COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 82/FN/Oct04

In the matter between:

The Competition Commission	**Applicant**
and	
The Tiso Consortium	**First Respondent**
New Africa Investments Limited	**Second Respondent**
Investec Bank Limited	**Third Respondent**
Safika Holdings (Pty) Ltd	**Fourth Respondent**
Capricorn Capital Partners Holding Company (Pty) Ltd	**Fifth Respondent**
Multidirect Investments 180 (Pty) Ltd	**Sixth Respondent**
Mineworkers Investment Company (Pty) Ltd	**Seventh Respondent**

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the agreement between the Competition Commission and the respondents, and which is annexed hereto marked “A”, as a consent order in terms of section 49D(3).

_____ **21 October 2004**

Norman Manoim **Date**

Concurring: David Lewis and Mbuyiseli Madlanga

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REASONS

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1. In this case we have agreed to make a settlement agreement between the Competition Commission and the respondents, a consent order in terms of section 49 D of the Act. The material terms of the order are that the members of the Tiso Consortium, agree jointly and severally to pay an administrative fine of R 500 000,00 (Five hundred thousand rand) for implementing a merger without the prior approval of the Competition Tribunal in contravention of section 13A (3) of the Act.[1]

1 The members of the Tiso consortium are the third to the seventh respondents.

2. Although it is not our normal practice to provide reasons for approving a consent order, in this case, we have decided to do so.

3. This application for a consent order arises from a contest for the control of New Africa Investments Limited (Nail) in 2003. Two rival consortia, the Tiso Consortium ("Tiso") and the Kagiso Consortium ("Kagiso") had made rival bids to Nail shareholders for their shares. The bids were structured differently. One significant distinction was that the Kagiso bid was conditional on Competition Act (the "Act") approval, whilst the Tiso bid was not.

4. Tiso exploited this distinction as a selling point to Nail shareholders in motivating acceptance of its offer ahead of Kagiso's. In its circular to shareholders making the offer, Tiso inter alia argued that –

> *"The Tiso Consortium's offer has been structured in as simple a manner possible to allow Nail shareholders the maximum degree of certainty when accepting the offer- …*
>
> - *by eliminating the need to wait until the end of an uncertain* regulatory process" [2]

5. Tiso succeeded in securing the shares and subsequently control of Nail. The transaction was subsequently notified as a merger after the Commission, in an application for an interdict (the "interdict application") that was previously before us, had expressed the view that the merger was indeed notifiable. The Commission, in the interdict application, argued that the Tiso consortium had acquired control of Nail, inter alia, in terms of section 12(2)(a). The merger was subsequently notified to the Tribunal and was approved subject to conditions.[3]

6. It seems common cause that the failure to notify was not motivated by a desire to avoid regulatory scrutiny because the merger might fall foul of the Act. Rather, the motivation for not notifying appears to have been animated by the desire to present a more attractive 'risk free' bid to shareholders.[4]

7. The crisp issue that the Commission had to determine in its investigation was whether Tiso genuinely believed that its scheme complied with the law and that it was not obliged to notify, even though the Commission considers this view of the

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2 See Circular to Nail Shareholders dated 2 October 2003, page 12.

3 The interdict application is reported as 54/FN/Oct03 and the merger approval as 59/LM/Oct03. The issue of whether there had been a change in control was not decided by the Tribunal in the interdict application as the application was withdrawn.

4 As the Tiso bid was structured into various stages it was only the first stage i.e. the purchase of the shares that was not notifiable. A second leg when they acquired the ordinary shares of Phaphama was to be notified as were subsequent legs in which the assets of Nail were to be divested.

law erroneous.

8. We were advised at the hearing that the Commission has accepted that the Tiso Consortium had in good faith not notified, because, on account of the complex Nail share structure, it did not believe it had crossed a 'bright line' in the Act for presuming a change of control.[5] The Commission conceded that it had not investigated further whether this view was held by Tiso at the relevant time, but had accepted the views of the parties' legal advisors that they genuinely believed this transaction not to be notifiable.

9. We have no reason to second guess the Commission on these facts and accept that if the parties were bona fide, the fine is appropriate.

10. Nevertheless we have some words of caution and hence our decision to give reasons for our order.

11. In our view, if the motivation for not notifying had not been bona fide, then the fine of R 500 000 would be inadequate, by an order of magnitude. It would be sad day indeed for our legal system that if in the race to reach a destination first, the party that that had no scruples about jumping a red light on the way, always won against the party that obeyed the law and stopped while waiting for the green. An appropriate sanction in these circumstances should ensure that the fine for jumping the light significantly diminishes the spoils of the prize.

12. The Commission should in future, in situations where there may be grounds for parties to have a motive not to notify, investigate the case further, and not merely accept the merging parties say so.

13. Transacting parties in the situation of Tiso, should endeavour to engage the Commission before the fact, and not after, in situations where the obligation to notify is not clear. [6] We have some sympathy with Tiso's contention that time is of the essence when structuring rival bids, but perhaps the Commission needs to assure parties that it can grant expedited advice when the circumstances justify

5 Nail's share capital comprised high voting ordinary shares and low voting "N" shares, the ratio was that 500 "N" share equaled the vote of one ordinary share. A company called Phaphama Holdings Limited owned 52,5% of the high voting shares and thus although owning only a minority proportion of the overall share capital, controlled the majority of the votes in Nail due to the disparity in weighting of the successive classes of shares. In the interdict application, Tiso's argument appears to have been that even if they acquired a simple majority of the issued shares in Nail, they had not acquired the majority of the voting shares, as these remained with Phaphama after the offer had been accepted. The Commission had in that proceeding argued, that section 12(2)(a) applies, regardless of whether the shares confer a majority voting right, as the Act in section 12(2) appears to distinguish between beneficial ownership of more than half the issued shares (section 12(2)(a) and the entitlement to vote the majority of shares section 12(2)(b).

6 Tiso did consult the Commission on the issue of notification but only after it had already acquired the Nail shares.

it.

14. Our comments are made not to cast possible doubt on the merging parties bona fides - there is no evidence before us to suggest that their contentions should not be accepted. Rather we see the occasion as a useful opportunity to give guidance to the Commission and merging parties placed in a similar situation in future.

_____ **21 October 2004**

Norman Manoim **Date**

Concurring: David Lewis and Mbuyiseli Madlanga

For the Commission:	Mark Worsley (Legal Services Division)

For NAIL:	Lee Mendelsohn & Justin Balkin *(Edward Nathan & Friedland Corporate Law Advisers)*
For the Tiso Consortium:	Zoe Banchetti & Safeera Mayet *(Tugendhaft Wapnick Banchetti & Partners)*