

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No.: 12/LM/Mar05

In the large merger between:

Hosken Consolidated Investments Ltd

Primary Acquiring Firm

and

Fabvest Investment Holdings (Pty) Ltd

Primary Target Firm

REASONS FOR DECISION

Approval

[1] The Competition Tribunal issued a Merger Clearance Certificate on 16 May 2005 approving the proposed merger between the abovementioned parties in terms of section 16(2)(a). The reasons for the approval of the merger appear below.

The Parties

[2] The primary acquiring firm is Hosken Consolidated Investments Ltd ("HCI"), a public investment holding company listed on the JSE. Its largest shareholder is SACTWU which holds 45.3% of the issued share capital in HCI. None of its shareholders either directly or indirectly controls HCI. HCI has a number of subsidiaries some of which are relevant for purposes of this transaction.¹ Flaghigh Investments (Pty) Ltd ("Flaghigh"), Tangney Investments (Pty) Ltd and Nactu (Pty) Ltd ("Nactu") collectively hold 32.06% of the issued share capital in Tsogo Investment Holdings ("TIH").²

[3] The primary target firm is Fabvest Investment Holdings Ltd ("Fabvest"), which is controlled by the Fabcos Trust ("Fabcos Trust") (as to 90.125%). Fabvest currently controls (directly or indirectly)³ Fabcos Investment Holdings ("FIH") (as to 75%)⁴, Censor SA (of which 95% of the issued share capital is held by FIH⁵), Anchor Yeast (Pty) Ltd (of which 95% is held by Censor SA), Established Investments (Pty) Ltd (of which 55% is held by Fabvest⁶). FIH holds 38% non-controlling stake in TIH.⁷

¹ Refer to HCI Group Structure, page 164 of the record.

² Other relevant subsidiaries include Global Payment Technologies (Pty) Ltd ("Global Payment") (96%); Vukani Gaming Corporation (Pty) Ltd ("VGC") (96%); and Vukani Gaming Mpumalanga, Western Cape, Eastern Cape, and Kwazulu-Natal ("KZN"). (See page 2 of the Commission's Report).

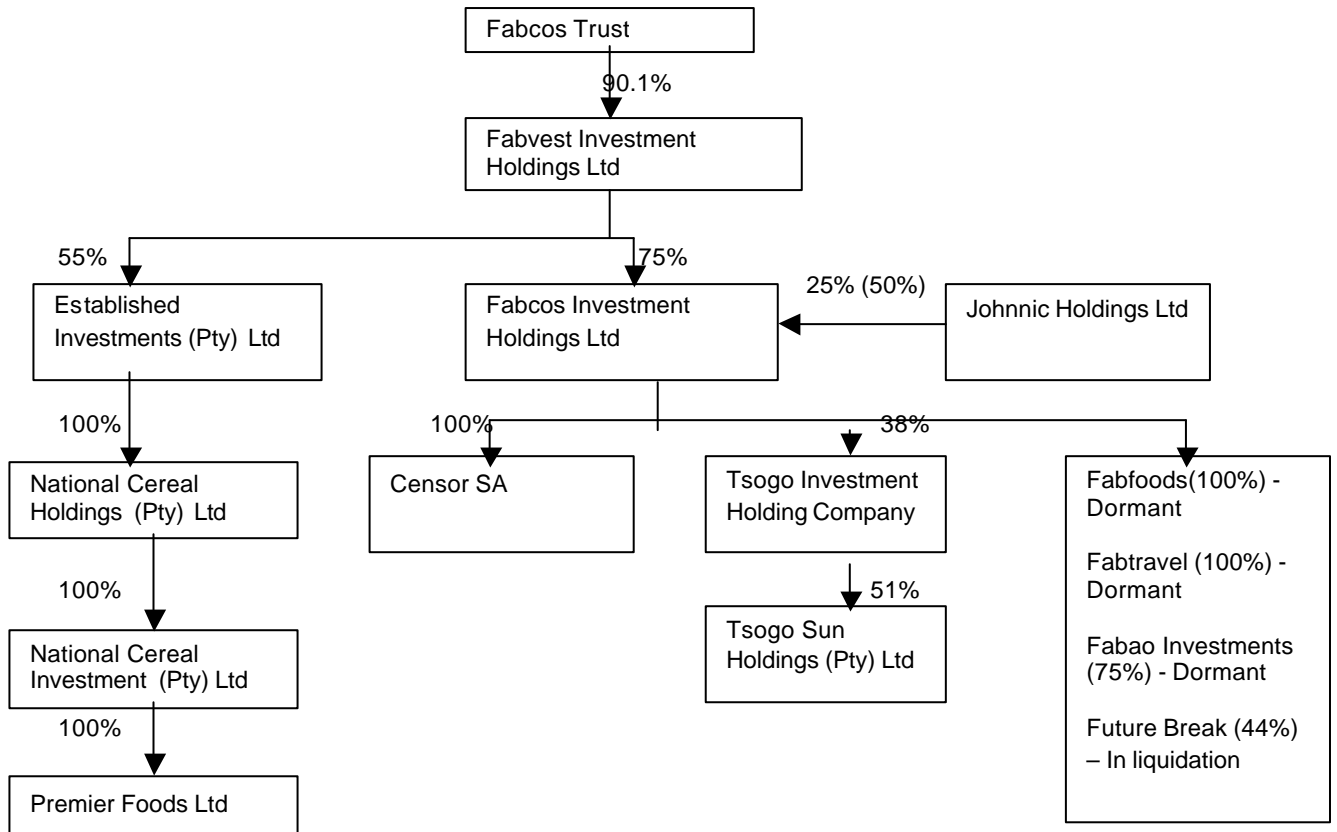
³ For all the info as to what Fabvest controls, see page 47-49 of the record. See further Fabcos group structure, page 259 of the record.

⁴ Subject to change to a 50% share, once the approval of the Johnnic / Fabcos transaction is approved by the National Gambling Board ("NGB").

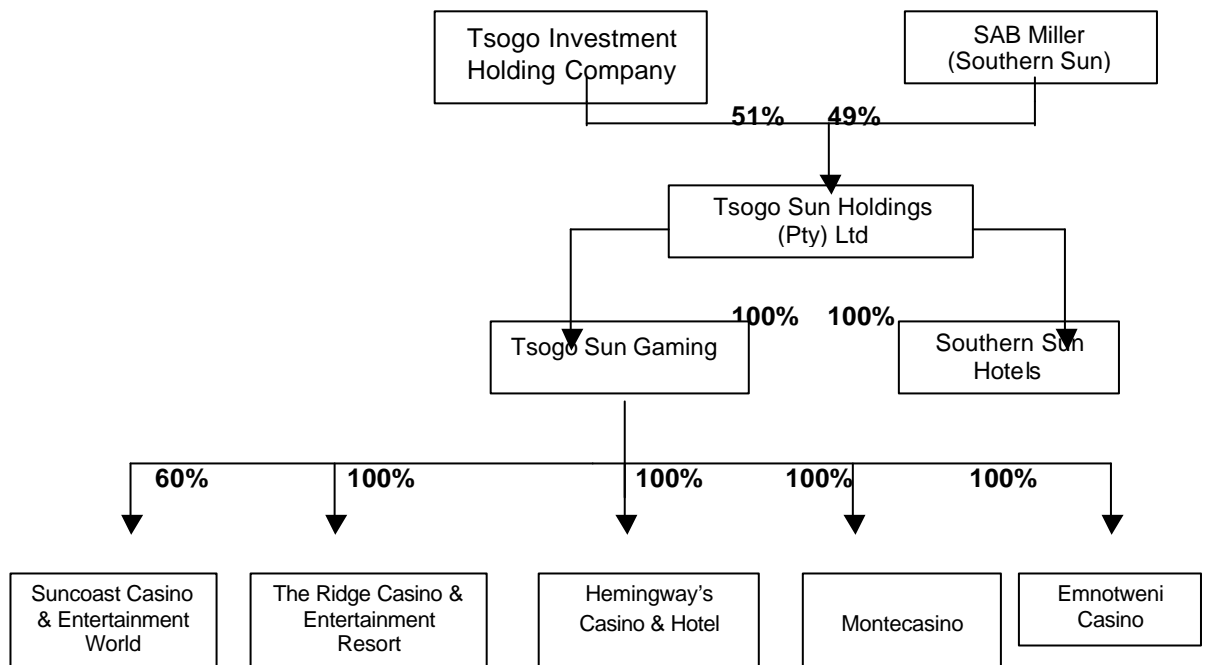
⁵ According to the parties, FIH's interests in Censor SA will be transferred to Fabvest pursuant to the Johnnic/Fabcos transaction.

⁶ The merging parties pointed out that Fabvest's interests in Established Investments would be excluded from the proposed acquisition.

[4] Below is an organogram which outlines the Fabcos shareholdings:



[5] The structure of TIH's subsidiaries is as follows:



The transaction

⁷ The remaining shares in TIH are held by: **Flaghigh, Nactu & Tangney (32%)**; Nafcoc Investment Holding Co. (Pty) Ltd (25%); African Renaissance (4.7%); and Patrice Motsepe (0.3%).

[6] The proposed transaction entails HCI acquiring 90% of the issued share capital of Fabvest from the Fabcos Trust. The remaining 10% will be acquired through section 440K of the Companies Act.⁸ Post-merger, it is envisaged that HCI will own and control 100% of the issued share capital of Fabvest. This will further entitle HCI to indirectly control TIH.⁹ It is through this transaction that HCI acquires the gambling and hotel activities of Fabvest.¹⁰

Rationale for the transaction

[7] HCI labels the present deal / investment in the hotel and casino industries as a lucrative one as South Africa continues to grow as a tourist destination of choice. HCI sees the deal as a continuation of its strategy to increase its stake in the Tsogo group. Fabcos Trust seeks to dispose of its stake in Fabcos to realise its investment in the hotel and casino industry (Tsogo group) so that it might concentrate on its core investment in Premier Foods and its subsidiaries.¹¹

Activities of the parties

[8] **HCI** is an investment holding company which has interests - through its subsidiaries - in 4 sectors, out of which only gambling seems relevant for purposes of our analysis. HCI is involved in the gambling market through limited pay-out machines ("LPM's") and casinos. As already pointed out, HCI has a 96% interest in Vukani, a route operator of LPM's. Vukani is currently operating in Mpumalanga and Western Cape provinces. We are told that although Vukani has also been awarded licences to operate these LMP's in Kwazulu-Natal ("KZN") and the Eastern Cape, it has as yet not commenced operations in these 2 provinces. Again, HCI has a 32% non-controlling stake in TIH, which owns 51% of, and controls, Tsogo Sun Holdings ("TSH"). TSH (which owns a 100% shareholding in Tsogo Sun Gaming and Southern Sun Hotels) holds 5 casino licences in SA, viz., Suncoast Casino & Entertainment World; the Ridge Casino & Entertainment Resort (Witbank); Hemingway's Casino & Hotel (East London); Montecasino (Fourways – JHB); and Emnotweni Casino (Nelspruit); and Suncoast Casino & Entertainment (Durban) (60%).¹²

[9] **FIH** was formed in 1997 to steer the commercial affairs of the Fabcos Trust. It was incorporated in 1995 as a special purpose vehicle specifically formed for purposes of acquiring shares and obtaining ownership stakes in corporate entities for the benefit and on behalf of the Fabcos members. The parties indicated that it was intended, after the establishment of Fabvest in 1997, that FIH would be ring-fenced

⁸ This is known as compulsory minority "take-out". Its salient features are: **(1)** The acquirer makes general offer for 100% of target shares; **(2)** If at least 90% acceptance of offer by all shareholders is achieved, remaining minorities can be compelled to sell (after six weeks); and **(3)** No court approval is required.

⁹ As consideration for the acquisition of the shares in Fabvest, HCI shall pay the purchase price and transfer 15 500 000 shares in its capital (approximately 13% of the issued share capital) to Newco, a vehicle created specifically for this purpose, the shareholders of which shall be the same as the current shareholders of Fabvest (**Page 89 of the Record and also the 4 steps outlined in the Commission's report, page 4**).

¹⁰ HCI will gain indirect control of TSH, which operates 5 casinos throughout South Africa. Therefore, by acquiring indirect control of TSH, HCI will also acquire the hotel interests of TSH listed on page 29 of the record. (**See the merging parties' attorneys' e-mail sent to the Tribunal on 11 May 2005, as well as pages 2-3 of the transcript of 16 May 2005**).

¹¹ The Fabcos Trust has already sold its 50% shares in FIH to Johnnic in a transaction approved by the Tribunal on 23 February 2005 (**Case no.: 01/LM/Jan05**). We were told that the *Johnnic / Fabcos* transaction was still awaiting approval of the National Gambling Board ("NGB"), which may happen in mid-June 2005.

¹² Johnnic holds the balance of 40% in the Suncoast Casino & Entertainment.

to hold only the Fabcos Trust's casino interests.

[10] **TIH** is described as a a broad based BEE entity whose shareholding benefits organized black owned businesses, labour movements and women groups. TIH has a joint venture company, Tsogo Sun with the SAB Miller. Both TIH and SAB Miller own a 51% and 49% shares in Tsogo Sun respectively.

[11] **Tsogo Sun Gaming** is a casino operating entity. It has 5 casino licenses operating in various geographic areas as described above.

Product overlap

[12] It is evident from the above that the only product overlap between the parties relates to their respective interests in the gaming industry. As already articulated, HCI and Fabvest have a common interest in the casino market through their indirect shareholding in TIH. However, HCI is also involved in the provision of LPM's. According to the Commission, the National Gambling Act - which regulates the South African gambling market (with the NGB being a statutorily established body to serve as the watchdog to oversee gambling activities in SA) – differentiates between casinos and LPM's, and therefore separates the activities of casinos and LPM's. Both the Commission and the merging parties contended that casinos and LPM's constitutes separate product markets hence no product overlap exist between HCI and Fabvest with respect to LPM's.

[13] Insofar as the casino market is concerned, the Commission and the merging parties submitted that the post-merger market structure will remain unchanged as the transaction would only result in HCI acquiring shares in Fabvest to gain control of TIH. The Commission did not foresee any competition concerns arising post-merger – no matter how the geographic market is defined.¹³

Market shares

[14] Below is a table (provided by the parties) reflecting the market share data relating to the gaming industry in which Tsogo Sun Gaming operates at provincial level.¹⁴

Gauteng

Casino	Licence holder	Market shares (%)
Caesars	Peermont Global	27
Carnival City Casino	Sun International	17
Emerald Casino resort	London Clubs	5
Gold Reef City	Gold Reef	21
Montecasino	Tsogo Sun	30

Mpumalanga

Casino	Licence holder	Market shares (%)
Champions Casino	Tsogo Sun	41
Emnotweni Casinos	Tsogo Sun	39
Graceland Hotel and Casino	Peermont Global	20

¹³ The merging parties contended that as individual provinces have the power to create their own regulations, no two provinces operate in exactly the same way to such an extent that the SA's geographic market for casinos can be viewed as 9 separate, independent markets sharing commonalities - page 101 of the record and pages 6-8 of the Commission's Report).

¹⁴ According to the parties, the market shares are management's best estimates based on gambling revenue figures from the NGB.

Kwazulu-Natal

Casino	Licence holder	Market shares (%)
Golden Horse Casino	Gold Reef	10
Monte Vista Casino and Resort	Balele Leisure	4
Sibaya Casino and Entertainment	Sun International	34
Suncoast Casino and Entertainment	Tsogo Sun	48
Tusk Umfolozi Casino	Tusk	4

Eastern Cape

Casino	Licence holder	Market shares (%)
The Boardwalk and Wild Coast Sun	Sun International	79
Hemingway Casino	Tsogo Sun	21

Competition Evaluation

[15] The parties contended that HCI already holds an investment interest in TIH and would merely be increasing its stake to an effective controlling interest through this deal. They further argued that as there would be no market overlap therefore the merger would not have impact on the gambling industry. They, however, admitted that barriers to entry are high as significant capital expenditure is required in order to establish the infrastructure and to acquire the equipment and machinery required for a new casino entrant to operate. Further to this, the Gambling Act and the various provincial gambling boards strictly regulate the casino industry. It was argued that because of this strict regulation countervailing power in this industry is very high. We were told that entry into the gaming industry was regulated through the old national Gambling Act 33 of 1996, which provided for the granting of a maximum of 40 licences, distributed across each of the 9 new provinces. With the introduction of the New Gambling Act – it was argued – the Minister of Trade & Industry (“the Minister”) is empowered to determine the maximum number of licences awarded from time to time with due regard to the criteria set out in the legislation.¹⁵ It appears the criteria require the Minister to balance the competing considerations of a competitive marketplace, BEE, and the incidence and consequences of over-stimulation of gambling. In such process, the Minister may also consult with the Competition Commission.¹⁶ The Commission contended that the proposed transaction would not result in any change in the current market structure.

Conclusion

[16] There were no public interest issues. In the Tribunal’s view, the transaction will not prevent or lessen competition substantially.

30 May 2005

David Lewis

Date

Concurring: **Urmilla Bhoola and Medi Mokuena**

¹⁵ See page 102-104 of the record.

¹⁶ For instance, section 54 of the new Gambling Act requires the licensing authority – when considering an application for a licence or the transfer of a licence – to consider whether approval of the application is likely to substantially effect competition in the gambling industry generally, or in respect of the proposed activity within that province or within SA (where applicable).

For the merging parties:	Robert Appelbaum and Nina Malan (<i>Sonneberg Hoffman Galombik Attorneys</i>)
For the Commission:	Hardin Ratshisusu (<i>Mergers & Acquisitions Division</i>)