



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IMR176Nov16

In the application between:

SOVEREIGN FOOD INVESTMENTS LIMITED

Applicant

And

COUNTRY BIRD HOLDINGS (PTY) LTD

First respondent

SYNAPP INTERNATIONAL LIMITED

Second respondent

KEVIN WILLIAM JAMES

Third respondent

KEVIN WILLIAMS JAMES N.O

Fourth respondent

CLIVE DENNIS KERN N.O

Fifth respondent

CLINTON CHARLES HOLING N.O

Sixth respondent

COLIN RODNEY JAMES

Seventh respondent

MARIELLE COLETTE REGINE LECLUSE

Eighth respondent

THE COMPETITION COMMISSION OF SOUTH AFRICA

Ninth respondent

Panel : Norman Manoim (Presiding Member)

: Medi Mokuena (Tribunal Member)

: Imraan Valodia (Tribunal Member)

Heard on : 26 July 2017

Order Issued on : 13 September 2017

Reasons Issued on : 13 September 2017

REASONS FOR DECISION

Introduction

- [1] This is an application to review and set aside the decision of the Competition Commission ("Commission") to conditionally approve an intermediate merger between the applicant, Sovereign Food Investments Limited ("Sovereign") and the first respondent, Country Bird Holdings (Pty) Ltd ("Country Bird").

- [2] The application is unusual for several reasons. First, it has been brought by the target firm in an intermediate merger; not as in other such cases by a disaffected customer or rival. Second, the application raises, as its central plank, whether the Commission still had a merger to consider at the time it made its ruling. Third, although the papers in this application are lengthy and raised a number of issues, the issue has narrowed due to an unexpected revelation from the Commission's representatives made during the course of our hearing.
- [3] There is no dispute between the parties that the transaction before the Commission was an intermediate merger, nor is there dispute that Country Bird sought and obtained approval from the Commission to implement the merger subject to certain conditions on 15 November 2016.
- [4] What is in dispute is whether, on that date, there was still a merger in extant for the Commission to approve and if there was, whether the decision to approve it was lawful based on several challenges made under grounds contained in The Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- [5] We have decided that the Commission's decision is reviewable and that such should be set aside. Our reasons for such follow.

Background

- [6] Sovereign, a processor of chickens, is the applicant in the matter at hand and the primary target firm in the intermediate merger approved by the Commission. Country Bird, also a processor of chickens, is the first respondent in this matter, the primary acquiring firm in the intermediate merger approved by the Commission, and a shareholder controlling roughly 30% of the shares in Sovereign. The second to eighth respondents are cited in their official capacities as representatives and members of the Country Bird board.
- [7] Sovereign and Country Bird have a long history of antagonism. Country Bird has made attempts in the past to acquire control over Sovereign without success and Sovereign has attempted to implement an empowerment scheme by way of special resolution which it accuses Country Bird of frustrating. It is evident that Country

Bird's ambitions of control over Sovereign persist, as does Sovereign's intent to enact its, as yet unimplemented, empowerment scheme. This history is not relevant to the legal issues raised in the present application, but serves to set the scene for the facts of present application which follow.

History

- [8] On 6 July 2016 Country Bird made a conditional cash offer ("the offer") to acquire the entire ordinary share capital of Sovereign, other than those ordinary shares it and its concert parties already held, for R9.00 per ordinary share. The offer, made in terms of section 117(1)(c) (v) of the Companies Act 71 of 2008 ("the Companies Act") would terminate on 13 September 2016 and was, notably to the present matter, subject to the condition that sufficient acceptance need be received such that Country Bird, together with its concert parties would hold at least 50% plus one of the total issued share capital of Sovereign after the implementation of the offer ("the acceptance condition").¹ Simply put, the transaction would not take place if Country Bird did not obtain the number of acceptances it required to afford it a 50% plus one share of the total issue share capital of Sovereign post transaction.
- [9] On the following day, 7 July 2016, Country Bird applied to the Commission in terms of its rules for a direction permitting Country Bird and Sovereign to file separate notifications of the proposed takeover.² Typically, merger notifications are filed jointly by the primary acquiring and primary target firm. However, the Commission's rules permit it to depart from this process in the appropriate circumstances. The Commission's practice has been to grant this permission where the notification involves a hostile takeover, since the acquiring firm in these circumstances is unable to obtain the co-operation and hence information from the target.
- [10] In this case the Commission gave the permission for separate notifications on 21 July 2016.

¹ The condition of a 50% plus one shareholding post transaction was reiterated in the circular submitted to Sovereign shareholders by Country Bird on 11 July 2016.

² Rule 28 of the Rules of Conduct of Proceedings of the Competition Commission ("Commission's rules").

[11] Accordingly, on 23 August 2016 both Country Bird and Sovereign filed separate merger notifications.

[12] Country Bird, in its covering letter to its merger notification, addressed to the Commission, dated 22 August 2016, described the transaction in the following terms:

*"...the proposed acquisition by Country Bird of the entire share capital of Sovereign through an unsubscribed offer ..."*³

Sovereign, in its merger notification, also describes the transaction as one in which Country Bird would acquire all the share capital in Sovereign, provided that it acquires at least 50% plus one share of all the ordinary shares.

[13] It appears that this was the assumption on which the Commission proceeded to investigate the matter i.e. that Country Bird's intention was to acquire the entire share capital of Sovereign or at the very least to acquire, as the offer stated, 50% plus one.

[14] By 5 September 2016, five business days before the offer expired, it had not yet reached the required level of acceptance for its enactment. Indeed, shareholders representing only 12.7% of the shares in Sovereign had taken up the offer at that stage. The percentage commanded by the accepting shareholders, added to the 34.1% shareholding already held in Sovereign by Country Bird, brought Country Birds' potential post-transaction shareholding to 46.1% of the shares in Sovereign, just shy of the 50% plus one shareholding required to fulfill the acceptance condition prescribed by the offer.

[15] Country Bird sought to remedy the situation by first applying through its corporate finance adviser to the Takeover Regulation Panel, (the "TRP") on 5 September 2016 for an extension of the date by when the offer needed to be declared unconditional as to acceptances. This application was withdrawn on 13 September 2017. Country Bird then released a circular on that same date, purporting to

³ Letter from Country Birds attorneys to the Commission dated 22 August 2017.

amend its offer. The amended offer, in so far as it is material to this case, waived the acceptance condition such that the offer was unconditional as to acceptances.

[16] This change to the offer was significant for appreciating what transaction was before the Commission as we go on to discuss.

[17] However, the amended offer was never implemented. Since the offer was made to the public it had to comply with the regulatory scheme set out in the Companies Act. This meant that the form of the offer and any changes to it required the regulatory approval of the TRP. The TRP has the competence to refer matters that come before it to a sub-committee known as the Takeover Special Committee (the "TSC").

[18] Sovereign's legal advisors objected to the change in the offer on the basis that it did not conform to the TRP rules.

[19] Sovereign's objection was referred by the TRP to the TSC which decided that the amended offer was invalid. This meant that in company law terms the offer had lapsed. This ruling was handed down only on 8 November 2016.

[20] By that stage the Commission had progressed diligently with its investigation of the merger and was discussing imposing possible public interest conditions with both parties, albeit separately.

[21] When the TSC ruling was released, Sovereign was quick to alert the Commission to this fact. In a letter to the Commission on 08 November, its attorney contended that the effect of the TSC ruling was that the offer had lapsed and, if this was the case, there was no merger before the Commission for it to consider. Put differently, Sovereign was alleging that the jurisdiction of the Commission was taken away by the TSC decision.

[22] At this stage, the Commission was in an unenviable position. Because this was an intermediate merger, a decision had to be made within the mandatory period

prescribed by section 14(2) of the Act.⁴ Since the Commission had already extended the period for its consideration it now had only a week left to come to a decision. If the decision was not made the merger would be deemed to have been approved unconditionally. Given that by that stage the Commission was deciding on imposing public interest conditions, if it took no further steps, the deeming provisions would apply and it would have failed to address these conditions.

[23] Its dilemma was not helped by the attitude of the two merger parties. Sovereign's view, as noted, was that the merger had lapsed. Asked if there was a possibility of an appeal against the TSC decision, Sovereign's attorney advised there was no provision for an appeal, only a review to the High Court.⁵

[24] Canvassed on the same issue, Country Bird's attorney indicated that Country Bird did not agree with the TSC decision and would challenge it in the High Court. It is interesting that at the date of this application, Country Bird had not initiated review proceedings. Country Bird's attorney also indicated very strongly that the merger was very much still alive still and that if the Commission did not issue its certificate in the requisite period the merger would be deemed to have been approved unconditionally.⁶

[25] Although not raised in the letters, even if an offer has lapsed consequent to the decision of the TRP of TSC, the offeror is not precluded forever from making a new offer. The prohibition only extends to preventing a new offer being made for a period of 12 months from the date that original offer lapsed.⁷

[26] Significantly Country Bird did not file a Notice of Abandonment.⁸ This is a right only given to the primary acquiring firm i.e. in this case Country Bird. The Commission

⁴ S14(2): *If, upon the expiry of the 20 business days period provided for in section (1), the Competition Commission has not issued any of the certificates referred to in that subsection, or, upon the expiry of an extension period contemplated in subsection 1(a), the Commission has not issued a certificate referred to in subsection (1)(b), the merger must be regarded as being approved, subject to section 15.*

⁵ Letter from Sovereign's Attorneys dated 10 November 2016, page 321 of the pleadings bundle.

⁶ Letter from Country Bird's Attorneys to the Commission dated 9 November 2016, para 3 and 4. Page 516 of the Pleadings bundle.

⁷ S127(3)(a) of the Companies Act prohibits an offeror in a lapsed offer from making another offer for the relevant securities for 12 Months.

⁸ This is provided for in Rule 34 of the Commission's rules.

decided to consider the notification of the merger still extant and approved it subject to the following conditions:

26.1. That the merging parties would not retrench any employees because of the merger;⁹

26.2. That, should Country Bird acquire a shareholding of above 75% in Sovereign, a B-BBEE transaction must be proposed that results in the transfer of at least 4% of issued shares in Sovereign to historically disadvantaged persons on comparable terms to those proposed by Sovereign Foods.

[27] Central to our finding in this matter is clause 5 of the Commission's conditions, dealing with the application of the conditions, which reads:

"The Conditions, other than the condition set out in para 4.2 [that relating to the B-BBEE transaction] will apply if CBH, [Country Bird] together with its concert parties, obtains control over Sovereign Food by acquiring 50% plus 1 of the issued ordinary shares in Sovereign Food." [our emphasis]

[28] The response of Sovereign to the Commission's finding was two-fold. It brought a consideration of the merger in terms of section 16 of the Act, i.e. an appeal as well as a review of the Commission's decision in terms of s27(1)(c) of the Act to the Tribunal. In its review application, the present matter, Sovereign sought to set aside the conditional approval.

[29] By agreement between all the parties the consideration application has been put on hold pending the decision of the review presently before us.

[30] The grounds for review made out in the applicant's founding and subsequent supplementary affidavits are, briefly, as follows:

30.1. The Commission enjoyed no power to make a decision in respect of the merger in the circumstances where the conditional offer had been deemed defective by another regulatory panel;

⁹ This condition was clarified to indicate that the Commission would not consider a number of processes as prohibited retrenchments, one of such being 'retrenchments lawfully effected for operational requirements unrelated to the merger' and 'any decision not to renew or extend a contract of an employee on fixed term contract'.

- 30.2. The Commission failed to comply with the dictates of procedural fairness in its engagement with Sovereign relating to the conditions it sought to impose upon the merged entity post-transaction;
- 30.3. The Commission's decision was materially influenced by errors of law in that the Commission believed that it possessed jurisdiction to approve the transaction deemed defective by another regulatory panel;
- 30.4. The Commission took irrelevant considerations and failed to take relevant factors into account in deciding to approve the proposed takeover by imposing conditions qualified by thresholds and caveats; and
- 30.5. The Commission's decision was irrational in that the conditions imposed on the post-transaction entity do not provide the protections for which they were and are intended in fact and in law.

[31] Our conclusion in this matter ultimately turns on two grounds, namely that the Commission based its finding upon a material mistake of fact, and, thus failed to consider relevant facts when coming to its decision as per s6(2)(e)(iii) of PAJA alternatively, the Commission's decision was irrational as per s6(2)(f)(ii)(aa) of PAJA. Since the review succeeds on these grounds, as will be explained below, it is not necessary to canvas any of the other issues raised by both parties.

[32] Importantly, for purposes of this decision, we will assume, without deciding the issue, that the merger notification was still extant at the time the Commission made its decision and thus it had jurisdiction to do so.

[33] It was also common cause among the parties that the Commission's decision to approve the merger was an administrative action, consequently reviewable by this Tribunal in terms of PAJA.

Which Merger did the Commission approve

[34] Central to our finding in this matter is an inherent uncertainty as to what merger the Commission approved. Whether it is the acquisition of *de jure* control by Sovereign- i.e. an acquisition of 50% plus one shares or the acquisition of *de facto* control i.e. the ability to command a majority in any shareholder meeting. This uncertainty

taints the decision to approve the merger subject to the imposition of conditions at a Sovereign shareholder threshold of 50% plus one, either with irrationality or as a decision based upon a material mistake of fact.

[35] Country Bird's original takeover offer and the description of the merger given to the Commission in the August letter was that the merger would only be effected if Country Bird acquired sufficient shares to acquire *de jure* control i.e. at the very least 50% plus one of Sovereign's shareholding. Country Bird's amendment to its takeover offer has the effect that the merger would still be effected at a lower shareholding (i.e. if Country Bird came to acquire 45-49% of Sovereign's shareholding) and, as described below, if sufficient acceptances are taken up, Country Bird may be able to exercise *de facto* control over Sovereign.

[36] In its reasons for approving the transaction, the Commission does not define the transaction as being effected at certain shareholder thresholds, nor does it make its approval conditional on Country Bird acquiring a 50% plus one share in Sovereign. It does however address the possibility of a review of the TSC application. It indicates that:

*"In the event that CBH is successful in its challenge of the TRP decision, then the Commission's decision may be implemented."*¹⁰

[37] Implicit in a successful challenge of the TSC decision is the possibility that a transaction may come about in which Country Bird acquires less than the 50% plus one shareholding originally notified. Simply put, if Country Bird reviews the TSC ruling and wins, under company law it is permissible to implement a transaction that is something other than an acquisition of 50% plus one of the shares in Sovereign. It may, for instance, acquire a shareholding of only 48% of the shares in Sovereign. On a fair reading of the above, the Commission appreciates this eventuality, and approves the merger regardless of *de jure* or *de facto* control.

[38] However, in the Commission's heads of argument it indicates that:

¹⁰ Competition Commissions Merger Report page 11 para 11.

"In the absence of Country Bird acquiring 50% plus 1 of Sovereign's issued share capital, the Proposed Takeover could not come about nor implemented..."

This position was repeated at the hearing where the Commission submitted that, on its own understanding, it had only approved a transaction in which Country Bird obtains a 50% plus one share in Sovereign i.e. *de jure* control.¹¹ As indicated above, this is not what its approval states.

[39] Country Bird's position is that it has obtained approval for *de facto* control. It says this in its answering papers in the clearest terms:

*"It is true that the possibility exists for Country Bird to attain de facto control at levels below the thresholds [for the implementation of the conditions]... The conditions are not imposed to regulate the moment of acquisition of control, they are imposed to regulate Country Bird's obligations in the event that certain bright lines are crossed. The Commission's determination was that the employment and empowerment concerns did not warrant, as a matter of principle and/or practicality, the imposition of conditions at levels below the bright lines identified."*¹²

[40] Country Bird's understanding is, in our view, a correct reading of the terms of approval. Contrary to what it argues in its heads of argument and before us, the Commission has approved the merger, but the conditions only become binding if the requisite shareholdings are reached. In the case of the employment condition at 50% plus one and in the case of the empowerment condition, at 75%.

[41] The issue of *de jure* and *de facto* control was brought about by Sovereign's argument that the imposition of the employment condition was subject to the rider contained in clause 5 of the Commission's decision. Sovereign argued that if the Commission was concerned about the employment effect why was the condition only triggered by *de jure* control when, with the revised offer, if it was ever implemented, Country Bird might acquire *de facto* control at some level short of 50% plus one. If Country Bird was able to acquire *de facto* control below 50%+1 it would be able to control Sovereign without being subject to the condition. In its papers Sovereign gave figures of recent attendances of general meetings of the

¹¹ Tribunal Transcript of Proceedings page 158 lines 20-24.

¹² Para96.1-96.4 of Country Bird's Answering Affidavit. Page 663 of merger record.

firm which suggested that *de facto* control might be exercised at a shareholding below 50%.¹³

[42] The Commission, from submissions of its counsel, does not seem to have been made aware of this possibility at the time it considered the merger.¹⁴

[43] The Commission thus labored under two mistakes of fact. A failure to appreciate that the change of offer might lead to a change of control at a level lower than 50% and that this was acceptable to Country Bird. Second, that given Sovereign's spread of shareholding the acquisition of control at some level just below 50% was a realistic possibility. Given the centrality of the employment conditions to the Commission's decision to conditionally approve the merger it seems anomalous.

[44] Whilst it is correct, that PAJA does not expressly provide for mistake of non-jurisdictional fact a ground of review as the common law did, Hoexter points out that courts have read this ground into PAJA by interpreting a reliance on a mistake of fact as a ground enunciated by section 6(2)(e)(iii), namely taking into account irrelevant facts or disregarding relevant considerations.¹⁵

[45] In the case of *Pepcor Retirement Fund v FSB*¹⁶ Cloete JA, writing for a unanimous court indicates that:

"A material mistake of fact should be a basis on which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to have been made. And if the decision has been made in ignorance, the decision should... be reviewable"

[46] In the case of *Chairpersons' Association v Minister of Arts and Culture and Others*¹⁷ Farlam JA, writing for the SCA indicates that:

¹³ Sovereign submitted its shareholder voting history which indicated that, at its highest, 91% of its shareholders voted in either AGM's or SGM's. On these figures, it was submitted that an entity need only 46.8% of the total shareholding to command a *de facto* majority shareholding and exercise control over the firm.

¹⁴ Tribunal Transcript page 158 lines 17-20.

¹⁵ Hoexter, *Administrative law* 2nd edition 2011 Cape Town Juta, page 304-6.

¹⁶ 2003 (6) SA 38 (SCA) para 47.

¹⁷ 2007 (5) SA 236 (SCA).

"the legal position as set out in the Pepcor case based as it is on the principle of legality still applies under PAJA, s 6(2)(e)(iii) of which provides that administrative action taken because 'irrelevant considerations were reviewable. Where a decision is based on a material misstatement of fact it is clear that that subparagraph applies"

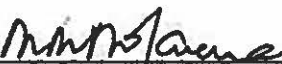
[47] In the present matter, the Commission has made a mistake of fact as to which acquisition of control it was approving - *de facto* control or *de jure* control. This is not simply a point of technicality. The condition which the Commission considered necessary to impose will only be triggered if there was an acquisition of *de jure* control. The failure to appreciate this distinction means the condition, which on its own logic should apply to any form of change of control, only applies to *de jure* control. Since *de facto* control is reasonably probable on these facts, the Commission has not applied its mind to this possibility. Thus, it either made a material mistake of fact as to what it was approving, which on its own admission suggests that was the case, or if it did not, it acted irrationally by applying a rider to the application of its conditions that would render such, ineffective for as long as Country Bird's shareholding remains below certain thresholds. On either of the preceding scenarios the decision to approve stands to be reviewed, set aside and remitted to the Commission.

Suitability of a declaratory order

[48] Sovereign sought, in the alternative, a declaratory order that the Commission's decision applied only to that transaction involving a 50% plus one acquisition. We maintain that this would not be an appropriate remedy, because we do not know if the same conditions, would have been imposed on the same terms by the Commission, if, it was aware of the possibility of Country Bird achieving *de facto* control. In setting aside the Commission's decision and remitting such, we are allowing the Commission to make the decision afresh, now more fully equipped than before.

Order

1. The Commission's decision to approve the intermediate merger between Country Bird Holdings and Sovereign Food Limited is reviewed and set aside.
2. The transaction is referred back to the Commission reconsider its decision and to decide whether the merger should be approved and, if so, which appropriate conditions (if any) should attach to such approval.
3. The Commission is granted 40 business days from the date of this order to come to a finding on the matter.


Ms Medi Mokuena

13 September 2017
Date

Norman Manoim and Imraan Valodia concurring

Tribunal Researcher: Alistair Dey-van Heerden

For the Applicant: Adv. F Snyckers SC assisted by Adv. R Pearse
Instructed by Cliffe Dekker Hofmeyr

For the First to Eighth Respondents: Adv. G Engelbrecht *instructed by* Herbert Smith
Freehills

For the Commission: Ms N Sakata *assisted by* L Phaladi