IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CT CASE NO: 78/LM/Aug05

In the matter between:

JOHNNIC HOLDINGS LIMITED	First Applicant
MERCANTO INVESTMENT (PROPRIETARY) LIMITED	Second Applicant

and

THE COMPETITION TRIBUNAL	First Respondent
THE COMPETITION COMMISSION	Second Respondent
RUPERT SMITH, N.O	Third Respondent

In re: The large merger between:

MERCANTO INVESTMENTS (PROPRIETARY) LIMITED

and

JOHNNIC HOLDINGS LIMITED

JUDGMENT

MAILULA, JA:

1. The present application relates to the implementation of the order granted by the first respondent, the Competition Tribunal, on 7 December 2005, in the large merger proceedings between the applicants, Johnnic Holdings Limited and Mercanto Investments (Proprietary) Limited, under case No. 78/LM/ Aug05. The applicants seek to review and set aside the second respondent's, the Competition Commission's refusal to approve the merger parties' divestiture proposal pursuant to the Competition Tribunal order, and seek an order remitting the matter to the Competition Commission for further consideration.

The Parties

2. At the hearing of this matter on 30 November 2007, this Court granted an order a copy of which is hereto attached marked "ANNEXURE A". The reasons now follow.

3. The first applicant is Johnnic Holdings Investment Limited ("Johnnic"), a company duly incorporated in accordance with the company laws of South Africa, with its principal place of business at Suite 624, 6th floor, Office Towers, Overport City, 430 Ridge Road, Durban.

4. The second applicant is Mercanto Investments (Proprietary) Limited ("Mercanto"), a company duly incorporated in accordance with the company laws of South Africa, with its principal place of place of business at Suite 624, 6th Floor, Office Towers, Overport City, 430 Ridge Road, Durban. Mercanto is a wholly owned subsidiary of Horsken Consolidated Investments Limited ("HCI").

5. The first respondent is the Competition Tribunal ("the Tribunal"), duly established

and constituted in terms of section 26 of the Competition Act No 89 of 1998, which conducts its administrative functions at the DTI Campus, Mulayo (Block C), 77 Esselen Street, Sunnyside, Pretoria.

6. The second respondent is The Competition Commission ("the Commission"), duly established in terms of section 19 of the Competition Act No 89 of 1998, which conducts its functions at the DTI Campus, Mulayo (Block C), 77 Esselen Street, Sunnyside, Pretoria.

7. The third respondent is Rupert Smith N.O, an adult male attorney practising at 73 Tyrwhitt Avenue, Birdhaven, Johannesburg. The third respondent was appointed as a trustee pursuant to the Tribunal order referred to above and to which this application relates. He is cited in his capacity as such and I shall hereinafter refer to him as "the Trustee".

Background

8. On 7 December 2005 the Tribunal approved the merger between Mercanto and Johnnic subject to the divestiture condition. Paragraph 2 of the order reads:

"2. DIVESTED BUSINESS

2.1 The merging parties merging shall divest the following business:

2.1.1 the business of the Gallagher Estate Exhibition and Convention Centre as a going concern; and/or

2.1.2 the entire shareholding of Johnnic in Gallagher Estate Holdings Limited."

9. In terms of the order the divestiture was to be implemented within 12 (twelve) months of the date of the order or within such further period as the Tribunal may approve. Further, the order provided for the appointment of an independent trustee to monitor and execute the order. In the event the applicants were unable to transfer legal title of the divested business within 12 (twelve) months of the date of the order

or within such extended period as the Tribunal may direct, the Trustee would have an exclusive mandate and power of attorney to sell the divested business within a period of 3 (three) months, at no minimum price.

10. The Tribunal directed the Commission to monitor and pre-approve the divestiture proposal by the parties to the merger. It is stipulated in paragraph 7 of the order that:

> *"7.1 When the merging parties have reached an agreement with a proposed purchaser [of the divested business] it will submit to the trustee and the Commission a fully documented and reasoned proposal enabling the Commission to:*
>
> *7.1.1. Verify in consultation with the trustee that the proposed purchaser is a suitable purchaser of the divested business.*
> *7.1.2. Grant any approvals require under these commitments with respect to any ancillary arrangements.*
> *7.2. ….*
> *7.3. The Commission will approve or reject the merging parties' proposal in writing. The approval of the proposal shall not be unreasonably withheld.*
> *7.4. …."*

The Applicants' Case

11. The applicants opted to dispose of the business and not of Johnnic's entire shareholding in Gallagher Estate Holdings Limited. The reasons advanced are that Gallagher Estate Holdings Limited is a trading company that owns numerous subsidiaries with a complex suite of assets and liabilities, including properties elsewhere in the country, and that it was in the circumstances not commercially feasible to dispose of Johnnic's shareholding therein, given the limited time period stipulated for the disposal in terms of the Tribunal order. Further, that there would be significant tax implications in dismantling the structure.

12. The applicants did not manage to dispose of the business and to fulfil the divestiture condition within the stipulated 12 (twelve) month period. On 14 November 2006, they applied to the Tribunal for an extension of time (for divestiture) as contemplated in terms of the order. This application for the extension of the time period was heard on 28 November 2006. The Tribunal subsequently granted a 3 (three) month extension period (which expired on 8 March 2007).

13. After securing a purchaser for the business and pursuant to the Tribunal order, the applicants submitted a divestiture proposal to the Commission for approval.

13.1 Initially the applicants approached the Commission on an informal basis. A meeting was held between the applicants' legal representatives and the Commission on 26 January 2007, where the divestiture proposal was discussed. The applicants proposed to dispose of the business by selling the business to the proposed purchaser for a nominal consideration and to enter into a five year renewable lease agreement with the purchaser in respect of the property from which the business is run. The existing Gallagher Estate Exhibition and Convention Centre management and employees were to be transferred with the business and Johnnic undertook not to re-enter the Exhibition and Convention Centre business. They further explained that the proposed purchaser is independent of the merger parties (the applicants) and that the purchaser would be well placed to operate a viable business. The applicants undertook to provide the Commission with a fully documented and reasoned proposal in due course and requested "initial clearance to proceed with [the] formal proposal".

13.2 According to the applicants the proposed divestiture is structured as the purchase of the business and a lease in respect of the premises from which the business operates because the property from which the business is operated (i.e. the Gallagher Estate Exhibition and Convention Centre) is located on the same property as the Pan-African Parliament Precinct, which is described as a multi-tenanted office building and approximately 16

hectares of vacant land. They state in the founding affidavit that It is at this stage not possible for the property on which the business is situated to be carved out for sale separately from the remainder of the property. Further, that numerous subdivision applications have been submitted in respect of the Gallagher land (in order to make the sale of different parts of the property feasible) but that these will only be finalised in approximately 30 months.

13.3 The Commission responded on 7 February 2007, expressing the view that the informal proposal was inadequate and would not comply with the Tribunal order. The Commission stated that the informal proposal was not acceptable for the following reasons:

> *"i. It is apparent from a perusal of the Tribunal's reasons and the evidence led during the proceedings that in the exhibition business, the venue is the business….. Perhaps more telling is the offer made by the acquiring firm to the Tribunal as recorded in paragraph 51 of the reasons '**HCI undertook to divest of all its interest in Gallagher Estate Exhibition Centre if the merger was approved'**….*
> *ii. It is evident from a perusal of the reasons for the decision that what was contemplated by the parties and the Tribunal was the divestment by the merged entity of Johnnic's interest in Gallagher Estates. Accordingly, it is our view that a sale of the business of Gallagher Estates must of necessity entail the sale of the venue itself i. e. the property. In this regard, the proposed lease agreement does not constitute a divestiture as the merged entity will retain a significant and material interest in the business of Gallagher Estate. …[and the merged entity] would … have sight of the tenant's management accounts. The added complication to this proposed lease is that the merged entity, as a competitor of the proposed tenants of Gallagher Estates, will be in the position of being able to dictate the largest portion of the lessee's fixed costs, namely the rental. …. We point out in this regard that it is our view that the rentals are pegged too high as variable*

costs have not yet been taken into account. This is likely to have an impact on the ability of the business to compete effectively in the exhibition market.

In conclusion, we advise that, in our view, full compliance with the Tribunal's order requires a complete divestiture of Johnnic's interest in the exhibition and conferencing business of Gallagher Estates, which business comprises the venue as well as all assets and customers."

14. Subsequent thereto the applicants submitted a formal proposal to the Commission on 22 February 2007. On 2 March 2007 additional information relating to the divestiture proposal, including signed copies of the Sale of Business Agreement and the Lease and Option Agreement were submitted to the Commission. The formal divestiture proposal is, in brief, structured as follows:

a) the business would be disposed of by means of an ordinary sale of business agreement for a consideration equal to the stock on hand as at the effective date;

b) both Johnnic and the seller, GE Property and Marketing (Pty) Ltd (a wholly owned subsidiary of Gallagher Estate Holdings which is, in turn, a wholly owned subsidiary of Johnnic, which conducts the Gallagher Estate Exhibition and Conference Centre) gave an undertaking that they will not directly or indirectly carry on or be interested or concerned in the business of conducting a conference and exhibition business in competition with the divested business within a radius of 3 km from Gallagher Estate for as long as HCI is a major shareholder in Johnnic and directly or indirectly holds an interest in Sandton Convention Centre, or for a period of 3 (three) years from the effective date, whichever occurs first;

c) the lease agreement would be entered into for a period of at least 5 (five) years. (The applicants maintain that this arrangement is

due to the fact that the property from which the business is operated is purpose built and cannot at this stage be sub-divided);

d) the lease is renewable at the end of the term. It further provides for cancellation of the agreement under certain circumstances, and in particular, in the event of a breach of the provisions thereof by the lessee;

e) the purchaser is accorded the right and option to purchase, upon subdivision and rezoning of the Gallagher property (the applicants gave an undertaking to submit a progress report on the subdivision process to the Commission twice a year until that process is finalised);

f) the lease agreement would be administered by an independent leasing agent (apparently to assure the Commission that they would not have insight into the lessee's business, including its management accounts);

g) the applicants advised that the purchaser would have the necessary resources to maintain the divested business as a viable and active competitor to the applicants' business i.e, the Sandton Convention Centre.

15. The applicants also submitted to the Commission that the proposal, in their view, complies with the Tribunal order and that, with regard to the interpretation of the divestiture condition, the Commission ought not to have recourse to extrinsic evidence nor the Tribunal's reasons as the Tribunal order was clear and unambiguous. The applicants' contention is that the order does not require the divestiture of the property.

16. The Commission, in its letter dated 7 March 2007 rejected the formal divestiture proposal as not being in compliance with the Tribunal order mainly

because "*the sale of the business of Gallagher Estates must of necessity entail the sale of the venue itself, i.e. the property. …, the proposed lease agreement does not constitute a divestiture."* In addition the Commission indicated the following:

16.1 that the cancellation clause that Johnnic could invoke upon breach of the lease conditions by the lessee would result in the lessee having to vacate the premises and not being able to conduct its business. Accordingly, it was unable to conclude that the purchaser would be able to comply with paragraph 6.5 of the Tribunal order, which stipulates that the merging parties (the applicants) need to maintain the structural effect of the order and not directly or indirectly re-acquire influence over the whole or part of the divested business; and

16.2 that it was not clear from the formal divestiture proposal whether the proposed purchaser is totally independent of the merging parties, and that the said purchaser will possess the financial resources, proven expertise and incentive to maintain the divested business as a viable competitor in competition not only with the merger parties but other competitors as well, as stipulated in clause 6.2 of the Tribunal order. It (the Commission) also pointed out that the verifying affidavits pursuant to paragraph 6.4 of the Tribunal order were outstanding.

17. With regard to the latter concern the Commission was subsequently provided with affidavits deposed to by the representatives of the proposed purchaser wherein they confirmed that:

17.1 the proposed purchaser is independent and not related to the merger parties or any directly or indirectly affiliate member of the merger parties' corporate group;

17.2 the proposed purchaser will possess the financial resources, proven expertise and the incentive to maintain Gallagher Estate as a viable and active competitive force in competition with the merger parties or any directly

or indirectly affiliated member of the merger parties' corporate group and other competitors; and

17.3 the information contained in the divestiture proposal submitted to the Trustee and the Commission, on 22 February 2007 and 2 March 2007, is both accurate and correct. (The qualifications and business experience of the representatives of the proposed purchaser were set out in their respective curriculum vitae and furnished to the Commission together with the formal proposal).

18. In view of the Commission's refusal to approve the divestiture proposal the Trustee's divestiture period would become operative as and when the merger parties' divestiture period lapses on or about 8 March 2007. He has the exclusive mandate to sell the business at no minimum price within a period of 3 (three) months.

19. Following the Commission's decision to reject the divestiture proposal the applicants brought this application for the review of the said decision under the provisions of section 6(2) or the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") as well as on constitutional and common law grounds. The grounds for review relate to the issues of legality, irretionality and procedural fairness and may be summarised as follows:

19.1 the decision was not taken by the Commission;

19.2 the Commission misinterpreted the Tribunal's divestiture condition and that in the circumstances the Commission's decision is therefore vitiated by a material error of law and is *ultra vires* the order;

19.3 the Commission took irrelevant extrinsic evidence into account in interpreting the divestiture condition;

19.4 the Commission failed to adequately consult with the Trustee as required by the Tribunal order, alternatively, failed to have proper regard for the views of the Trustee, regarding the suitability of the proposed purchaser of the business in terms of the divestiture proposal;

19.5 the Commission exceeded its powers under the Tribunal order in that it did not confine itself to assessing whether the proposed purchaser was a suitable purchaser of the business. The Commission's decision was therefore *ultra vires*;

19.6 the Commission did not take relevant considerations into account in making its decision;

19.7 the Commission's decision was irrational or unreasonable;

19.8 the Commission's decision was taken in a manner that was procedurally unfair. And

19.9 The reasons furnished by the Commission for its decision are at odds with the record.

The Commission's Case.

20. The Commission (the second respondent) is the only party that opposes this application. In its answering affidavit, it takes a ***point** in limine*, that this Court does not have the requisite jurisdiction to hear this matter. Reliance is placed on the provisions of section 27 of the Competition Act No 89 of 1998 (" the Act") which deals with the functions of the Tribunal and section 37 which deals with the functions of the Competition Appeal Court and provides for the review of the Commission's decision by the Tribunal and, in turn, the Tribunal's decision by this Court.

21. The Commission states further that at the hearing of the merger proceedings before the Tribunal, there were competition concerns raised in relation to the exhibition market. In a bid to address those concerns Mercanto undertook to cause Johnnic to depose of the Gallagher Estate Exhibition and Conference Centre and/or its (Johnic's) entire shareholding in Gallagher Estate Holding Ltd within a specified period. The divestiture condition in the circumstances was intended by the Tribunal to give effect to the Mercanto's undertaking. The proposal was in its view at variance with the undertaking and the consequent divestiture condition.

22. The Commission concedes that it did not consult with the Trustee to verify if the proposed purchaser was a suitable purchaser as envisaged in paragraph 7.1.1 of the Tribunal order. It avers however, that it was impossible to do so as the information required for that purpose, had, at the crucial stage, not been placed before it. The relevant affidavits on the suitability of the proposed purchaser only became available on or about 14 March 2007.

23. It denies that its power to approve the merger was, in terms of the Tribunal order, limited to assessing the suitability of the proposed purchaser.

24. The Commission denies that it took irrelevant extrinsic evidence into account in interpreting the divestiture condition. In its view it is proper to take into account both the evidence led at the Tribunal proceedings as well as the reasons for the Tribunal's decision as the intention of the Tribunal to impose the divestiture condition is explained in its reasons, which reasons are, in turn, informed by the evidence. The undertaking given was part of what informed the Tribunal to impose the divestiture condition and therefore had to be taken into account.

25. According to the Commission if regard is had to the undertaking given by Mercanto at the hearing before the Tribunal, the sale of the business must also include the sale of the property from which the business is conducted.

Otherwise, that would detract from the Tribunal order and would fail to ensure the structural separation envisaged by the Tribunal.

26. The Commission denies that the decision was taken in a procedurally unfair manner. The formal proposal was submitted late in the day, 22 February 2007 and supplemented on 2 March 2007, and the Commission had to make a decision sooner. There wasn't sufficient time as the extended divestiture period was due to expire on 8 March 2007.

27. With regard to the complaint that the decision was not taken by the Commission, its response thereto is that, the Commission met on 6 February 2007 to discuss the divestiture proposal. At the conclusion of the discussions it came to a conclusion that the proposal did not comply with the Tribunal order. This was subsequently communicated to the applicants. The formal proposal was in substance not different from the initial proposal, save for more detail added, consequently that "at its meeting of 7 March 2007, the executive committee of the Commission, after having considered the divestiture proposal aforesaid, endorsed the decision which was taken by a properly constituted meeting of the Commission that had considered and had taken a decision regarding the divestiture proposal".

28. It further denies that the Commission's decision is at odds with the record. It explains that the reason for the refusal to approve the divestiture proposal is that the said proposal does not properly address the structural separation envisaged by the Tribunal in its order. Further, that what appears in paragraphs 16.1 and 16.2, above, i.e., the cancellation clause in the proposed lease agreement and the independence of as well as the proposed purchaser's ability to compete in the relevant market, respectively, were merely observations (and not reasons for rejecting the divestiture proposal). The Commission remarks that it was not in a position to remark on the suitability of the proposed purchaser as no such information was forthcoming.

The Applicant's Reply.

29. The applicant's response to the point in limine may be summed up as follows:

29.1 that in terms of section 62(1) of the Act the Tribunal and the Competition Appeal Court share jurisdiction in some respects and that it does not necessary follow that this Court is deprived of jurisdiction in instances where the Tribunal is cloaked with same.

29.2 that the decision by the Commission amounts to an administrative action, the grounds for review of such action under section 6 of PAJA are applicable in the present case.

29.3 further, that upon the reading of sections 33 and 166 of the Constitution read with section 36(1)(a), 62(2) and 27(1) of the Competition Act this court is cloaked with the necessary jurisdiction to entertain this application.

Save as aforesaid, the applicants persist in the application.

The Point in Limine

30. At the hearing of the matter, Counsel for the Commission argued, that this Court is not possessed of the requisite jurisdiction to hear this form of review application as a court of first instance and that it is a matter that should have properly been brought before the Tribunal. He submitted, that while the application relates to the implementation of the order that was granted by the Tribunal on 7 December 2005, under case number 78/LM/Aug05, the decision that is sought to be reviewed and set aside, is a decision of the Commission (the second respondent herein), refusing to approve the divestiture proposal in respect of the sale of the business of the Gallagher Estate Exhibition and Conference Centre, submitted by the applicants to the Commission on 22 February 2007, and supplemented on 2 March 2007.

31. In support of this submission Counsel relied on the following authorities:

a) Section 26 of the Act. It provides for the establishment and constitution of the Competition Tribunal.

b) Section 27 of the Act which provides for the powers and functions of the Competition Tribunal. Section 27(1)(c) provides that the Tribunal shall hear appeals from, or review of any decision of, the Competition Commission that may, in terms of this Act, be referred to it.

c) Rule 42 of the Rules for the Conduct of Proceedings in the Competition Tribunal (hereinafter referred to as "the Tribunal Rules"), which regulates the procedure with regard to reviews:

d) He submitted that, from a reading of both section 27 of the Act and Rule 42 of the Tribunal Rules, there can be no doubt that the Tribunal is an adjudicative body of first instance not only in relation to complaints regarding prohibited practices as well as in relation to requests for the approval of large mergers, but also has what is essentially an appeal and review functions in relation to decision of the Commission regarding other matters. The review of any reviewable decisions of the Commission therefore lies only with the Tribunal and that a decision of the Tribunal may be taken on appeal or review to the Competition Appeal Court.

e) In terms of section 166 of the Constitution, the judicial system comprises of a number of courts, including "any other court established or recognised in terms of an Act of Parliament, including, any court of a status similar to either the High Courts …." The Competition Appeal Court is a court contemplated in section 166(e) of the Constitution. As a creature of statute it derives its jurisdiction, functions and powers from the Act.

f) Section 36 of the Act provides for the establishment and constitution of the Competition Appeal Court. It specifically provides that the Competition Appeal Court is a court contemplated in section 166(e) of the Constitution with a status similar to that of a High Court. It has jurisdiction throughout the Republic.

g) Further, the Competition Appeal Court's functions are provided for in section 37 of the Competition Act, 1998. It may -

> *"(a) review any decision of the Competition Tribunal; or*
> *(b) consider an appeal arising from the Competition Tribunal in respect of-*
> *(i) any of its final decisions, other than a consent order made in terms of section 63; or*
> *(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal*

h) From the aforegoing, it is argued that, it is clear that the functions of the Court are restricted under section 37 to hearing appeals and reviews arising from the decisions of the Tribunal subject to what is set out in paragraph 32 and 33 below.

32. Counsel for the applicants submitted, further, that appeals and reviews to the Competition Appeal Court are dealt with in section 61 of the Act which provides:

> *"(1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.*

He argued that this section (section 61), confirms that this Court's review jurisdiction is confined to the review of decisions taken by the Tribunal and that its review powers do not extend beyond the powers conferred by section 37 of the Act. Such conclusion, Counsel argued, seems to find support in Rule 23(1) of the Rules of this Court which regulates applications to review a decision of the Tribunal to the Competition Appeal Court.

33. He submitted further that it may be argued that section 62 of the Act, could be construed as widening the scope of this Court as well as the appeal and review jurisdiction, it provides for exclusive jurisdiction in competition matters. It provides:

"62. **Appellate Jurisdiction.**

(1) ….

(2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over-

*(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of **this Act**;*

(b) any constitutional matter arising in terms of this Act;

(c) the question whether a matter falls within the excusive jurisdiction granted under subsection (1).

(3) The jurisdiction of the Competition Appeal Court-

(a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and

(b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).

…"

However, he argued, the jurisdiction has not been extended to cover review

applications of this nature. In support of this submission he strongly relies on the following passages in:

33.1 In **Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another,** 2003(3) SA 64 (SCA), Schultz JA observed with regard to the review of the decision of the Commission:

> *"[2] The reasons why the review application could be brought in the High Court was that at the time of its institution, the Act did not confer review powers on the Tribunal, … Although the Competition Appeal Court (also a creature of the Act) had exclusive appellata and review powers over the Tribunal's decisions (s65(4)), it also did not have review powers in respect of the Commission. Accordingly, the High Court at the time of the institution retained its common–law review jurisdiction."*

33.2 **TWK Agriculture Limited v The Competition Commission and Others,** where Davis JP observed:

> *"[21] Since the decision in **Pharmaceutical Manufacturers of South Africa and Others**: in re: **Ex Parte Application of President of RSA and Others** 2000(3) BCLR 241 (CC) at par 50, it is clear that the source of judicial review is to be found in the Constitution . As Mr Cockrell, who appeared on behalf of first respondent, noted section 33 of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution) reads: "Everyone has the right administrative action that is lawful, reasonable, and procedurally fair."*
>
> *[22] Consequently, the approach contended for by Mr Brassey that acting "within their respective jurisdiction" covers all grounds of review, at the very least, is not supported by PAJA which has*

given legislative form to s33 of the Constitution regarding the source of judicial review. That may not be the end of the applicants' argument, were the wording of the Act to afford clear contrary support.

[23] However, the attempt to locate the source of all review of the Commission's actions within section 62(2) of the Act requires a strained interpretation of this provision. Given that section 27(1)(c) and section 37(1) of the Act which provide for review powers to both the Tribunal and the Court in circumstances where no such review power had existed prior to the 2000 amendment to the Act, it places an anomalous construction on these sections to contend that, when Parliament passed an amending provision to ensure that the Tribunal or this Court had review powers, it sought to do no more than duplicate the very review powers provided for in section 62(2) of the Act. To extent that Mr Brassey contends that s27(1)(c) is of no assistance to respondents because in terms thereof the Tribunal can only review a decision of the Commission 'that may in terms of the Act, be referred to it' and that no such provision exists in the Act for such referral, there are two clear responses to this submission both of which applicant was unable to counter: Firstly, as Mr Rogers submitted, the phrase 'this Act', as it appears in section 27(1)(c), is a defined term which includes the regulations and schedules (section 1(1)(i)). Rule 42(3) of the Tribunal Rules refers to the decision of the Commission that is being appealed or reviewed. This rule clearly envisages the possibility of a review by the Tribunal of the decision of the Commission. Secondly, the linguistic attack on s27 omits to consider the foundational point, being that s27(1)(c) specially employs the term 'review' which would make no sense, were s62 (2) to be interpreted to cover all forms of review, which could conceivably be undertaken by the Tribunal. Why the need for two

sections dealing with the same power?

[24] There is a further problem with the approach contended for by applicants. As Mr Rogers correctly noted, the structure of the Act is designed to ensure that this Court is, as its name suggests, an appeal court. Were Mr Brassey to be correct, this court would be a court of first instance insofar as the review of decisions of the Commission were concerned. It would not have the benefit of the considered decision of a specialist body, being the Tribunal. In this way, applicants' interpretation would undermine the careful construction of the competitions as provided for by the Act.

……

[33] To sum up: for the reasons already advanced in this judgment, this Court is not possessed of the requisite jurisdiction to hear this form of application for review a as court of first instance. This is a matter that should have been brought properly before the tribunal."

as well as, inter alia,

33.3 In **Old Mutual Propriety (Pty) Ltd and Another v Competition Tribunal and Others**, Malan, AJA, as he then was, emphasised the fact that the Competition Appeal Court being a creature of statute derives its jurisdictional powers form the four corners of the statute.

34. From these passages, it was argued that, in terms of the **TWK** judgment this Court is deprived of jurisdiction in the present circumstances.

35.1 In **Simelane and Others NNO v Seven Eleven Corporation**, supra, the court dealt with the review of the decision by the Commission to refer a matter to

the Tribunal (section 50 of the Act). The remarks by Schultz are self explanatory. The key phrase is “at the time of institution”. In that decision the court referred to the period before the amendment of the Act.

35.2 I agree with the submission by Counsel for the applicants that the facts in **TWK** supra are distinguishable from the present matter. In that case the applicants sought the review of the Commission’s decision relating to merger proceedings, a purely competition issue. The applicants relied on section 62 (2) alternatively section 62(1) of the Act. The Court held that it did not have jurisdiction to hear the matter as a court of first instance. In casu, the applicants rely on the provisions of section 62(2)(b). The review sought by the applicants relating to the decision of the Commission is based on constitutional grounds. Section 1(c) of the Constitution entrenches the supremacy of the Constitution and the rule of law, and the right to just administrative action in Section 33 thereof. PAJA is constitutionally mandated legislation contemplated in Section 33(3) of the Constitution. Section 6 of PAJA provides for circumstances under which an administrative action may be subject to review. The present application is not a competition but a constitutional matter.

See: **Hoexter, Administrative Law in South Africa** at 114.

36. It is common cause that the Commission’s decision is an administrative action. The Commission unequivocally concedes this point. Accordingly, as Navsa JA, observed in Z **Sidumo and Another v Rustenburg Platinum Mines Ltd and 2 Others** case No. CCT 85/06 [2007] ZACC 22.

> *“[80] The Supreme Court of Appeal found that PAJA applies. It took the view that because PAJA was the national legislation passed to give effect to the constitutional right to just administrative action, was required to “cover the field” and purported to do so, it applied to awards by commissioners. In this regard it relied on decisions of this Court in* ***New Clicks*** *and* ***Bato Star****. It did not examine the nature of a*

commissioner's function by reference to section 33 of the Constitution, nor did it explore whether PAJA provided an exclusive statutory basis for the review of all administrative decisions.(footnote ommited).

[81] In ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others****, the following appears:*
"In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matter is not so much the functionary as the function. The question is whether the task itself is administrative or not.
…

[89] Section 33(3) of the Constitution provides that national legislature must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. ….

[91] Nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA. Of course, any legislation giving effect to section 33 must comply with its prescripts.

[92] In ***Bato Star*** *the following appears:*
"The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. ***It is not necessary to consider here causes of action for judicial review of administrative action that do***

not fall within the scope of PAJA*. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.(emphasis added) (footnote omitted)*

PAJA is a codification of the common law grounds of review. It is apparent, though, that it is not regarded as the exclusive legislative basis of review."

The Merits

37. The decision was not taken by the Commission.

37.1 This Court is empowered by the provisions of section 62(2) (b) of the Act to hear applications of this nature as a court of first instance. It confers jurisdiction in respect of "any constitutional matter arising in terms of the Act".

37.2 Section 6 of PAJA provides that an aggrieved party "may institute proceedings in a court or a tribunal for the judicial review of an administrative action". The words "court" and "tribunal" are both defined in PAJA. Neither definition includes the Competition Tribunal. The definition of "court" includes "a High Court or another court of similar status". As stated hereinbefore, this Court is of similar status as a High Court. It therefore follows that this court, and not the Tribunal, is cloaked with the requisite jurisdiction.

38. One of the grounds upon which the applicants challenge the Commission's decision not to approve of the divestiture proposal is that the decision has been taken by a body which is not competent to do so. It is only the Commission which could take such decision in terms of the Tribunal order.

39. Section 19(2) of the Act provides that "the Competition Commission consists of the Commissioner and one or more Deputy Commissioners". It follows that it is the

Commission (consisting of the Commissioner and one or more Deputy Commissioners) that was required to take the decision in terms of paragraph 7.3 of the Tribunal order. From the answering affidavit, as well as the Record of Decision there is nothing to indicate that the Commission (i.e. the Commissioner and one or more Deputy Commissioners) took the impugned decision. On the contrary, the record of decision makes it clear that the impugned decision was made by Exco on 6 March 2007. The Commissioner was not present at this Exco meeting. Exco is not a body that is established in terms of the Act.

40. Further, there is nothing in the record of the decision to indicate that the Commission had delegated the relevant decision-making power to Exco. The Commission's answering affidavit admits that the impugned decision was made by Exco and not by the Commission. It avers, however , that the informal divestiture proposal had been considered by the Commission at a meeting held on 6 February 2007, and that the Exco decision of 7 March 2007 merely "endorsed" the decision of 6 February 2007.

41. I agree with Counsel for the applicants that this explanation cannot be accepted for the following reasons:

41.1 The meeting of 6 February 2007 was not a meeting of the Commission. The minute describes it in express terms as a meeting of Exco.

41.2 The answering affidavit states that "the Commission, as defined in the Act, was present at the first meeting held on 6 February 2007". It is not apparent from the minute whether at least one Deputy Commissioner was present at the Exco meeting of 6 February 2007. But even if a Deputy Commissioner was present, this would not serve to convert a meeting of Exco into a meeting of the Commission.

42.1 Further, counsel for the applicants submitted that the Commission is wrong when it avers that "the decision made on the 7 March 2007, does not

differ to that of the 7 February 2007, since the proposal itself did not change significantly in nature". The formal divestiture proposal differed in fundamental respects from the informal divestiture proposal. He pointed out the following:

a) the purchase price is stipulated.

b) the merged entity will not have any insight into the business of the tenant. It has no access to the management accounts, financial or other information of the lessee. An independent leasing agent will be appointed to ensure that the lessor does not exercise ant oversight in respect of the lessee;

c) the purchaser will have an option to purchase the Gallagher Estate Exhibition and Conference Centre premises as soon as the re-zoning and subdivision has occurred; and

d) the sale of Business Agreement contains a restraint of trade clause.

42.2 These seems to me to be differences of substance. Even accepting that the two proposals did not materially differ, nowhere in the minute does Exco intimate it is endorsing a previous decision. To the contrary it (Exco) makes a finding. It in any event has no powers in law to endorse a decision by the Commission.

43. In my view the submission by counsel for the applicants that the administrator who purported to take that decision (Exco) was not authorised to do so by the empowering provision (within the meaning of section 6(2)(a)(i) of PAJA) is valid. Consequently the decision ought to be set aside on this ground.

44. The Commission did not consult with the Trustee.

44.1 Paragraph 7.1.1 of the order stipulates that the Commission must verify "in consultation with the Trustee" that the proposed purchaser is a suitable purchaser.

44.2 The purchaser of the divested business must be independent and not related to the merger parties (para 6.1 of the order) and must possess "*the financial resources, proven expertise and the incentive to maintain the divested business as a viable and active competitive force in competition within the [merger] parties or any directly or indirectly affiliated member of the [merger] parties' corporate group and other competitors"* (para 6.2 of the order).

44.3 Paragraph 6.5 states as follows: *"[in] order to maintain the structural effect of this order, the [merger] parties or any directly or indirectly affiliated member of their corporate group, will not subsequently directly or indirectly re-acquire influence over the whole or part of the divested business". The order requires that the purchaser be totally independent of the applicants.*

44.4 It is common cause that the impugned decision was not taken in consultation with the Trustee. This is also borne by the record of decision.

44.5 The Commission contends that its failure to consult with the Trustee is irrelevant since the decision that is sought to be reviewed is "the rejection of the divestiture proposal and not the suitability of the purchaser". But this contention is manifestly incorrect. The reasons furnished (which the Commission says it is merely observation) make it plain that the Commission rejected the formal divestiture proposal on the ground that there was insufficient evidence to establish the suitability of the purchaser.

44.6 The Commission further contends that it was impossible to consult with the Trustee as required by paragraph 7.1.1 of the order since the applicants had failed to furnish the relevant information to the Commission.

This contention is also incorrect. The formal divestiture proposal placed some information before the Commission to enable it to assess the independence and the suitability of the proposed purchaser. Whatever the Commission's opinion is, it clearly had to consult with the Trustee.

44.7 Even if the applicants had failed to furnish sufficient information to the Commission, this would not have absolved the Commission from its obligation to consult with the Trustee before taking a decision in terms of paragraph 7.1.1 of the order. The duty to consult with the Trustee is a jurisdictional requirement for the exercise of the Commission's powers under paragraph 7.1.1. Legally, the Commission could not exercise that power unless and until it had consulted with the Trustee. Accordingly the impugned decision ought to be set aside as the mandatory and procedural condition was not compiled with (within the meaning of section 6(2)(b) of PAJA). It was not authorised by the empowering provision within the meaning of section 6(2)(f)(i) of PAJA.

45. *The Commission exceeded its powers*

45.1 Paragraph 7.1 of the order provides that the Commission will have the power to verify that "the proposed purchaser is a suitable purchaser of the divested business"; and "to grant any approval required under these commitments with respect to any ancillary arrangement".

45.2 Counsel for the applicants submitted that the powers to approve with respect to ancillary arrangement is not relevant for the present purposes. The only relevant power vested in the Commission is the power to verify the suitability of the proposed purchaser having regard to the considerations contained in paragraph 6 of the order.

45.3 It seems to me that the Commission has more powers than to merely approve the purchaser. In my view it has to do more than that. It has to

monitor the divestiture as per the Tribunal order. Paragraph 7.3 of the order envisages that the Commission will "approve or reject the merging parties' proposal". In my view this means that the Commission has to monitor the divestiture order and to ensure compliance therewith, including the structural independence. This objective cannot be achieved if the Commission's power is limited to determining the suitability of a purchaser in terms of paragraph 7.1.1. Same is true of the other paragraphs the Commission relies on. Paragraphs 5.1 and 5.9 deal with the appointment of a Trustee subject to the approval by the Commission. The Commission has in terms of clause 5.12 the powers to reject the Trustee. It also has in terms of clause 6.3 to approve of the acquisition of the divested business (which is to be granted to the purchaser). Clause 7 deals with approval of the purchaser and of "any ancillary matter of the commitments under the order". It has to. The mere fact that the applicants approached the Commission for approval of the divestiture proposal is indicative of the appreciative of the Commission's role in policing or monitoring compliance. In my view, this would include any aspect to ensure full and proper compliance with the order.

46.1 It is important to note that the reasons for the Tribunal imposing the divestiture condition were to:

46.1.1 remove any anti-competitive concerns that might exist in relation to the activities of the applicants in the exhibition facilities market (since the merger parties both held interest in the Sandton Convention Centre and Johnnic owned the Gallagher Estate Exhibition and Conference Centre)**.** and

46.1.2 address concerns that the merger entity might amend the terms and conditions of bookings already confirmed at the Gallagher Estate Exhibition and Conference Centre, and/or that a new owner could convert the Gallagher Estate Exhibition and Conference Centre into a non-exhibition venue, leaving the industry with the Sandton

Convention Centre as the only comparable exhibition centre in the region.

In my opinion the Commission would have to look at the proposal as a whole to determine if there is compliance in sense of truly transferring the divested business (as a going concern) to an independent purchaser who is in a position to compete in the conference and exhibition market.

47. The business as a going concern.

47.1 In terms of the order the applicants were required to dispose of the business as a going concern. The order defines the business as:

"'The divested business' – means the business as referred to in clause 2 of the order"

47.2 Cause 2 reads that: "the merging parties shall divest the following business:

"21.1 the business of the Gallagher Estate Exhibition and Conference Centre as a going concern; and/or
21.2 the entire shareholding of Johnnic Holdings in Gallagher Estate Holdings Limited."

48. The Commission refused to approve the divestiture proposal on the grounds that the sale of the business must of necessity include the sale of the venue and that the proposed lease agreement did not comply with the Tribunal Order.

49. In **General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd and Another** 1982(2) SA 653 (SECLD), one of the issues the Court had to decide was essentially the interpretation of a contract of sale. Kannemeyer, J observed at page 657H – 658D:

"Now the business that the first claimant sold as a going concern was engaged in the manufacture of components for motor cars. It was in operation as such when it was sold. Part of its operation was the manufacture, under contract, of toolings and components for the applicant. It was bought as a business which was "active and operating" in its field. It was sold as a going concern so that "the trade may not be broken up and dispersed". It was bought as one "in actual operation". In my view this must mean that the intention of the parties was that the purchasers would be entitled to continue with any operations which were in progress at the time of the sale for their account. The surrounding circumstances, the factual background known to the parties coupled with the insertion of the restraint of trade clause in the agreement leads me to the conclusion that it was intended by the parties to the agreement that contracts in the process of being performed at the time of the sale were part and parcel of the business sold as a going concern.

Further support for this view can be found in the conduct of the parties subsequent to the signing of the contract….

I thus come to the conclusion that on a proper interpretation of the contract in question the sale of the business as a going concern includes work that was in the course of execution but not yet complete when the business was sold. The fact that clause 1 (a) of the agreement which states that the business is sold by the first claimant to the purchasers as a going concern for R200 000, also recites that the R200 000 represents the purchase price of the goodwill and the listed machinery and equipment is not intended to limit the ***res vendita*** *to the goodwill and the equipment to the exclusion of the work in hand which, in my view, forms part of the concept of a business sold as a going concern".*

50. In **NEHAWU v University of Cape Town and Others** [2002]4 BLLR 311 (LAC) the Court dealt with the interpretation of section 197 of the Labour Relations Act 66 of 1995 and its application to outsourcing. Zondo JP, albeit in the minority judgment, after extensive comparative analysis of the meaning of the phrase "business as a going concern", observed at paragraphs 64 and 65:

> *"[64] Furthermore, I am of the view that the question of whether in a particular case a business has been transferred as a going concern is a matter for objective determination. This does not mean that the intention of the parties are irrelevant but it does mean that the say-so of the parties cannot be conclusive. In my view there are a number of factors that are relevant in determining whether or not a business has been transferred as a going concern. These may include what will happen to the good-will of the business, the stock-in-trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, the debts of the business, whether there has been interruption of the operation of the business and, if so, the duration thereof, whether same or similar activities are continued after the transfer or not and others. I do not think that the absence of anyone of these will on its own mean that the transfer of the business has not been one as a going concern. I would align myself with the approach adopted by the European Court of Justice when, in paragraph11,12 and 13 of its judgment in the **Spijker**s case, it said:*
>
> > *"[11] … It appears from the general structure of directive 77/187 and the wording of Article 1(1) that the directive aims to ensure the continuity of existing employment relationships in the framework of an economic entity, irrespective of a change of owner. It follows that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity.*
> > *[12] Consequently it cannot be said that there is a transfer of an*

enterprise, business or part of business on the sole ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities.

[13] To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of any interruption in those activities. It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other."

[65] In my view the position is that there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as a transfer of the business as a going concern if many of the other factors that are relevant to a transfer being one as a going concern are absent and there will be transactions where the transferor and the transferee will agree that the workforce will not be taken over but the transaction will still amount to a transfer of a business as a going concern because of the presence of many or all of the other factors that go to making a transfer of a business to be one as a going concern. Accordingly each transaction must, in my view, be considered on its own merits in the

light of all the surrounding circumstances of the transaction before a determination can be made whether it constitutes a transfer of a business as going concern."

In the majority judgment by Van Dijhorst, AJA observed at paragraphs [104] and [105] that "A going concern is one "in actual operation" and that "purchasers and sellers of businesses as going concerns are at liberty to define what is included in that concept" and that they, in practice generally do."

51. Even though the decisions in **General Motors** and **Nehawu** cases, supra, deal with contract and labour issues, respectively, the principles enunciated in these cases are apposite to the determination of 'dispose of the business as a going concern' as it is applicable in the present dispute..

52. In my view the term "business as a going concern" in the context of the present matter means the economic entity which is in existence and in operation i.e. the conference and exhibition business. The venue is included only to the extent of location and facility not that the property itself is included. The parties clearly did not envisage that the property be sold as the agreement reflects. The business is distinct from the property itself. As it will become clear hereunder, it is in any event impossible to sell the venue on its own, that is, apart from the rest of the land, as it is not subdivided from the rest of the Gallagher land. The fact that the property is not included does not mean the transaction is not one "as a going concern". The operation of the particular economic entity is transferred to a new owner. For instance the stock, the contracts, as well as management and staff are transferred to the new owner who will continue running the same type of business from the same premises.

53. Procedural unfairness.

53.1 It is common cause that after the applicant's lodged their formal divestiture proposal with the Commission on 22 February 2007, and

supplemented on 2 March 2007, the impugned decision was taken on 6 March 2007 and communicated to the applicants on 7 March 2007.

53.2 The Commission states in its answering affidavit that the formal divestiture proposal placed it under severe time constraints. The parties' divestiture period was due to expire on 8 March 2007. There was in the circumstances no time to afford the applicants an opportunity to address the concerns raised. I accept that there was in effect 6 days for the Commission to consider the proposal before the parties' divestiture period was due to lapse. However, the concerns raised – the independence as well as the ability of the proposed purchaser to compete in the relevant market – were apparently raised in the Commission's internal memorandum which is dated 2 March 2007. These surely could have been communicated to the merger parties before a decision is finally taken. Failure to do so renders the proceedings procedurally unfair within the meaning of section 6(2)(c) of PAJA. For this reason alone the proceedings ought to be set aside.

The decision is in my opinion procedurally unfair. The Commission did not convey its concerns to the parties. It should have given the applicants a hearing before taking its decision.

54. Irrationality.

54.1 The decision by the Commission to reject the proposal on the grounds that the property itself ought to form part of the sale is, as correctly submitted by Counsel for the applicants, vitiated by unreasonableness.

54.2 For reasons set out in paragraphs 49 to 53 above, it is clear that the Commission is mistaken in law in its conclusion that the property ought to be disposed of as well.

54.3 As it can be gleaned from the site map and the layout of the Gallagher

estate, as well as correspondence attached to the founding papers, the Gallagher land comprises a number of properties, including the property where the Pan African Parliament is situated, and that the land has yet to be subdivided. Several applications fro subdivision have been lodged. At present the land is not severable. It could not have been the intention of the Tribunal that the applicants should sell the Gallagher land as a whole, as the vast portion thereof has nothing to do with the conference and exhibition business and consequently market. To impose such a condition is incongruent with the "competitive" harm intended to be addressed as that portion of land is totally unrelated to the particular market. Such outcome would be unreasonable. The decision is irrational. The venue cannot be sold without subdivision of land.

54.4 There is nothing in the Record of Decision to show that the Commission applied its mind to the suitability of the purchaser. To the contrary the internal memorandum of 2 March 2007 indicate that it was at that stage unable to comment as it did not have sufficient information. The Commission states in the answering affidavit that it could not have considered this aspect including the question of the lease agreement as it did not have such information. It follows therefore that the decision cannot be rationally connected to the evidence within the meaning of section 6(2)(f)(ii) of PAJA.

55. Irrelevant and/or extrinsic evidence.

55.1 The Commission concedes that in arriving at its decision it took account of the evidence which was led at the hearing before the Tribunal, the undertaking the merger parties gave at that hearing as well as the reasons by the Tribunal.

55.2 In **Firestone South Africa (Pty) Ltd v Gentiruco AG** 1977(4) SA 298(A) Trollip JA observed at 304 E-G:

"*The basic principle applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as constructed according to the usual, well-known rules…. Thus, as in the case of document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of appeal against it or otherwise….. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it*"

55.3 In casu, the order granted by the Tribunal is clear and unequivocal/ unambiguous. There is therefore no need to resort to extrinsic evidence to resolve its meaning. The Commission therefore, erred in law in taking into account e.g. the evidence led at hearing before the Tribunal. The decision therefore falls to be reviewed and set aside. (See: Section 6(2(d) of PAJA).

56. **COSTS**

In my opinion costs must follow the event.

MAILULA, JA

Davis, JP and Levinsohn, AJA concurred.
