. Clause 41.2.1 is almost identical to clause 46.1.1 of the Articles of Association and also states that financial statements for the immediately preceding year must be presented at the Annual General Meeting.

[39] Upon a plain reading of these two paragraphs, it is clear that separate financial statements for the two companies will be presented at their respective annual general meetings.[16]

[40] The MPLC's Articles of Association (Annexure FA4) defines "Joint Electorate Action" as being "Any of the matters listed in Article 63.1 other than any matter which the Board and the Board of Limited have from time to time agreed will be treated as a Class Rights Action."

[16] We are aware that the confidential merger notification, filed under protest pending the finalisation of this appeal application, contains the Mondi Group Integrated report and financial statements for 2017. We have not considered these as they were not dealt with in the Founding Affidavit. We are also unable to ascertain whether a similar report and financial statements were prepared for the years preceding 2017.

[41] Article 63.1 reads as follows:

> *"Resolutions of the holders of PLC Ordinary Shares shall require approval to be obtained in accordance with Article 63.2 if they relate to the following matters:*
>
> *63.1.1 the appointment, removal or re-election of any Director or any director of Limited or both of them;*
>
> *63.1.2 the receipt or adoption of the annual accounts of the Company or Limited, or both of them, or accounts prepared on a combined basis;*
>
> *63.1.3 a change of name by the Company or Limited or both of them;*
>
> *63.1.4 the appointment or removal of the auditors of the Company or Limited or both of them;*
>
> *63.1.5 any proposed acquisition or disposal or other transaction of the kinds referred to in the Listing Rules of the UK Listing Authority or the JSE Listing Rules which, in any case, is required under such Applicable Regulation to be authorised by holders of Ordinary Shares;*
>
> *63.1.6 any matter considered by shareholders at an Annual General Meeting or at a General Meeting held on the same day as an Annual General meeting; and*
>
> *63.1.7 any other matter which the Board and the Board of Limited decide, either in a particular case or generally, should be approved as a Joint Electorate Action.*
>
> *If a particular matter falls within both Article 62.1 and this Article 63.1, then it shall be treated as a Class Rights Action falling exclusively within Article 62.1."*

[42] Class Rights Actions are provided for in Article 62. These actions include: the amendment or termination of the Sharing Agreement; the SA DAT Deeds; the UK DAT Deeds; any Action in respect which a Matching Action or an adjustment to the Equalisation Ratio would be required pursuant to Clause 3 of the Sharing Agreement; and other matter which the Board and the Board of Limited agree should be treated as a Class Rights Action.[17]

[17] See Article 62 for full details of the Class Rights Actions.

[43] Similar provisions exist in the Memorandum of Incorporation of MLTD. The Class Rights Actions and the Joint Electorate Actions are dealt with in Articles 59 and 60 respectively.

[44] In terms of Article 59.3, a Relevant Resolution to approve a Class Rights Action shall not be effective unless it is passed by (i) a vote in favour of a least the Required majority of the votes cast by the holders of the PLC ordinary Shares and the PLC Special Voting Share voting as a single class, (ii) a vote in favour of at least the Required Majority of the holders of the Limited Ordinary Shares and (iii) the written consent of the Limited Special Converting Shares, obtained in accordance with the procedure set out in Articles 59.3.1 – 59.3.6.2. In respect of a relevant resolution, the holder of the Limited Special Converting Shares shall on receipt of a notice from PLC confirming that the Required Majority has been obtained, give its consent to the Relevant Resolution and if PLC confirms that the Required majority has not been obtained, withhold its consent to the Relevant Resolution.[18]

[45] Similar provisions exist in respect of Joint Electorate Actions and these are to be found in Articles 60.1–60.4. Of relevance is the fact that A Relevant Resolution which constitutes a Joint Electorate Action must be considered in accordance with the procedure set out in Articles 60.3.1 – 60.3.4. When the votes cast by the holders of PLC Ordinary Shares have been determined, PLC will send to the Company and the holder of the Limited Special Converting Shares written notice of such determination and the holder of the Limited Special Converting Shares must cast the votes attached to such share agreement in accordance with the provisions of the Memorandum itself and the Voting Agreement.[19]

[46] What is significant for the purpose of these reasons is that both the Joint Electorate Actions and the Class Rights Actions shall not be effective unless they are passed in accordance with the special procedures stipulated in Articles

[18] Article 59.3.6.
[19] Article 60.3.4.

63.3 and 62.3 of the MPLC Articles of Association and Articles 59 and 60 of the MLTD's Memorandum of Incorporation.[20]

[47] The Memorandum specifically refers to the UK Trust Co which was allotted and issued with special voting shares and special converting shares in the capital of MPLC. The UK Trust Co must cast the special vote referred to in order to ensure that the outcome of the vote at the relevant meeting is the same as the outcome of the vote taken at a general meeting of MLTD.

[48] It also refers to the SA Trust Co to which the Limited Special Converting Shares in the authorised share capital of MLTD have been allotted and issued. The SA Trust Co must cast the special vote referred to in order to ensure that the outcome of the vote at the relevant meeting is the same as the outcome of the vote taken at a general meeting of MPLC.

[49] Whenever a relevant resolution which constitutes a Joint Electorate Action is to be considered, the procedure stipulated in Article 63.3 must be followed.

[50] MPLC and MLTD will hold general meetings. The holders of the MPLC ordinary shares and the holder of the MPLC Special Voting Share are entitled to vote as a single class and the holders of the MLTD ordinary shares and the holder of the MLTD Special Converting Share are entitled to vote as a single class.

[51] For a very specific reason, the poll shall not be closed in relation to MPLC Special Voting Share and the MLTD Special Converting Share until its holder has cast its vote on such resolution. The holders of the MPLC Special Voting Share and the MLTD Special Converting Share must ensure that the outcome of the vote at the two general meetings is identical. In other words, if the company wishes to appoint a director, then the holders of the two special shares control or influence the outcome of the vote in respect of the appointment of the director concerned.

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[20] The confidential DLC Structure Sharing Agreement between MPLC and MLTD explains how the voting system works and contains two annexures, viz., annexures 3 and 4 which illustrate the voting procedure for Class Rights Actions and Joint Electorate Actions.

[52] Mr Wilson who represented the applicants argued that at best the holders of these special shares may influence the outcome of the vote. That to us, appears to miss the point of the voting arrangements which have been put in place. Those voting arrangements ensure a particular outcome through the casting of votes by the holders of the special voting shares and the special converting shares.

[53] Both the Articles of Association and the Memorandum of Incorporation contain references to a Conversion date. In respect of MPLC, after the conversion date, the holder of MPLC Special Voting Share shall cease to receive notice of, attend, speak or vote at any general meeting including the Annual General Meeting.[21]

[54] In respect of MLTD, on or after the conversion Date, the special rights attributable to the Limited Special Converting Shares will fall away and shall rank *pari passu* with the Limited Ordinary Shares. After the share certificate in respect of the Limited Special Converting Shares have been surrendered, the Company must issue the holder of those shares with a new certificate in respect of Limited Ordinary Shares in the share capital of the Company. The holder of those shares, similarly to the holder of the MPLC Special Voting Shares, shall cease to have any right to receive notice of, attend, speak or vote any General Meeting, including an Annual General meeting.

[55] After the Conversion Date (which is not specified in either the Articles of Association or the Memorandum of Incorporation), the holders of the special voting shares and the special converting shares will not be able to influence or control the outcome of voting at the general meetings, including the annual general meetings as that element of influence or control will fall away.

[21] Article 64.2 of the Articles of Association.

[56] An important element of the proposed simplification is that it envisages that MLTD will become a subsidiary of MPLC.[22] Presently, MLTD is a separate entity in its own right.

[57] What we have in respect of MPLC and MLTD are two trusts which hold special voting shares and special converting shares which influence or control the voting in MPLC and MLTD respectively. When the simplification takes place, these special shares will fall away, and the two trusts will not be able to influence or control the voting at general meetings in order to determine the outcomes of those meetings. We need to consider, with reference to our own South African jurisprudence whether these complex dual listed company ("DLC") arrangements described by Mr Labuschagne and the proposed simplification thereof require notification in terms of the Act.

[58] Before doing so, we'll briefly outline some of the points made by the Respondent in its opposition to the application.

[59] Mr Ratshidaho Nthendeni Maphwanya ("Mr Maphwanya"), deposed to an answering affidavit on behalf of the Respondent, the Competition Commission ("the Commission").

[60] Mr Maphwanya states that on 18 January 2018, the Commission was notified about the proposed transaction between MPLC and MLTD. In terms of the proposed transaction MPLC would acquire the entire issued share capital of MLTD and, through that, acquire direct control over MLTD. He mentions that he is advised that such control is a form of control contemplated in section 12(2)(a) of the Act. Therefore, the proposed transaction is a notifiable merger.

[61] Mr Maphwanya states that the merging parties contend that the proposed transaction is not a merger in terms of section 12(1)(a) of the Act as MPLC and MLTD are a "*single economic enterprise*". Therefore, no change of effective

[22] Clause 9 of the DCL Structure Sharing Agreement specifically envisages that the agreement will terminate on written notice by one party on the other at any time after either party becomes a subsidiary of the other.

control takes place as the ultimate shareholders of MLTD and MPLC will remain the same post-merger with the same directors managing the business post-merger.

[62] Mr Maphwanya notes that such a concept is not expressly recognised in the Act. However, section 4(5)(b), that applies to restrictive practices, mentions the concept of a single economic entity. This section reads as follows:

> *4(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by—*
>
> *(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or*
>
> *(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).*

[63] It would appear, therefore, that Mr Maphwanya suggests that in South African law a single economic entity can only consist of a company and its various subsidiaries. We mention here that according to Whish, the single economic entity doctrine is undoubtedly part of EU competition law.[23] However, the doctrine applies to parent companies and their subsidiaries. Crucially, according to Whish, is whether the parent exercises decisive influence over its subsidiary.[24] Whish adds that the fact that a parent owns all the shares in the subsidiary means that it has the ability to exert decisive influence and creates a rebuttable presumption that such influence was actually exercised.[25]

[64] It would appear that for the purposes of mergers the concept of a single economic entity finds only limited application in South African competition law.

[65] The argument advanced by Mr Wilson on behalf of the Applicants that the complex arrangements were put in place as part of the general arrangements

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[23] Whish R & Bailey D *Competition Law* 9th ed (Oxford University Press) 2018 p502.
[24] Ibid.
[25] Ibid.

relating to the two companies being in a single economic unit cannot be accepted, for this reason.

[66] Mr Maphwanya also points out that the merging parties have confirmed that no single shareholder controls MLTD or MPLC. By extension, he says, MPLC does not control MLTD and vice versa. Similarly, no single director controls the respective boards of MPLC and MLTD. For those reasons, he submits that there is no single mind controlling both MLTD and MPLC together as a single economic entity.

[67] Mr Maphwanya also argues that the fact that the directors of the two boards have to take into account the interests of the shareholders of both companies is insufficient to render the merging parties a single economic entity as this would not render the various directors a single controlling mind. Similarly, he says, the reference to the merging parties as a single unified entity in the annexures to the Founding Affidavit does not transmute the merging parties into a single economic entity by agreement when there is no single controlling mind. For these reasons, he submits that MLTD and MPLC are separate firms and the proposed transaction will constitute a merger as MPLC will acquire direct control over MLTD.

[68] Furthermore, in relation to potential public interest concerns resulting from the proposed transaction, the Commission argued that the merging parties have indicated that the South African operations are not as profitable as the non South African operations have proven to be, and, therefore in a sense the South African operations are becoming a burden when it comes to distributing the largesse at the end of the day. The Commission therefore was of the view that the proposed restructuring could affect the public interest in South Africa.

[69] Mondi, in its heads of argument (HOA) notes that the facts of the matter are almost entirely common cause, but with one notable disagreement. The Commission denies that the proposed simplification will result in Mondi's shareholders having the same effective voting interests as they currently do. Mondi suggests that that denial is based on a "misunderstanding".

[70] Pertinent to the issues in this matter is *Distillers Corporation (SA) Ltd v Bulmer (SA) Pty Ltd*[26] which we consider herein.

[71] The First and second appellants in *Bulmer* entered into an agreement in terms of which the first appellant would acquire, subject to shareholder approval, the assets and liabilities of the second appellant for an amount of R515 157 950, 31 in the form of 55 580 000 ordinary shares in the share capital of the first appellant.

[72] The shares in each of the first and second appellant are listed on the JSE. The shares in each were owned as follows:

72.1 60% by Rembrandt- KWV Investments Ltd ("Rem-KWV");
72.2 30% by SAB;
72.3 10% by the general public.

[73] In other words, the shareholdings in the first appellant mirrored precisely the shareholdings in the second applicant, with the obvious result that the shareholders who owned the first appellant also owned the second appellant in the same proportions.

[74] In terms of a voting pool arrangement, though, Rembrandt, SAB and KWV exercised control over the appellants.

[75] The Competition Commission took the view that the proposed transaction did not constitute a merger. That view was disputed by two competitors which approached the Competition Tribunal which ruled that the transaction constituted a notifiable merger. It was this ruling of the Tribunal which was appealed.

[26] [2002] CPLR 36 (CAC) ('Bulmer').

[76] The CAC, in its judgement, provides very useful guidance as to the approach to be adopted to sections 12 and 13. Whilst the judgement applied to these two sections (12 and 13) prior to the amendments contained in the Competition Second Amendment Act, 39 of 2000, the principles remain the same.

[77] With reference to sections 12, 13 and 16 of the Act, the CAC stated that those (sections) provide a clear indication of the purpose of Chapter 3 (which deals with merger control) which is to ensure that all transactions which are likely to substantially or lessen competition should be carefully examined by the competition authorities. Significantly, in our view, the CAC underscored that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to determine whether competition was impaired and this favours a broad interpretation of section 12. The CAC roundly rejected the contention by the appellants that the definition of a merger must be narrowly defined so that the direct or indirect acquisition or direct or indirect establishment of control must mean ultimate control. Unless ultimate control changes, according to the appellants' argument, the transaction falls outside the scope of section 12 and section 13 would not apply. The CAC noted that section 12(1) does not expressly exclude transactions between a company and its wholly owned subsidiary from the definition of a merger and that the wording of section 12(2)[27] includes a situation where more than one party simultaneously exercises control over a company.

[78] According to the CAC, for the purpose of merger control, a wide definition of control is envisaged to allow the competition authorities to examine a wide range of transactions which could result in an alteration of the market structure and lead to a reduction of competition in the relevant market. What is, perhaps, relevant for the purposes of this matter is that the CAC observed that the facts in the case illustrate the importance of such a conclusion to the purpose of the Act in general and chapter 3 in particular. Prior to the proposed merger, appellants were separately listed on the JSE. They were separately legal structures, controlled by different boards of directors and had totally different

[27] Section 12(2) is identical to the provisions of the current section 12(2).

operating structures. It also mused that at best for the appellants case, prior to the transaction, the shareholders of the appellants might have exercised indirect control over the assets of the two companies. The effect of the transaction was that the first appellant acquired direct control over the assets of the second appellant and that two distinct businesses would effectively be merged into one. Thus, the acquisition of the assets by first appellant would bring about the acquisition of control as between first and second appellants, irrespective of what effect the transaction itself might have on the ultimate control that the shareholders of the two appellants exercised.

[79] For this reason, the transaction falls within the meaning of section 12(1) in that there was an acquisition of control pursuant to a transaction by which first appellant acquired the assets of the second appellant. Accordingly, the appellants were required to provide notification in terms of section 13 of the Act.

[80] *Bulmer* has not yet been overturned and remains authority for the proposition that when the shareholders who own two different companies decide to acquire one of those companies in order to streamline the business operations of the two, then that transaction must be notified in terms of the Act.

[81] MPLC will, in terms of the proposed simplification, hold all the existing shares in MLTD and each MLTD shareholder will receive one new MPLC share in exchange for each MLTD share held by them prior to the simplification. As a result of this, MLTD will become a wholly owned subsidiary of MPLC.[28] In other words, on implementation of the proposed transaction MLTD will cease to exist as a South African entity and will be wholly controlled by MPLC.

[82] The Applicants have placed a great deal of reliance on *Hosken Consolidated Investments Ltd ("HCI") and Another vs Competition Commission*[29] and *Competition Commission of South Africa vs Hosken Consolidated Investments Limited and Another*.[30] In these cases the CAC and the Constitutional Court

[28] Founding Affidavit para 12.
[29] 2018 (4) SA 248 (CAC) ('Hosken CAC').
[30] [2019] ZACC 2 ('Hosken CC').

rejected the Competition Commission's contention that the transaction which formed the basis of both actions constituted a notifiable merger because, amongst other reasons, it resulted in Tsogo, a HCI subsidiary, acquiring control over Niveus, another HCI subsidiary.

[83] HCI which had a 47,61 per cent shareholding in Tsogo was in fact already the *de facto* sole controller of Tsogo. The proposed transaction in that case would have conferred *de jure* control on HCI. The earlier merger had already been approved by the competition authorities which were informed that ultimately HCI intended to acquire sole control over Tsogo.

[84] HCI is clearly distinguishable from the present case. No prior merger is involved and MPLC has neither *de facto* not *de jure* control over MLTD. The fact that the shareholders in both MPLC and MLTD are the same is of no consequence. The two are separate legal entities with their own primary listings on the LSE and the JSE respectively.

[85] If the proposed simplification does go ahead, MLTD will become a subsidiary of MPLC which will exercise sole control over MLTD in circumstances where MLTD is not currently controlled by another firm including MPLC. For this reason, the proposed simplification constitutes a notifiable merger in terms of section 12(1)(a) of the Act.

[86] The above conclusion on a change of control and the notifiability of the proposed transaction is consistent with the CAC's guidance in *Bulmer* that "*the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions* ...".[31] The factors to be considered by the competition authorities include the effects of the proposed transaction on both competition and the public interest. In this case MLTD is a South African entity which owns its assets located in South Africa and the other assets held by it in other African countries. After the implementation of the proposed transaction MLTD will however become a

[31] Bulmer (note 26 above) p26.

subsidiary of MPLC. The merged entity's incentives regarding public interest considerations in South Africa may therefore change.

[87] From the Commission's applications to extend its investigation period in this matter we know that the former Minister of Economic Affairs and now Minister of Trade and Industry have raised a number of public interest concerns in relation to the proposed transaction. Furthermore, the merging parties have tendered certain proposed remedies to address the Minister's public interest concerns. It would therefore seem that this is a transaction that the competition authorities potentially should examine from a public interest perspective in terms of section 12A(3) of the Act.

[88] It is for the above reasons which we issued our order on 27 May 2019 as per the order attached as "Annexure A".

09 July 2019

Mr Enver Daniels **Date**

Mrs Medi Mokuena and Mr Andreas Wessels concurring.

Tribunal Case Manager	:	Busisiwe Masina
For the 1st and 2nd Applicant	:	Adv. Jerome Wilson SC *instructed by* Daryl Dingley *of* Webber Wentzel
For the Respondent	:	Layne Quilliam *on behalf of* the Competition Commission
For The Minister of Economic Development (the intervening party)	:	Adv. Hamilton Manaetjie SC *instructed by* Tebogo Malatji *of* Malatji Kanyane.

"ANNEXURE A"

competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM247Jan19/Jur262Feb19

In the matter between:

Mondi Limited	**First Applicant**
Mondi PLC	**Second Applicant**
And	
Competition Commission	**Respondent**

Panel	:	Enver Daniels (Presiding Member)
	:	Medi Mokuena (Tribunal Member)
	:	AW Wessels (Tribunal Member)
Heard on	:	03 and13 May 2019
Decided on	:	27 May 2019

ORDER

Having heard the parties, it is ordered that:

The Applicants' application to:

1. set aside the opinion of the Respondent, taken on 21 February 2019, that the restructuring of the Applicants' business (**"the proposed simplification"**), is a merger as defined in section 12 of the Competition Act, 89 of 1998 that falls within the jurisdiction of the Act; and

2. declare that the proposed simplification is not a merger as defined in terms of section 12 of the Act that falls within the jurisdiction of the Act;

3. order the respondent to:
   (a) refund the filing fee paid in respect of the proposed simplification to the first applicant; and
   (b) return the Merger Notice in respect of the proposed simplification to the

applicants,

is dismissed with no order as to costs.

The reasons for decision will be issued in due course.

Presiding Member
Mr. Enver Daniels

27 May 2019
Date

Concurring: Mrs M Mokuena and Mr AW Wessels