IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

In the matter between:

JOHNNIC HOLDINGS LTD	Applicant
and	
MERCANTO INVESTMENTS (PTY) LTD	First Respondent
HOSKEN CONSOLIDATED INVESTMENTS LTD	Second Respondent
THE COMPETITION TRIBUNAL	Third Respondent
THE COMPETITION COMMISSION	Fourth Respondent

J U D G M E N T

HUSSAIN, J:

On 9 December 2005 the applicant brought an urgent application against the first and second respondents for an interdict. The third and fourth respondents did not make any representations and I assumed that they elected to abide by the court's decision. In this application I will refer to the

applicant, Johnnic Holdings Ltd, as *"Johnnic",* the first respondent, Mercanto Investments (Pty) Ltd, as *"Mercanto"* and the second respondent, Hosken Consolidated Investments Ltd, as *"HCI".* The Competition Commission and the Competition Tribunal will be referred to as *"the Commission"* and *"the Tribunal"* respectively. Any references to *"the Act'* means the Competition Act No 89 of 1998.

In its application Johnnic asked for the following relief:

"2. *Interdicting and restraining the first and second respondents from implementing alternatively further implementing the merger including, without limitation, by acquiring any further shares in the applicant and/ or by exercising the voting and/or other rights attaching to such shares as it may have acquired since March 2005, pending the final determination of:*

2.1 the appeal by the applicant against the Tribunal's order approving the merger subject to the conditions set out therein dated 7 December 2005 ('the Tribunal's order'),

2. 2 the review application to be launched by the applicant for the review and setting aside of the Tribunal's order, which review application is to be issued on or before a date to be determined by this Honourable Court..

3. Declaring that, upon a proper construction of the undertaking given in favour of the applicant by the second respondent in the following terms:

'HCI has, since the date of publication of the Mandatory Offer, not purchased any further shares in Johnnic , and will not do so other than in terms of the Mandatory Offer pending the date upon which HCI receives approval (whether unconditionally or on such conditions as may be acceptable to HCI) from the Competition Tribunal in respect of the proposed merger contemplated in the merger notification ('the approval date')',

the first and second respondents are precluded from purchasing any further shares in the applicant pending the final determination of the aforesaid appeal and review application, and then only in the event of both being dismissed"

At the commencement of the hearing of the application I indicated that I intended to grant an order after hearing counsel and that I will, at a later stage, give full reasons. The circumstances of the hearing were such that I was compelled to publish my order immediately as there was no time to give full reasons.

On 9 December 2005 and after hearing counsel for the parties I granted an order dismissing the application with costs.

These are my reasons.

[1] As far as urgency is concerned, I indicated to counsel that I had read the papers and was satisfied that the matter should be heard and disposed of on its merits. I therefore did not entertain any argument over the question of urgency. In my view it was in the interests of all the parties, including shareholders, that the matter be disposed of without delay.

THE FACTUAL BACKGROUND

[2] Johnnic and HCI are holding companies that are listed on the JSE Securities Exchange South Africa (hereinafter referred to as *"JSE').* Johnnic's main investments, after unbundling some of its assets, lie in gaming and exhibitions. HCI's areas of investment include media and broadcasting, information technology, gaming, financial services and transport HCI also has an interest in the conference and exhibitions market The subject-matter

of this application involves a large merger, as defined in the Act, where Mercanto is the primary acquiring firm and Johnnic is the primary target firm. It has to be said at the outset that this was, at least in the eyes of Johnnic, a hostile merger. It is not in dispute that Johnnic wanted to and indeed took steps to oppose the merger, which Johnnic describes as an *"unsolicited hostile takeover bid'.*

HCI and Johnnic each own an indirect equity interest in Tsogo Investment Holding Company (Pty) Ltd (hereinafter referred to as "TIH"), and accordingly in the Tsogo Sun group of companies.. The Tsogo Sun group holds five casino licences in South Africa. In addition to its interest in the Sun Coast Casino and Entertainment held through T1H, Johnnic has an interest in Sun Coast Casino and Entertainment held through Durban Add-Ventures, The effect of the merger will be to increase the extent of HCI's indirect equity interest in TIH and, accordingly, in the five casinos in the Tsogo Sun group. It was not disputed that the effect of the implementation of the merger would merely be to increase HCI's investment interest in the Tsogo Sun group It will not increase HCI's market share in the casino and hotel industry.

[3] On 7 July 2005 HCI announced an unsolicited offer to acquire all or part of the share capital in Johnnic for a cash consideration of R9,75 per Johnnic share. The offer was thereafter increased to R10,70 per Johnnic share, alternatively, one HCI share for every 2,57 Johnnic shares Upon receipt of the requisite number of acceptances from Johnnic shareholders, HCI intended to invoke the provisions of section 440K of the Companies Act

No. 61 of 1973 and delist Johnnic from the JSE As at 5 August 2005 HCI obtained irrevocable undertakings from 3,1% of Johnnic shareholders to accept its offer Due to the hostile nature of the offer the Commission granted the parties permission to file separate merger notifications in terms of Rule 28 of the Rules of Conduct of proceedings in the Competition Commission. Mercanto filed its merger notification on 3 August 2005 and Johnnic on 15 August 2005

[4] The aforesaid transaction constitutes a merger in terms of section 12(2)(a) of the Act as HCI stands to acquire more than 50% of the issued share capital in Johnnic, It was accepted that the merger constitutes a large merger in terms of section 11(5)(c) of the Act as the value exceeded the higher threshold published in terms of section 11(1)(a) of the Act..

The Commission found that there was a product overlap between the merging firms in the following sectors:

Gaming, hotels and leisure and

Exhibition and conference facilities

Notwithstanding such overlap the Commission, after investigating the matter, decided to recommend merger approval without condition When the matter came before the Tribunal the applicant, Johnnic , contended that, post merger, there were very real competition concerns in the exhibition and conference

sectors as well as in the gaming sector. The Tribunal dealt with these concerns comprehensively.

[5] According to Johnnic HCI increased its shareholding in Johnnic from 30% to approximately 40% through the acquisition of shares from Gold Reef Casino Resorts Ltd (hereinafter referred to as *"GRC")* This acquisition by HCI included an arrangement with GRC that HCI will support GRC, should GRC make an offer for the entire issued share capital in TSH from SABSA Holdings (Pty) Ltd (hereinafter referred to as *"SABSA")* Johnnic alleged that this agreement between HCI and GRC constitutes a prohibited practice in terms of section 4(1)(a) of the Act, in that it amounted to an agreement between or concerted practice by HCI and GRC. Johnnic further alleged that in the event of GRC acquiring the shares in TSH from SABSA, this will raise significant competition concerns in the casino industry.

[6] In response to Johnnic's concern, HCI pointed out that its acquisition of Johnnic shares from GRC was an independent transaction and not conditional upon the successful conclusion of an agreement between SABSA and GRC for 49% of SABSA's stake in TSH. In any event, SABSA made a public announcement that it had no intention to sell its shares in TSH. There were, accordingly, no further discussions between GRC and SABSA On 9 December 2005, the CEO of GRC deposed to an affidavit to this effect. It was not disputed by Johnnic that SABSA was no longer selling its stake in TSH and that no negotiations were being held with GRC.

[7] At the hearing before the Tribunal Johnnic expressed concern over the effect on competition in the convention and exhibition market if the merger was approved. Johnnic led expert evidence that it was not appropriate for both Gallagher Estate and the Sandton Convention Centre to be under the control of the merged entity. Although HCI was of a different opinion, namely that there was no serious competition concerns in the conference and exhibition market post merger, it decided that since this was not part of their core undertaking, it may be in the interests of the merger to divest themselves of Gallagher Estate's post merger HCI accordingly gave such an undertaking to the Tribunal. It must be noted that the Commission did not share Johnnic 's concern and recommended unconditional approval of the merger to the Tribunal. The Tribunal approved the merger on condition that the parties, dispose of Gallagher Estate The Tribunal set out the conditions very carefully and in my opinion succeeded in addressing any genuine competition concern The Tribunal thus gave its conditional approval for the merger

The applicant noted an appeal against the order and pending appeal to this Court required, in effect, a suspension of the merger

[8] At the hearing before me the parties engaged in a squirmish over the appropriateness of the order sought by the applicant Mr Gauntlett SC, for the respondents, argued that the order sought by the applicant was an interdict the nature of which was not permitted by the Act According to Mr Gauntlett section 38(2A)(d) permitted *"suspension"* of operation of an order and did not permit the granting of an interdict . In any event, Mr Gauntlett submitted, the

Act did not permit the granting of an interdict in the wide terms required by the applicant, In my view this is a point worth debating, Mr Unterhalter SC, for the applicant, argued that the relief claimed in the Notice of Motion was competent and amounted to no more than an equivalent relief to what is stated in section 38(2A)(d) This submission, in my view, was equally worthy of consideration However, for purposes of this judgment I need not decide this point I could nevertheless grant an order, if the applicant succeeded, in terms of section 38(2A)(d).

The issues

[9] In this application the following must be addressed:

91 Does the applicant's appeal of the Tribunal's conditional merger approval enjoy *prima facie* prospects of success?

92 Is whose favour does the balance of convenience lie?

93 Would any injustice caused by the implementation of the merger outweigh any subversion of the purposes of the Act caused by a suspension of the Tribunal's approval of the merger?

The grounds of appeal and the prospects of success

[10] The grounds upon which the appeal is founded is as follows:

" *1. The Tribunal erred in not requiring that the procurement by the first respondent orHosken Consolidated Investments Ltd ('HCT) of a suitable purchaser for Gallagher Estate Exhibition and Conference Centre ('Gallagher') or the appellant's entire shareholding in Gallagher Estate Holdings Ltd ('the shareholding') operate as a condition precedent to the approval of the proposed merger*

2 The Tribunal erred in approving the merger subject to the conditions in circumstances where the conditions do not adequately address the competition concerns identified in the economic report filed by G:enesis, and, more particularly, though without derogating from the generality of the aforegoing, in circumstances where the conditions fail adequately to ensure that:

21the economic and competitive value of Gallagher will be preserved and maintained pending the disposal of Gallagher or the shareholding;

22the party or parties who will ultimately manage Gallagher will have the necessary skills and ability to run Gallagher as a viable and active competitive force in competition with other exhibition and conference centres in Gauteng which currently operate in competition with Gallagher.

3 The Tribunal erred in permitting the first respondent or HCI the extended period of 12 months (including a mechanism for the further extension thereof) within which to procure the disposal of Gallagher or the shareholding, insofar as that period, during which Gallagher is run under the control of the merged entity, permits of precisely the harmful anti-competitive effects which were identified in the Genesis economic report and the evidence of Carol Weaving, which evidence was not substantially challenged. Such effects include but are not limited to the removal of the basis upon which exhibition organizers are currently able to bargain on prices, service levels and schedule allocations in respect of exhibitions not yet finally agreed upon for 2006 and thereafter

4. The Tribunal erred insofar as it failed to consider the true nature and extent of the relationship between Gold Reef Casino Resorts (Pty) Ltd and HCI, and thereby precluded itself from finding, as it should have, that the merger, through the operation of that relationship, had the effect of substantially preventing or lessening competition in the gaming market, and should accordingly be prohibited"

I will first deal with each of these grounds and their prospects of success The grounds of appeal can be conveniently separated into two parts namely that the Tribunal erred in approving the merger without taking into account genuine competition concerns in:

a)The conference and exhibition market and

b)The gaming market, and in particular the casino industry.

The conference and exhibition market

[11] Johnnic owns Gallagher Estate and HCi controlled the Sandton Exhibition Centre.. These two conference and exhibition facilities are in Gauteng and compete in exactly the same segment of the market. The applicant disagreed with the Commission's definition of the geographic market. The Commission saw the market as national while the applicant saw the market as regional. At the hearing before the Tribunal the applicant led evidence of the harmful effects of both Gallagher Estate and the Sandton Convention Centre falling into the same hands. Although HC! did not accept Johnnic 's submission to the Tribunal, they decided, in the interests of removing a potential and unnecessary obstacle to the merger, to give an undertaking to divest the merged entity of Gallagher Estate's post merger. In my view this put paid to any legitimate competition concerns in the conferencing and exhibition market and the way was then open for the Tribunal to approve the merger

[12] Once divestiture was ordered by the Tribunal, Johnnic , in its grounds of appeal, changed its strategy, as plainly it was forced to. Now Johnnic 's complaint is that the Tribunal erred in not ordering divestiture of Gallagher Estate as a condition precedent to the approval of the merger.. The applicant argued that the period of 12 months, post merger, given to the parties to dispose of Gallagher Estate was too long and will be harmful to competition within the market In my view this is an entirely spurious criticism which is not supported by any facts What is more is that the suggestion that Gallagher Estate be sold before the merger is implemented is unsustainable as it is in law not possible and will simply cause extended delays and give the applicant means to frustrate the merger For HCI to dispose of Gallagher Estate it must first obtain control over Johnnic . There is no means in law, pre-merger, to force Johnnic to dispose of its assets.

[13] The Tribunal very carefully considered the effect of ordering divestiture and therefore set out, in its conditions, what was expected to happen to Gallagher Estate during the period of 12 months, post merger. I am satisfied that the Tribunal had addressed the competition concerns raised by Johnnic . In the face of the very detailed and carefully considered conditions imposed by the Tribunal, Johnnic merely and vaguely make an allegation that the conditions do not address the concerns raised by its experts Johnnic advances no facts to sustain this allegation It must be noted that Johnnic 's expert evidence was based on the merged entity controlling both Gallagher Estate and Sandton Convention Centre The opinion of Johnnic 's experts did not extend to divestiture post merger

[14] The Tribunal was alive to the competition concerns regarding the conference and exhibition market and carefully addressed that. The following conditions are noteworthy:

> 141 The Tribunal established an interim regime concerning the management of Gallagher's business pending its divestiture, through placing obligations on the merging parties to maintain the competitiveness of such business.
>
> 142 The Tribunal provided for the appointment of an independent trustee to monitor the steps that the merging parties are taking to comply with their obligations
>
> 143 The provision of a period of 12 months (or such further period as the Tribunal may, on application, approve) for the divestiture of Gallagher is reasonable and appropriate, given that it represents a valuable asset of Johnnic which will require time to be disposed of on commercially viable terms.

Accordingly, in my opinion the applicant has no prospect of success on appeal in respect of these grounds

The gaming market

[15] At the outset it must be said that Johnnic 's expert, at the hearing before the Tribunal, offered no opinion or view of the effect of the merger on the gaming market and in particular the casino industry. Johnnic 's complaint is that the Tribunal erred in denying itself the opportunity to probe the alleged relationship between GRC and HCI, The Tribunal found that this relationship, if there was one, was in all the circumstances irrelevant and did not assist it in deciding the appropriateness of the merger. I can find no fault in the Tribunal's findings in this regard. Again, Johnnic fails to put up any facts which justify the conclusion that there was a relationship between HCI and GRC which was calculated to exert some control over the casino industry in future.. The whole idea of the relationship comes from two facts namely:

a) That HCI purchased GRC's shares in Johnnic and
b) That HCI supported GRC in the latter's desire to purchase TSH shares from SABSA

According to HCI, its purchase of Johnnic shares from GRC was a separate and independent and stand alone transaction. There is no evidence before me to suggest that it was anything else. The whole submission by Johnnic around the acquisition of TSH shares in SABSA by GRC turned into a red herring The truth is that no agreement was actually concluded by GRC to purchase TSH shares from SABSA In fact SABSA made a public announcement that it had no intention of selling its shares in TSH On 9

December 2005, Steven Joffe the CEO of GRC stated the following in an affidavit:

> *"GRC has made a public announcement that SABSA informed GRC that it was not a seller of its shareholding in TSH and that GRC's negotiations with SABSA have ceased.*"

This was not disputed by Johnnic .

[16] It must be noted that on Johnnic 's own version the conclusion of the proposed GRC/SABSA transaction is a prerequisite for any of the alleged anti-competitive effects which Johnnic alleges constitutes a reason for prohibiting the merger. Absent such precondition the relationship, if any, between HCI and GRC becomes entirely irrelevant to the determination of the merger by the Tribunal,

[17] In any event, even if the proposed GRC/SABSA's transactions for TSH shares were to be implemented, this will be subject to regulatory approvals, including merger approvals in terms of the Act Any competition concern can then be properly pursued at that time

[18] The relevance of the alleged GRC/HCI relationship was properly ventilated before the Tribunal. Prior to the hearing the Tribunal had received the record of the Commission's investigations and recommendations, as well as submissions made to the Commission, by both sides, on this very issue. I accordingly find that the decision of the Tribunal to exclude evidence relating

to the HCI/GRC arrangement or relationship followed a procedurally fair process.,

[19] The impression made by Johnnic , in these papers, regarding the possible harm to competition on the gaming industry appears to be based on speculation The initial objection by Johnnic was that HCI and GRC had concluded an arrangement which constituted a prohibited restrictive horizontal practice in terms of section 4 of the Act. If this was indeed the case it was open to Johnnic to follow the machinery created by the Act to deal with such concerns. The complaint procedures under Part C of Chapter 5 of the Act were available but Johnnic made no attempt to use them. In fact Johnnic 's allegations regarding the HCI/GRC arrangement is not based on any credible facts..

In my view Johnnic has failed to establish any legitimate ground for appeal or review of the Tribunal's decision insofar as it relates to the HCI/GRC relationship. There are no prospects of success.

Balance of convenience

[20] The balance of convenience and the issue of urgency was based on the following:

20 1 That pending the outcome of the appeal competition within the exhibition and conference market will be compromised;

20 2 That the relationship between GRC and HCI could compromise competition within the gaming market and

20.3 That the general meeting called by Johnnic was due to take place on 12 December 2005.

I will deal with each of these issues..

[21] Post merger both Gallagher Estate and the Sandton Convention Centre will effectively fall into the same hands. This the applicant submits will lessen competition within the exhibition and conference market. At the hearing before the Tribunal this issue was fully canvassed, including the presentation of an expert witness. In my view the Tribunal applied their minds to the issue and properly addressed all of the applicant's competition concerns in the conditions imposed in approving the merger. It was anticipated that, post merger, the parties should be able to dispose of Gallagher Estate within 12 months I find that there is no balance of convenience that favours the applicant in this regard..

[22] The applicant made much of the fact that the Tribunal failed to properly investigate the relationship between GRC and HCI. The applicant alleged that there was a relationship between these parties which was designed to, in future, exert dominance in the gaming and casino market in Gauteng and KwaZulu The Tribunal correctly found that this relationship was irrelevant. The applicant, on the papers before me, was unable to show any legitimate

competition concerns in the gaming and casino market, post merger. Nor do I believe they were able to do so before the Tribunal. In any event there can be no competition concerns which cannot be addressed in future if HCI and GRC increased their presence in this market. As the Tribunal correctly pointed out any such conduct in future will be subject to regulatory measures within the ambit of the Act Again there is no balance of convenience that favours the applicant.

[23] The general meeting for 12 December 2005 was called, *inter alia,* for the following main purposes:

a)The voting of HCI's nominees onto the Board of Directors of the applicant and

b)The approval for the applicant's acquisition of the entire shareholding of NAFCOC Investment Holdings Ltd (hereinafter referred to as *"NAFHOLD")* in TIH. This will secure a further 25% shareholding in TIH for the applicant.

The voting of nominees to the board was not material to this application and I will say nothing further about it.

The applicant relied heavily on the date of the meeting for urgency and to demonstrate possible injustice if HCI were allowed to vote its shares, at the meeting, post merger. It was common cause that HCI was purchasing Johnnic 's shares on an incremental basis and that post merger will control

more than 40% of the shareholding in Johnnic . The applicant submitted that the NAFHOLD transaction was in the interests of the company and its shareholders and anticipated that the shareholders, barring HCI, would vote in favour of it. The applicant expressed concern that if HCI was not interdicted it will vote against the NAFHOLD transaction thereby causing the applicant to possibly lose a favourable transaction.

Upon closer scrutiny of the NAFHOLD transaction it emerged that there was nothing special or magical about the 12 December 2005. The meeting could be postponed for another date at the instance of the applicant and NAFHOLD It was not in dispute that NAFHOLD and the applicant enjoyed a cordial relationship. The whole transaction was also subject to certain conditions, some of which were only due to be fulfilled some time in the near future namely by 31 December 2006. Upon reading the papers and considering the NAFHOLD transaction, I came to the conclusion that there was nothing in the approval of the merger which could cause the applicant and its shareholders serious competition issues in the meeting of 12 December 2005. In fact the meeting need not even take place and if it did take place there was an equal possibility that HCI, as a shareholder, will vote in favour of the NAFHOLD transaction.

[24] HCI on the other hand had a legitimate interest in implementing the merger. The order obtained from the Tribunal is and remains valid HCI is a shareholder of the applicant and I can find no basis in law to deprive it of its rights as a shareholder

[25] Accordingly I find as follows:

> 251No injustice will be caused by the implementations of the merger prior to the determination of the underlying review/appeal. If the appeal or review succeeds then HCI will be at risk of being ordered to divest. A risk which HCI plainly accepted.
>
> 252The purposes of the Act will, in the circumstances, be subverted if the Tribunal's approval of the merger is suspended pending determination of the appeal/review

It became abundantly clear to me that the applicant was merely using the processes of this Court to thwart the merger. The applicant could demonstrate no legitimate competition concerns post merger.. Orders in terms of section 38(2A)(d) must not be lightly granted The parties seeking relief in terms of section 38(2A)(d) must do so for genuine competition concerns and must assist the court and make a full disclosure to the court of all of the material facts

> See: *Glaxo Wellcome (Pty) Ltd v Terblanche NO and Others (No 1)* 2001 (4) SA 901 (CAC).
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> *Community Health Care Holdings (Pty) Ltd v The Competition Tribunal and Others* Case No. 46/CAC/FEB05.

I was therefore persuaded to exercise my discretion in favour of the respondent.

I accordingly dismissed the applicant's application with costs.

I HUSSAIN JUDGE OF THE
COMPETITION APPEAL COURT

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