COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 65/FN/Jul05

In the matter between:

Johnnic Holdings Limited	Applicant
and	
Hosken Consolidated Investments Limited	First Respondent
Competition Commission	Second Respondent

Decision

Tribunal's order

1. The Tribunal issued an order on 23 September 2005 dismissing this application with costs.

2. This decision sets out the reasons for the order.

Introduction

3. On 21 July 2005 Johnnic Holdings Ltd (“Johnnic”) filed an application with the Tribunal for a declaratory order and an interdict relating to action which Johnnic perceived was being or would be taken by Hosken Consolidated Investments Ltd ("HCI") in alleged implementation of a large merger which had not received the approval of the competition authorities. The merger in question is between HCI (acting through a wholly owned subsidiary, Mercanto Investments (Pty) Ltd ("Mercanto")) as the acquiring party, and Johnnic as the target company.

4. HCI, the first respondent in the application, opposed the application. The second respondent, the Competition Commission ("the Commission") did not oppose the application or file evidence.

5. The matter was heard on 22 September 2005.

HCI's undertaking, and the relief ultimately sought

6. A considerable terrain was in dispute at the time when HCI had filed its answering evidence (on 8 August 2005) and Johnnic responded with replying evidence, filed on 23 August 2005 This terrain was however considerably diminished when HCI's attorneys gave Johnnic an undertaking on HCI's behalf on 7 September 2005 to the effect that HCI would refrain from carrying out certain actions which Johnnic had decried as unlawful. At the hearing, Johnnic's counsel undertook to reframe the relief originally sought in order to take this undertaking into account, and the revised version was duly provided.

7. In the revised version, what Johnnic seeks is an order for:

   A declaration in these terms:

   > *The purchase by the first respondent of any shares in the applicant, and/or the exercise by the first respondent of any voting and/or other rights attaching to such shares as it may have acquired in the applicant, prior to the approval of the first respondent’s merger, alternatively proposed merger, with the applicant constitutes implementation, alternatively further implementation, of such merger, alternatively proposed merger, without approval in contravention of the provisions of the Competition Act (No. 89 of 1998)(the “Act”);*

   and an interdict in these terms:

Pending the final approval, if any, of the merger, alternatively proposed merger (with or without conditions), between the first respondent and the applicant, by the Competition Tribunal or the Competition Appeal Court, as the case may be, in terms of the Act, the first respondent shall be and is hereby interdicted and restrained from implementing, alternatively further implementing, the merger, alternatively proposed merger, including, without limitation, by exercising the voting and/or other rights attaching to such shares as it may have acquired in the applicant.

Fundamental questions in the application

8. The remaining questions in dispute include some which traverse thorny ground, but on the view we have taken of the application what requires resolution comes down to two fundamental points:

   1) Does HCI control Johnnic in the sense in which control is envisaged in s. 12(2)(g) of the Competition Act, 1989, as amended ("the Act")?

   2) Does HCI's intended merger with Johnnic amount to a 'proposed' merger which, on the basis of the decisions of the Competition Appeal Court ("the CAC") in the cases referred to below as the Gold Fields/Harmony cases, disentitles HCI from exercising voting rights in its current holding of Johnnic shares before the merger has received the approval of the competition authorities?

9. The relevance of these questions will be apparent once we have set out some of the essential facts.

Factual background

10. The dispute originates from the desire of both HCI and Johnnic to become significant owners of assets in the gaming industry, and the consequent strategy which both HCI and Johnnic adopted of targeting for acquisition the shares of a holding company in this sector, Tsogo Investment Holdings ("TIH"). TIH is the majority shareholder of a substantial casino and hotel operator, Tsogo Sun Holdings Ltd ("TSH"), said to be the largest in this field in South Africa.

11. Johnnic, originally a conglomerate, undertook the unbundling of Johnnic Communications Ltd ("Johncom") in March 2004. Johnnic's assets after the unbundling consisted of:[1]

    - A 100% interest in Gallagher Estate and Johnnic Properties;

1 Founding affidavit, paragraph 12, p. 10-11 of the record.

- An effective interest of 28.6% in Suncoast Casino; and
- And effective interest of 9.55% in TIH, with the acquisition of a further effective 9.5% interest subject to regulatory approvals;
- (Apparently, according to HCI, but not mentioned by Johnnic in its list of these assets in its founding affidavit) some R1.3 billion in cash.[2]

12. Following the unbundling of Johncom, Johnnic set out to acquire further gaming investments.

13. As illustrated in the accompanying diagram, which was supplied by Johnnic as an annexure to one if its affidavits, Johnnic, during the latter part of 2004, acquired 25% of the ordinary share capital of Fabcos Investment Holding Company Ltd (”FIH"), a 38% shareholder in TIH. This is described in the papers as "the first tranche". Johnnic also purchased a further 25% shareholding in FIH, "the second tranche”, which is subject to certain regulatory approvals.

14. HCI resisted Johnnic’s acquisition of the second tranche and has entered into a transaction to acquire Fabvest Investment Holding Ltd ("Fabvest"), currently a 75% shareholder in FIH. This acquisition by HCI is also subject to regulatory approval. Fabvest disputes Johnnic's acquisition of the second tranche and this dispute is the subject of arbitration between Johnnic and Fabvest.

15. HCI clearly sought ways to circumvent what appears to be a tumultuous scramble for ownership of TIH and TSH which, on the description given at the hearing by HCI's counsel, has generated a swathe of litigation in various High Courts and before the gambling regulatory boards of several provinces. Johnnic asserts that from the outset HCI intended to acquire control of Johnnic. HCI denies this, if somewhat obliquely, and asserts that this intention was formed only later, at a point we shall identify.

16. The first step taken by HCI to get around its head-to-head contestation with Johnnic was the acquisition by HCI during March 2005 of 20.72% of the issued shares in Johnnic. Soon after, HCI took the next step, being the acquisition of a further 9%, bringing its total shareholding in Johnnic to approximately 30%.

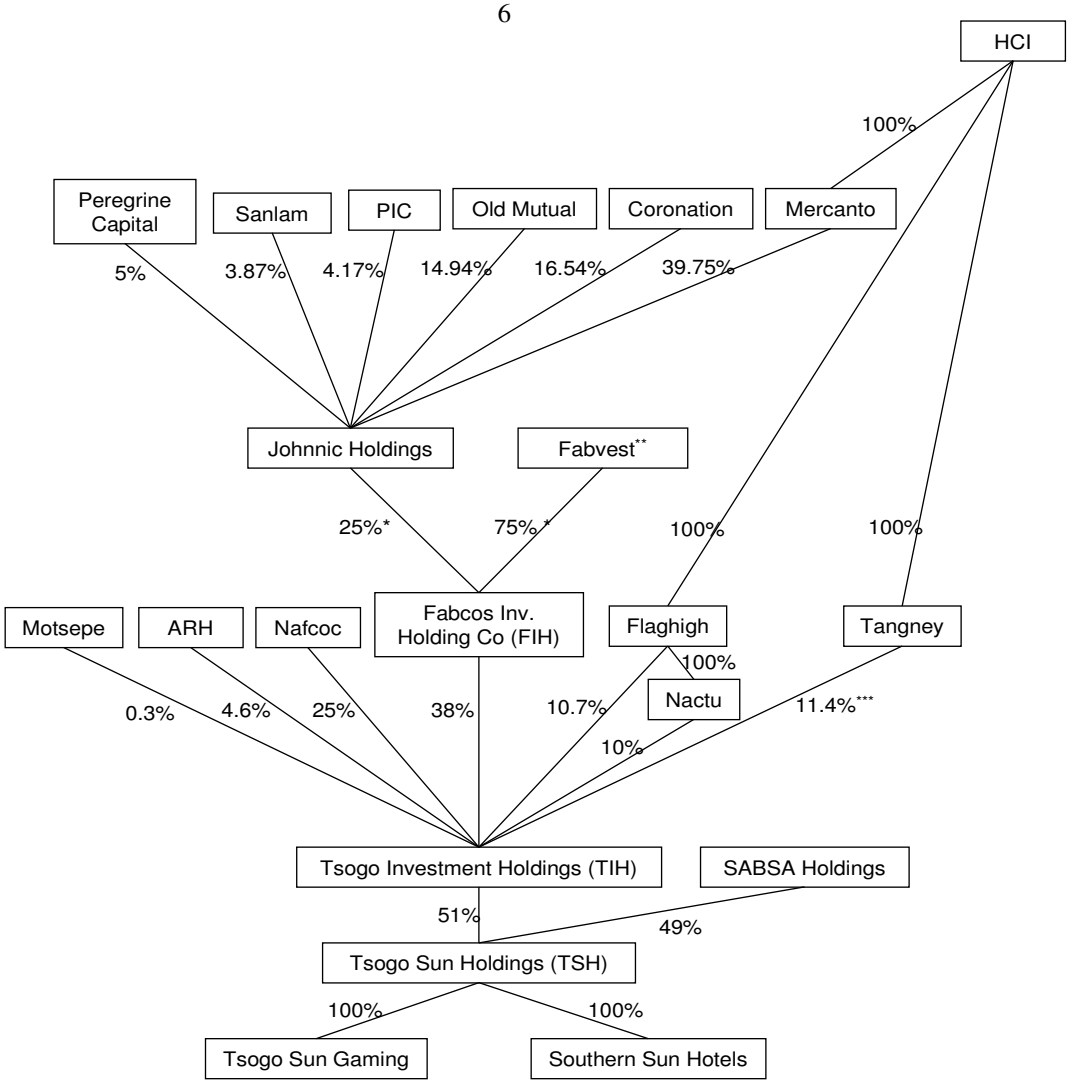
17. During May 2005, and on strength of its 30% interest, HCI requisitioned a meeting of Johnnic shareholders in terms of section 181 of the Companies Act, its purpose being to secure the appointment of three of HCI's nominees as directors of Johnnic. This would have enlarged Johnnic's board from six to nine members. At this meeting, which was held on 30 June 2005, the majority shareholders voted against the

2 Answering affidavit, paragraph 67, p. 97 of the record.

appointment of HCI's nominees, thereby defeating HCI's proposal.

18. On 1 July 2005, the day after the requisitioned shareholders' meeting, HCI announced that it had acquired an additional holding of approximately 10% in Johnnic, raising its total shareholding to 39.75% – a holding to which we shall refer below, for convenience, as 40%. Mercanto holds all of these shares.

19. The web of holdings in this corporate matrix is illustrated in the accompanying diagram. Companies which have not been identified above but which are named in the diagram have no part in the dispute before the Tribunal between Johnnic and HCI.



* In the event that the suspensive conditions to the second tranche are fulfilled, both Johnnic Holdings and Fabvest will each hold a 50% interest in FIH.
** HCI has purchased 100% of the shares in Fabvest, subject, *inter alia*, to obtaining the approval of the relevant Gaming Boards, which approval has yet been obtained.
*** Tangney's shareholding in TIH is the subject of a dispute in the High Court of South Africa.

20. Before the requisitioned shareholders' meeting of 30 June 2005, HCI and its corporate advisors had met with Johnnic's institutional shareholders and presented a plan to them in terms of which it was proposed that HCI's three nominees be appointed to Johnnic's board, and that Johnnic, with HCI's co-operation, set out to become the vehicle through which the TSH group would be listed on the JSE. In essence, TIH would sell all of its shares in TSH to Johnnic in return for shares in Johnnic, and SABSA Holdings (Pty) Ltd, the minority shareholder in TSH, would sell its holding to Johnnic in return for cash or shares in Johnnic. This course of action was only to be pursued once HCI's nominees had been appointed to the Johnnic board.

21. This plan fell apart when Johnnic's other shareholders voted down HCI's resolution at the requisitioned meeting.

22. This rebuff led HCI to change course and to increase its stake in Johnnic to the extent where it could contend for control. HCI asserts that it was only at this point that it formed the intention of controlling Johnnic.[4] Its former strategy, if we understand it correctly, had been to co-exist with Johnnic, each holding substantial direct or indirect

4 Answering affidavit, paragraph 28, on p. 77 of the record.

stakes in TIH/TSH but preserving its own identity, with HCI retaining what was by 30 June 2005 a significant but not a controlling holding in Johnnic.[5]

23. The attainment by HCI of its 40% shareholding in Johnnic, exceeding the 35% which triggers a mandatory offer in terms of the Securities Regulation Code on Takeovers and Mergers and the Rules of the Securities Regulation Panel ("the SRP Code"), led HCI to announce on 4 July 2005 its firm intention to make such a mandatory offer for the balance of the shares in Johnnic. HCI also announced that it would invoke s. 440K of the Companies Act, if it obtained acceptance of 90% of the shares bid for in the mandatory offer, in order to take its holding to a full 100%. Thereafter, HCI announced, it would cause Johnnic to be delisted.[6]

24. In the light of this announcement Johnnic's attorneys sent a letter to HCI on 5 July 2005 informing HCI that Johnnic regarded HCI's latest acquisition of Johnnic shares and the mandatory offer as a "proposed merger" in terms of the Competition Act. In the letter, Johnnic put HCI on terms to notify the competition authorities of the "proposed merger", and pending their approval to refrain from:

    - implementing the "proposed merger";
    - taking transfer of any of the latest 10% of Johnnic shares acquired by HCI;
    - acquiring and taking transfer of further Johnnic shares other than in terms of the mandatory offer; and
    - voting or otherwise exercising any rights attaching to the shares constituting the latest 10% acquisition or attaching to any further Johnnic shares acquired by HCI.[7]

25. For convenience we set out here the relevant provisions of s. 13A of the Act:

    1) A party to …... a large merger must notify the Competition Commission of that merger in the prescribed manner and form.
    2) ……
    3) The parties to …….[a] large merger may not implement that merger until it has been approved, with or without conditions, by ……. the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.

26. HCI's attorneys responded on 6 July, largely refuting Johnnic's contentions but stating that HCI considered that its mandatory offer might lead HCI to boost its shareholding in Johnnic beyond 50%, which would in HCI's view constitutute a notifiable merger. In anticipation of acceptance above this level, HCI had informed the Commission of HCI's mandatory offer and the merger which would ensue if an appropriate level of

5 See paragraph 22 of the answering affidavit, p. 76 of the record.
6 The initial announcement forms Annexure KCR 2 to the founding affidavit, at p. 30-31 of the record. HCI's circular to Johnnic's shareholders setting out the offer forms Annexure JC4, starting at p. 130 of the record.
7 Annexure KCR 17 to the founding affidavit, at p. 60-61 of the record.

acceptance was achieved. However, HCI denied that it had control of Johnnic at that stage, and asserted that it had not entered into any voting pool or other arrangement with others which would amount to control. Accordingly HCI denied that it was obliged to comply with Johnnic's demands and declined to submit to them.[8]

27. A letter from HCI's attorneys to the Commission was indeed sent on 6 July 2005 informing it of HCI's shareholding in Johnnic and of HCI's intention to make a mandatory offer for the remaining shares, on the basis that acceptance in respect of another 10% of the shares would lead to a notifiable merger.[9]

28. An offer document was circulated by HCI to Johnnic's shareholders on 1 August 2005 in compliance with the requirements of the SRP Code, and on 3 August 2005 Mercanto filed a statutory notification of a merger with the Commission in terms of section 13A(1) of the Competition Act. It appears that Johnnic has also filed a merger notification document in its capacity as a target company in a merger.[10]

29. It is common cause that the merger contemplated in the notifications is a large merger.

Some features of the parties' evidence

30. According to Johnnic's main deponent, Ms Ramon, HCI had a "*calculated, deliberate and ongoing strategy to implement an actual, or at least proposed merger with Johnnic through a series of inter-related steps, without the approval of the competition authorities*". She asserts that the acquisition by HCI of the 10% shareholding on 1 July 2005, taking HCI's holding to 40%, was "*merely the final step of a strategy to acquire control of Johnnic which commenced with its acquisition of an approximately 20.72% interest … in March 2005*."[11]

31. Ms Ramon states that HCI is the largest single shareholder in Johnnic, with twice as many shares as the next largest shareholder. She identifies the other material shareholders in Johnnic and their approximate percentage interests as follows:[12]

Coronation	16.54
Old Mutual	14.94
Public Investment Commission ("PIC")	4.17
Sanlam	3.87
African Harvest ("AHFM")	4.7

32. It emerged from a supplementary affidavit by Ms Ramon, dated 21 September 2005, that Sanlam has in the interim sold its holding and that another institutional investor,

8 Annexure KCR 18 to the founding affidavit, pp 62-64 of the record.

9 Annexure KCR 3 to the founding affidavit, pp 32-33 of the record.

10 See transcript p. 18 and for Mercanto's notification p.261 of the record.

11 Paragraph 36 of the founding affidavit and on p. 17 of the record.

12 Founding affidavit, paragraph 37 on p. 17 of the record.

Peregrine, has acquired a holding of 5%.[13] This most recent information is reflected in the array of shareholders identified in the accompanying diagram.

33. In her founding affidavit Ms Ramon stated, in language which we find highly equivocal, that she had been advised that HCI's current shareholding of 40% in Johnnic "*may itself constitute an acquisition of control, and hence the implementation of an actual merger, within the meaning of s. 12 of the Act, and in particular the ability to materially influence the policy of Johnnic within the meaning of section 12(2)(g).*"[14]

34. For convenience, the terms of s. 12(2), as it relates to companies, are stated at this point:

12(2) A person controls a firm if that person –

a) beneficially owns more than one half of the issued share capital of the firm;
b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
c) is able to appoint or veto the appointment of a majority of the directors of the firm;
d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);
e) …….
f) …….
g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

35. It seems from various parts of the founding affidavit, but specially paragraph 37, that Johnnic regards the mere acquisition of its shares by HCI, with the ultimate goal of securing control, as the implementation of a merger in contravention of the Act. Although this too is stated only obliquely in the affidavit, it seems that this alleged implementation is considered to extend collectively to all the transactions by which parcels of shares leading up to the current holding of 40% were obtained, and also to certain and later attempts of HCI to acquire additional shares, manifested by approaches to some of the institutional shareholders.[15] Ms Ramon mentions in particular the PIC and AHFM.

36. Ms Ramon also set out in her founding affidavit the extent of shareholder participation

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[13] Paragraph 11 of supplementary affidavit of Ms Ramon dated 21 September 2005.

[14] Founding affidavit, paragraph 37 on p. 17 of the record.

[15] See paragraphs 19-32 of the founding affidavit, p. 12-15 of the record.

in the voting at a number of the most recent general meetings of Johnnic, identified in the table below. [16]

Date of meeting	% of issued share capital represented	Purpose of meeting
3/6/2003	76.28%	General meeting to consider unbundling of Johnnic assets
30/9/2004	64.36%	Annual general meeting
27/10/2004	83.85%	Annual general meeting
9/3/2005	80.35%	General meeting to consider unbundling of Johnnic assets
30/6/2005	90.42%	General meeting requisitioned by HCI to appoint directors to Johnnic Board

37. Ms Ramon stated that the average percentage of issued share capital represented at Johnnic's general meetings since 2003, derived from this table, had been 79.05%. Only at the most recent meeting, in June 2005, at which there had been an unusually high turnout, would HCI not have commanded a majority of votes cast, she asserted.[16A] These facts, she claimed, demonstrated that HCI, with its 40% shareholding, was in control of Johnnic.

38. Ms Ramon's assertions equate to a claim that HCI's holding of 40% gives it the "material influence" referred to in s. 12(2)(g). This allegation is the major plank in the first part of Johnnic's case, as will be seen.

39. Ms Ramon deals in her founding affidavit with her perception of harm suffered as a result of the allegedly illegal conduct of HCI. Her allegations are couched in entirely general terms.[17] She states that since the Competition Act is intended to protect the public interest, a party to a merger who seeks to implement a proposed merger without notification and without the prior approval of the competition authorities does injury to the public interest. She asserts further that HCI is a competitor of Johnnic in the hotel and gaming market, in particular in respect of TSH. If HCI is permitted to implement the merger it will be able to control Johnnic (if it does not already do so) and will be able to "neutralise" the competition of Johnnic for TSH. Accordingly, she states, there is a reasonable apprehension that HCI, if not restrained by the Tribunal, will continue to implement its proposed merger with Johnnic without approval and in contravention of the Act. This would be tantamount to harm to the public interest and

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[16] Paragraph 39 on p.18 of the record.

[16A] We find this a puzzling assertion in view of the fact that, on the figures she adduced, shareholder representation at the three most recent general meetings of Johnnic exceeded 80%.

[17] Set out in paragraphs 60-63 of her affidavit, p. 23-24 of the record.

to competition, and "serious and/or irreparable" harm to Johnnic.

40. It is only in Ms Ramon's replying affidavit, filed on 23 August 2005, that a more specific vision of harm emerges. She states[18] that a general meeting of Johnnic's shareholders will be held on or about 27 September 2005 at which HCI will be able to vote its shares in Johnnic - a meeting at which "*a number of resolutions of significant strategic and operational importance*" for Johnnic will be considered, including:

    - the adoption of the group's financial statements for the year to 31 March 2005;
    - the re-election of certain directors;
    - a special resolution authorising the directors to re-purchase Johnnic shares;
    - the approval and adoption of "the Johnnic Holdings Limited Long Term Incentive Plan 2005";
    - approval of the non-executive directors' remuneration.

41. Although Ms Ramon refers to other possible meetings of shareholders of Johnnic, she does not describe any as having been convened or being in immediate prospect. The further meetings she describes appear to be the shareholders' meetings one would expect a company such as Johnnic may be required to hold in special circumstances, such as to vote on Category 1 transactions under the rules of the JSE and meetings in terms of rule 19 of the SRP Code. Nothing is said by Ms Ramon to suggest that any such special circumstances are impinging on Johnnic.

42. Much of the evidence in the parties' affidavits is otiose in view of the undertaking of HCI, referred to above.[19] This was an undertaking, provided after Johnnic had filed its replying affidavit, to refrain from acquiring further shares in Johnnic outside the mandatory offer, pending approval of the merger by the competition authorities. It followed an equivocal response by Johnnic in its replying evidence to a statement by HCI in its answering affidavit that HCI did not intend to buy further Johnnic shares outside the mandatory offer to Johnnic's shareholders.

43. However, some of the contents of the answering affidavit by HCI's deponent, Mr Copelyn, should be mentioned.

44. Mr Copelyn asserts that HCI's acquisitions of shares in Johnnic formed part of its overall strategy "*to increase its exposure to gaming assets and to TIH and [TSH]*".[20] Although his evidence on the point is somewhat circuitous, he appears to seek to

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[18] Paragraph 16, at p. 273-4 of the record.

[19] The undertaking is set out in a letter from HCI's attorneys to Johnnic's attorneys, dated 7 September, forming Annexure JC 8 to HCI's supplementary affidavit by Mr Copelyn. It is at p. 328-329 of the record.

[20] Answering affidavit, paragraph 14, at p. 73 of the record.

present the picture that it only occurred to HCI to seek control of Johnnic after his company had been rebuffed in its attempt at the meeting of 30 June 2005 to place three nominees on the board of Johnnic. We find this far-fetched. It is far more probable that a bid for control of Johnnic was foreseen from the start as a fallback plan if the cake of TIH and TSH could not be amicably cut with Johnnic.

45. As regards the declaratory order sought, Mr Copelyn regards it as academic in view of HCI's stated intention, set out in his affidavit, not to acquire further shares in Johnnic outside of the mandatory offer.[21] He states further that HCI has no intention of implementing the merger until it has been approved by the competition authorities.[22]

46. The interdict sought by Johnnic should not be granted, he contends, because Johnnic has failed to establish the requirements for an interdict.[23] He goes on to discuss what he considers to be Johnnic's failure to reveal a clear right, an injury committed or a well-founded apprehension of an injury, and the absence of an alternative remedy. These are essentially legal submissions and they will be dealt with below when the arguments of counsel at the hearing are discussed.

47. On the crucial question of whether HCI now controls Johnnic, Mr Copelyn denies the existence of such control and the possession of "material influence"[24], and points out the equivocal nature of Johnnic's assertions[25] – that HCI's 40% holding "*may*" constitute control (paragraph 37 of the founding affidavit), and the allegation that "HCI has already acquired control over Johnnic" (paragraph 41). He further contends that HCI has always sought to comply with the Competition Act, and made its merger notification once the mandatory offer had been triggered, not as a matter of legal obligation at that stage but in anticipation of the acquisition of control.[26]

48. In his denial that HCI has *de facto* control of Johnnic, he points out that HCI has no representation on Johnnic's board, and asserts that HCI has no arrangement by way of a voting pool or otherwise by which it could exert control or influence the voting of Johnnic shares other than those currently held by it.[27]

49. He reveals however that HCI had in the preceding few days obtained irrevocable undertakings from shareholders holding 3.1% of Johnnic's issued share capital to accept the mandatory offer, subject to all requisite regulatory approvals.[28]

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[21] Answering affidavit, paragraph 40, p. 83 of the record.

[22] Answering affidavit, paragraph 52.3.3, p. 91 of the record.

[23] Answering affidavit, paragraphs 45 et seq, from p. 85 of the record.

[24] Paragraphs 6.3.1 at p. 71 of the record and paragraph 81.1 at p. 105.

[25] Paragraph 52.2.3 at p. 89 of the record.

[26] Paragraph 31.6, at p. 79 of the record.

[27] Paragraph 31.7, at p. 80 of the record.

[28] Paragraph 78.6, at p. 104 of the record.

50. He contends that Ms Ramon's reliance on the voting figures at recent meetings of Johnnic's shareholders is misplaced since Johnnic is "*an entirely different company*" after the unbundling of Johncom in March 2004, and will in all likelihood be exposed to greater scrutiny and shareholder participation than in the past, particularly as significant press coverage of the current situation between Johnnic and HCI has led to heightened shareholder interest in Johnnic's affairs.[29]

51. He asserts that there are at present relatively few significant shareholders in Johnnic and they are mainly very sophisticated and experienced institutional investors.[30] In the light of these factors a high turnout of shareholders at general meetings can be predicted.[31] The other shareholders have already demonstrated their ability to vote as a block, when HCI sought to have its three nominees placed on Johnnic's board.[32] Bearing in mind that at the most recent meeting the shareholder presence had been 90.42% of Johnnic's share capital, he considers that HCI could only be said to have gained control of Johnnic if it had half that number of shares plus one share.[33] This would place a controlling shareholding at more than 45%.

Submissions of counsel at the start of the hearing

52. Johnnic's counsel, Mr Unterhalter, conceded that, because of the undertaking given by HCI to refrain from acquiring shares in Johnnic outside the mandatory offer, the main practical interest in the case from Johnnic's viewpoint was whether HCI was entitled to vote its existing shares in Johnnic at the general meeting of shareholders to take place on 27 September 2005. In addition, Mr Unterhalter indicated that, because of the hostile nature of the merger, the possibility that further meetings of Johnnic's shareholders might be necessary before evaluation of the merger by the competition authorities had taken place was of substantial concern to Johnnic.[34]

53. Mr Gauntlett, for HCI, pointed out that HCI had indicated in correspondence between the parties' attorneys that it would be possible to postpone the meeting scheduled for 27 September, and confirmed HCI's willingness to co-operate in securing such a postponement.[35] This did not satisfy Johnnic.

Basis of claims for interdict

54. Mr Unterhalter contended that Johnnic was entitled to an interdict in

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[29] Paragraph 82, at p. 106 of the record.

[30] Idem.

[31] Idem.

[32] Idem.

[33] Idem.

[34] See exchange of comments between the chairman and Mr Unterhalter at p. 4-5 of the transcript.

[35] Transcript, p. 3.

regard to the voting of HCI's shares in Johnnic on two alternative grounds.

55. The first is that HCI has acquired control of Johnnic either solely by virtue of its 40% shareholding or jointly with other shareholders who have undertaken irrevocably to sell 3.1% of Johnnic's shares to HCI in terms of the mandatory offer.

56. The second is that HCI is a party to a proposed merger with Johnnic through its mandatory offer and the consequent s. 440K acquisition referred to above. Under both alternatives Johnnic reasonably apprehends, he asserted, that HCI would seek to implement the merger without prior approval of the merger by the competition authorities.

57. He referred to the definition of a merger under s. 12(1)(a) of the Act, which states:

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

The issues of control and implementation as argued by Johnnic

58. Mr Unterhalter contended that the mere ownership by HCI of 40% of Johnnic, given the "*widely fragmented*" spread of shareholders in Johnnic, conferred on HCI the ability to materially influence the policy of Johnnic within the meaning of s. 12(2)(g) of the Act. He said that one of the ways in which material influence could be tested was to analyse the *de facto* ability of a minority shareholder to determine the outcome of shareholder meetings, and cited the EC Notice on the Concept of a Concentration:[36]

> *….. the shareholder is highly likely to achieve a majority at the shareholders' meeting, given that the remaining shares are widely dispersed. In such a situation it is unlikely that all the smaller shareholders will be present or represented at the shareholders' meeting.*

59. It could not be inferred, he contended, that because HCI's attempt to install its three nominees as directors of Johnnic had elicited an "*abnormal and exceptional*" turnout of shareholders, all future decisions of major importance to Johnnic would generate the same extraordinary degree of attendance.

60. On the issue of joint control, he argued that HCI now had an additional 3.1% of voting power because of the irrevocable undertaking received by HCI from other shareholders to sell these shares to HCI under the mandatory offer. This amounted to

[36] OJ [1998] C66.

joint control since "*it goes without saying that shareholders willing to sign irrevocable undertakings of this sort are likely to vote together with HCI on matters of significant strategic and operational importance for Johnnic*."

61. In a review of the law in other jurisdictions, Mr Unterhalter mentioned the UK case of Government of Kuwait v BP PCL, where the following was said: [37]

> *… a shareholding of 21.6 would, in the absence of any other large shareholdings, have been sufficient to allow the Government of Kuwait to ensure that the Board of BP and its senior management would have regard to the interest and wishes of Kuwait before finalising any major decisions… Its holding would have put it in a very strong position to tip the balance if differences arose between shareholders.*

62. Hence, he submitted, HCI already controlled Johnnic. Voting by HCI at the forthcoming shareholders' meeting of Johnnic would amount to implementation of HCI's merger with Johnnic and would be unlawful.

The "proposed merger" and the implications of this concept

63. The second ground argued by Mr Unterhalter, referred to above, is that HCI has launched a "proposed merger" with Johnnic and is intent on implementing the proposed merger without the approval of the competition authorities, implementation taking the form of voting its Johnnic shares.

64. The statutory basis for the term "proposed merger" is located in s. 11(5) of the Act, which defines three types of merger, and in subsection (c) states that:

> *"a large merger" means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).*

65. There are corresponding definitions in s. 11(5)(a) and (b) of small and intermediate mergers. The term "proposed merger" also appears in sections 12A2(g) and 14(1)(a) of the Act.

66. The mandatory offer, Mr Unterhalter contended, represented the final stage of a calculated, deliberate and ongoing strategy to acquire control through a series of inter-related, incremental steps. The first of these steps, he said, had been taken in March 2005 when HCI acquired its first parcel of shares in Johnnic. Mr Unterhalter argued that this course of action placed HCI squarely within the boundaries of the decision in Gold Fields Ltd v Harmony Gold Mining Company Ltd and another [2005] 1 CPLR 74 (CAC) and its consequent decision, Harmony Gold Mining Company

37 CM 447 (1998) at paragraph 8.16

Limited v Gold Fields Ltd and others [2005] 1 CPLR 97 (CAC). We shall refer to them collectively as "the Gold Fields/Harmony cases".

67. In those cases an interdict was granted to Gold Fields to restrain Harmony, pending approval by the competition authorities, from voting or otherwise excercising its voting rights in shares it held in Gold Fields at a time when Harmony had launched a bid for control of Gold Fields. More details of the essential facts in those cases will emerge later in this decision.

68. Mr Unterhalter's strenuously argued interpretation of the Gold Fields/Harmony cases was that a firm's mere intention to merge, arising at the time when the intention to bring about the merger first takes hold in its corporate mind, becomes at and from that moment a notifiable merger in terms of the Act, and that the exercise of voting rights in shares in the target which the acquiring firm then holds or later acquires is prohibited, being a form of implementation of the merger, until the merger has been approved by the competition authorities.

69. We observe in passing that such a proposed merger would be, on Mr Unterhalter's reasoning, on the same footing for purposes of notification to and approval by the competition authorities, as, for example, a friendly merger ensconced in a written, binding agreement, supported and endorsed if necessary by the boards and shareholders of either or both of the merging parties, and containing a suspensive clause of a customary type making the merger subject to the competition authorities' approval. But it would also extend to numerous earlier milestones in a negotiation leading up the conclusion of a contract, including discrete points at which draft documents for the merger were drawn up and later revised or replaced. At each such milestone, on Mr Unterhalter's contention, a notification must be filed. When it is superseded by say the next draft agreement, representing a counter-offer in the negotiation, the notification must be withdrawn and a fresh notification filed. We shall return later in this decision to this view of the notification requirements of the Act and its implications.

70. Mr Unterhalter argued that "*at least from*" 1 July 2005, when HCI acquired the 10% stake in Johnnic which raised its holding from 30% to 40%, there was a clear intention to take control of Johnnic, and consequently a proposed merger. From then onwards, he contended, HCI was barred under s. 13A(3) from voting its shares in Johnnic or taking any other step in implementation of the merger, and further was obliged under s. 13A(1) to notify the proposed merger to the Commission. He accepted that HCI had fulfilled the latter obligation, even if "*belatedly and somewhat reluctantly*". Having filed the notification, HCI was still disentitled to vote its shares in Johnnic. All the shares HCI had acquired, and not only the last parcel of 10%, were affected by this disability.

71. Tracing what he considered a close parallel with the facts in the Gold Fields/Harmony cases, he drew attention to a passage in the first of these cases on which he placed strong reliance: [38]

38 At p. 92F-G

> *… the early settlement, if implemented, would constitute a large merger that must be notified in terms of [s.] 13A(1). For this reason the acquisition by the first respondent [Harmony] of 34.9% of the issued share capital of appellant, read with the irrevocable undertaking of Norilsk, would constitute an assumption of control in terms of section 12(2)(g) of the Act.*

72. This finding of the CAC was significant, Mr Unterhalter argued, in that it did not postulate the success of the early settlement offer (a voluntary offer for only sufficient shares to bring Harmony's stake in Gold Fields to 34.9%). There was no certainty that the early settlement offer would succeed, and yet the effect of the CAC's ruling was that if the best outcome of such an offer would be the attainment of a controlling shareholding, that represented a proposed merger. The test was how many shares the offeror intended to acquire by its offer.

73. Even the facts revealed in the later of the Gold Fields/Harmony cases, in which Harmony sought leave to appeal and also sought an amendment of the terms of the interdict, had not dissuaded the CAC from upholding the interdict, if only in a revised form which corrected the excessive ambit of the original version.

74. Thus, contended Mr Unterhalter, the effect of the GoldFields/Harmony cases was that once a proposed merger existed, and pending the outcome of a merger notification at the hands of the competition authorities, the intending acquiring party is barred from voting its shares in the target firm. There was a complete parallel in the present case, he contended.

75. Mr Unterhalter:[39]

> *"… it was part of a co-ordinated plan from March to seek to acquire incremental interests in Johnnic so as to be able to ensure its ultimate control over [TSH] and there too we say there was a proposed merger at least from that date. But it doesn't really matter, because in either event …. [t]here is a proposed merger before the Commission and the disability then kicks in, and therefore on that ground, the interdict is competent and legally, in a sense, required. That is on the basis that the interdict flows from the proposed merger."*

Basis for the declaratory order

76. Mr Unterhalter rejected HCI's contention in its evidence that the declaratory order sought by Johnnic would be academic. HCI had attained sole or joint control of Johnnic on the basis set out above, he said, in contravention of the Act. The entitlement to a declaratory order

39 Transcript at p. 35.

followed from the contravention. He conceded that the grant of such an order was discretionary but urged it on the Tribunal as a way of demonstrating to the public that contraventions had consequences.

HCI's arguments

77. HCI's defence rested on three bases: that there was no harm threatening Johnnic, that there had been no contravention of the Act, and that the relief sought by Johnnic was misconceived.

78. The alleged harm to Johnnic stemming from HCI's impending participation in the voting at Johnnic's general meeting on 27 September was, Mr Gauntlett suggested, an afterthought. It had clearly been devised when Johnnic's allegations in the founding affidavit about HCI's moves to acquire further shares in Johnnic had been deflated by assurances in HCI's answering affidavit that HCI had no intention to acquire further shares outside the mandatory offfer. This assurance had later been cemented by the undertaking extended through HCI's attorneys, "*couched in words of one syllable*."

79. The shareholders' meeting scheduled for 27 September 2005 was the "*beginning and end*" of the case, Mr Gauntlett contended. The items on the agenda for that meeting were purely routine and strategically inconsequential – comparable to stereotypical corporate agenda items such as "*parking bays and paternity leave*".

80. Johnnic had produced no evidence to show that any of the items on the agenda for the meeting of 27 September 2005 was highly controversial or would have a life-changing effect on Johnnic. Mr Gauntlett contrasted this with the facts in the Gold Fields/Harmony cases, where a special meeting of shareholders of Gold Fields had been convened at which a controversial and major transaction – a "fork in the road" for the company – had been in prospect, and on which Norilsk, a 20% shareholder in Gold Fields, had differed fundamentally from the majority of the board of the company and had undertaken to vote with Harmony in opposing the resolutions which would have given the company approval for the transaction.

81. HCI had made a merger notification in the form required by the Act, and Johnnic had not sought to base its relief on a contention that HCI had been dilatory in doing so. The notification having been made, it was irrelevant whether it should have been filed at any earlier date. Assuming it was necessary to make the notification, HCI had complied with the Act.

Other contentions on behalf of HCI

82. As regards the contention that HCI had unlawfully implemented a proposed merger in that all of the steps taken so far by HCI to acquire control of Johnnic constitute the unlawful implementation,[40] HCI contended that this view of a merging firm's obligations would lead to absurd consequences. Once a firm has formed an intention to merge, it will be prohibited from taking any steps to give effect to the intention until

40 Founding affidavit, paragraph 59, p. 23 of the record.

the merger had been notified and approved. This would be "regulatory stalemate."

83. The correct interpretation, HCI contends, is that a firm can properly acquire control but cannot implement the control until its merger has been approved. It is this implementation of control after the acquisition that amounts to a contravention of s. 13A(3) if approval has not yet been given by the competition authorities. This view, HCI contends, is consistent with the principles of merger regulation since competition authorities have no interest in restraining the activities of an intending merging party outside the exertion of control.

84. HCI further contends that this view of the matter is fully supported by the Gold Fields/ Harmony cases. Two relevant passages in the first case read: [41]

> *The implication of this procedure is not that the party cannot continue with its proposal to effect a merger but that it will be prohibited in terms of section 13A from implementing the merger until the latter has been approved;*

and

> *What section 13A(3) seeks to prohibit was not the completion of the merger but any implementation thereof prior to authorisation having been given by the relevant competition authorities.*

85. In another passage cited by HCI the CAC stated in this case that: [42]

> *Were the early settlement offer to constitute a merger as defined in section 12 of the Act, first respondent would not be entitled to exercise a controlling influence over the first appellant pursuant to this offer without having obtained permission from the competition authorities to do so.*

86. The interdict in the Gold Fields/Harmony cases, HCI contends, was therefore directed at the exertion of a controlling influence, not the acquisition of control. What was interdicted was not voting of the shares in general, but voting them in a manner which amounted to implementation of a merger.

87. In any case, HCI contended, it does not have control over Johnnic. The evidence in Johnnic's affidavits on this point comes down to speculation, based on the arithmetic of attendances at Johnnic's most recent meetings of shareholders. Johnnic is different in nature from what it was before the unbundling of Johncom. It now possesses a large sum of cash, and shareholders will be particularly concerned about how this cash is spent. A high level of shareholder interest and

41 At p. 16 of the CAC decision.
42 At p. 37 of the CAC decision.

activism can be expected at present. Even on Ms Ramon's table of attendances, and taking the most recent meeting as the benchmark, a company would need to have a shareholding of at least half of 90.42% to command control.

88. Mr Gauntlett also contested the notion that the shareholders in Johnnic were "*fragmented*" and by implication unable to assert their interests. On the contrary, they are "*tough*" institutional shareholders who are "*in it for the money*" and so far have shown "*scant inclination to dance to our tune*."

89. The contention that HCI had joint control with the shareholders from whom it had an irrevocable undertaking to sell their shares on the conditions set out in the mandatory offer was wholly unfounded, Mr Gauntlett contended. The fact that they had agreed to sell their shares to HCI did not mean that they would "*vote like lackeys*" at the meeting on 27 September. There was no evidence at all that they had formed a coalition with HCI to vote similarly on any issue.

90. Accordingly, HCI contends, it cannot be found to control Johnnic. Without control, it cannot implement a merger, and accordingly its refusal to refrain from using its voting rights at meetings of Johnnic is justified.

91. As to the relief sought, Mr Gauntlett contended that Tribunal has a discretion whether to issue a declaratory order even when illegality has occurred. He referred to Baxter, Administrative Law,[43] in this regard. A declaratory order is an exceptional remedy, not usually granted together with an interdict.

92. In any case, HCI contends, the declaratory order sought by Johnnic would extend in perpetuity, for no good reason.

93. The application is, Mr Gauntlett contended, an interlocutory proceeding pending the Tribunal's consideration of the merger as notified, and the Tribunal should be cautious in its approach to issues surrounding the merger so that it does not pre-empt a proper decision on what will be the main matter.

The Tribunal's conclusions

94. The Tribunal is mindful that this is an application for final relief and must be decided on a balance of probabilities, not on the somewhat more generous basis which would apply to an applicant in an application for temporary relief.

95. Any doubt which may have existed previously about the Tribunal's powers to issue an interdict sought by a firm on the basis that another is implementing a merger which has yet to be ruled upon by the competition authorities – thus, a contravention of s.

[43] Pages 702-704.

13A(3) of the Act – has been dispelled by the decision of the CAC in the first of the Gold Fields/Harmony cases, where this power was affirmed and such an interdict was granted.[44]

96. It should by now be clear that the answers to the two questions posed at the outset of this decision would dispose of this case.

97. On the question of the control of Johnnic under s. 12(2(g), we are satisfied that HCI has not been shown to control Johnnic, whether singly or jointly with others.

98. There is, as Mr Gauntlett stressed, no evidence of any kind before us to show that the shareholders who have agreed irrevocably to sell 3.1% of Johnnic's shares to HCI in terms of the mandatory offer will ally themselves with HCI in any voting choices. There is moreover no common or customary pattern of behaviour in this regard within our knowledge to suggest a likelihood that an intending seller's voting choices at shareholders' meetings will coincide with those of a shareholder who is in the market for more shares. The allegation of joint control must fail – it is purely speculative.

99. As to sole control, 40% of a company's shares is not a number which commands control under any of the provisions of subsections 12(2)(a) to (f) of the Act. While in other circumstances we might well find that a shareholding of 40% satisfies the form of control described in s. 12(2)(g), with its dual content of "material influence" and comparability to the forms of control expressed in earlier subsections of s. 12, the present circumstances are very different. The other shareholders in Johnnic, holding altogether 60%, are in the main, as to some 44.5%, substantial and in some cases powerful institutions, experienced and shrewd investors, well capable of advancing and defending their own interests when they find it necessary by exerting their muscle in the affairs of Johnnic. They, or a number of them, voted down HCI as recently as 30 June 2005 when HCI had a 30% shareholding and attempted to vote three of its nominees on to the board of Johnnic, at a meeting where shareholders holding more than 90% of the issued shares were present or represented. The outcome of this foray of HCI – not an attempt to obtain majority representation but merely to secure a voice in Johnnic's affairs – does not represent control but its antithesis. Had the foray succeeded we might well have had to reflect deeply on the question whether the requirements of s.12(2)(g) have been satisfied, but there is no such need.

100. Does the picture change by reason of the fact that HCI now, since the meeting on 30 June 2005, has an additional parcel of 10% of the

[44] See footnote 38 above for the CAC's rulings on this question.

Johnnic shares? We see no basis for concluding that there has been such a sea change. The institutional shareholders still outnumber HCI in voting power, HCI is still not represented on Johnnic's board, it has no management contract or voting pool arrangements to influence Johnnic, and the fact that Johnnic is still actively pursuing a spate of litigation against Johnnic and is jousting with Johnnic for ownership of gaming assets is once again the polar opposite of the concept of material influence by HCI over Johnnic. As we see the matter, the only difference which the accretion of the last 10% has made is to trigger the mandatory offer for the balance of the shares in terms of the SRP Code. As Mr Copelyn has pointed out, even the making of this offer does not seal Johnnic's fate as a captive of HCI since few shareholders may accept the mandatory offer, leaving HCI with a shareholding that is still below the level at which it can exert control whether by any of the means expressly set out in s. 12(2) or otherwise.

101. The tour we were given by Johnnic at the hearing of the guiding principles and leading cases regarding the concept of minority control in other countries and regions was illuminating but not decisive of anything. In countries or regions where there are very large companies with, by comparison, vast numbers of shareholders, a numerically small shareholding may well represent far more cohesion and influence in a listed company than in South Africa, where the investing public is small in number and where the share registers of many companies are dominated by a handful of large institutional investors. We must thus use with great caution *dicta* such as that reproduced above from the BP case in the UK.

102. Johnnic's approach to the second question posed at the outset of this decision is based on the notion that there can be implementation of a merger before the merger has taken place. The sleight of hand, if this is what it is, which leads one to this proposition is the contention that a proposed merger, although being different from what, for want of a better term, has been called an actual merger or a completed merger, can carry the obligations of an actual merger. Johnnic relies on the decision in the first of the Gold Fields/Harmony cases as authority to claim that HCI's course of action in acquiring a sufficient stake in Johnnic's shares to trigger the requirement for a mandatory offer amounts to a proposed merger of a kind which, in terms of that decision, requires notification to the Commission under s. 13A(1) of the Act (and, in due course, consideration by the competition authorities), and which bars any steps taken in implementation of the merger until approval for the merger has been obtained. This is so, Johnnic contends, even though HCI has not yet ascertained through the mandatory offer whether it will secure sufficient shares to give it control of Johnnic and hence convert the proposed merger into an actual merger.

103. Mr Unterhalter went, in fact, considerably further and suggested that the decision in the first Gold Fields/Harmony case placed an obligation on HCI to notify its proposed merger with Johnnic at the earliest identifiable point in its courtship of Johnnic – even before it instructed its brokers to acquire its first parcel of shares in Johnnic, in or about March 2005. Because of the mere intention to merge, a proposed merger had come into being, he argued, and the rest followed from the Gold Fields/Harmony decision.

104. While the decisions in the Harmony/Gold Fields cases may carry certain enigmas, we do not think they support this line of reasoning. If the CAC had intended to rule that a

mere intention to bring about a merger amounts to a proposed merger and that such a proposed merger, if it is an intermediate or a large merger, activates the obligations set out in subsections 13A(1) and (3), we think that the CAC would have stated the rule in very different language from that in which its decisions in those matters was couched.

105. What is a proposed merger? We think it is really nothing more than it says, namely a proposal, whether bilateral, as in a friendly merger, or unilateral, as in a hostile merger, where the proposal may come as a nasty shock to the target company when it is revealed. All large mergers are in a sense proposed mergers, within the terminology of the Act, until they receive the approval of the Tribunal or the CAC, since if they have not yet been implemented a prohibition of the merger will mean than the merger never comes into being. (If a change in control has already been implemented at the time when the competition authorities rule on the matter, such premature implementation, in contravention of s. 13A(3), would in all likelihood be visited with penalties under s. 59(1)(d)(iv) and could possibly lead to divestiture under s. 60 of the Act.)

106. In short, we consider that the use of the term "proposed merger" in the Act is not intended to create a category of mergers different from mergers simpliciter, as referred to generally in the Act. At most the use of the word "proposed" places some emphasis, in the particular context where it occurs in the Act, on the fact that the merger is at that stage prospective.

107. In the Gold Fields/Harmony cases, differing crucially from this case, a voting agreement was in place between Harmony and Norilsk, a shareholder in Gold Fields with a 20% holding. Norilsk had entered into a written agreement with Harmony, hedged with numerous conditions and provisos, to vote with Harmony on what for convenience may be called the IAMGold resolution, which could have been defeated by a simple majority at a forthcoming general meeting of the shareholders of Gold Fields. The CAC categorised the relationship between Harmony and Norilsk as one seeking joint control, and the case was clearly decided on the basis that Harmony's so-called early settlement offer would succeed and yield for Harmony a harvest of 34.9% of the shares in Gold Fields. The voting partners, Harmony and Norilsk, were assured on that basis of an absolute majority when voting took place on the IAMGold resolution.

108. We should add that while the competition authorities have a clear obligation under the Act to enforce its provisions, and must be vigilant to do so, they must be equally vigilant to refrain from interfering with the ordinary governance of firms. A restraint on the voting rights of a shareholder is a drastic form of intervention, which we should only impose when we are convinced that it is warranted.

109. As it is, the reformulated wording of prayer 2 of the relief sought by Johnnic, as received by the Tribunal on 23 September 2005, still goes beyond an interdict on voting rights. The interdict sought would restrain HCI from "*exercising the voting and/ or other rights attaching to such as shares as it may have acquired in [Johnnic]*". The "other rights" might easily be construed as including the right to attend shareholders' meeting or to collect dividends or to sell or pledge the shares. This is clearly excessive in the light of the concession made by Johnnic's counsel at the hearing

about the remaining scope of the case.

110. As will be obvious, our answer to the second question posed at the outset of this decision is in the negative. It follows that Johnnic has failed to make out a case than an injury has been actually committed or is reasonably apprehended. This is, of course, an essential requirement for the grant of an interdict of the kind sought by Johnnic.[43]

111. The declaratory order sought is, in our view, misplaced. No justification for it exists in view of our findings as set out above. We note that it too is excessively broad on the case argued before us, suggesting *inter alia* that all HCI's shares in Johnnic have been acquired in contravention of the Act, as well as that the exercise of normal voting and other rights attaching to the shares before the approval of the merger by the competition authorities must be seen as unlawful. We have no hesitation in declining to issue the order sought.

112. The matter is of sufficient complexity, we believe, to have justified the use by HCI of two counsel, and our order for costs should consequently be regarded as awarding the costs of an attorney and two counsel.

21 October 2005

L. Reyburn **Date**

Concurring: D. Lewis and T. Orleyn

43 Gold Fields Supra at page 14.