**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**Case No: DCO155Aug17**

In the matter between:

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| **HOSKEN CONSOLIDATED INVESTMENTS LIMITED** | First Applicant |
| **TSOGO SUN HOLDINGS LIMITED** | Second Applicant |
| and | |
| **THE COMPETITION COMMISSION** | Respondent |

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| Panel | : Yasmin Carrim (Presiding Member)<br>: AW Wessels (Tribunal Member)<br>: Enver Daniels (Tribunal Member) |
| Heard on | : 08 September 2017 |
| Order Issued on | : 12 September 2017 |
| Reasons Issued on | : 29 September 2017 |

**Reasons for Decision**

**Introduction**

[1] This matter involved an application for a declaratory order by the applicants to the effect that their proposed transaction did not require approval from the competition authorities in terms of the merger control provisions of the Competition Act, No. 89 of 1998, as amended ("the Act"). In terms of the proposed transaction Hosken Consolidated Investments ("HCI") will consolidate all of its gaming interests (other than its sports betting and lottery interests) under Tsogo Sun Holdings Limited ("Tsogo"), an entity over which it exerts control by transferring such gaming interests owned indirectly by one of its subsidiary companies, Niveus Investments Limited ("Niveus") to Tsogo.

[2] The application follows a request by the applicants for an advisory opinion from the Competition Commission ("the Commission") made by HCI on 04 July 2017. In HCI's view the proposed transaction was not notifiable because it had already obtained approval for sole control in a 2014 transaction that had been approved by the Tribunal ("the 2014 transaction").

[3] The Commission issued its advisory opinion on 16 August 2017 in which it expressed the view that the proposed transaction ought to be notified for *inter alia* the following reasons:

a. The proposed transaction would result in the crossing of a "bright line" as HCI through Tsogo Investment Holding Company (Pty) Ltd ("TIHC") would increase its shareholding in Tsogo from the current 47.61% to more than 50% resulting in HCI beneficially owning more than half of the issued share capital of Tsogo within the contemplation of section 12(2)(a) of the Act. The Commission indicated that the crossing of this bright line has a definite legal implication because it indicates the types of transactions that the Legislator deemed should be notified to the Commission. Thus, the crossing of this bright line triggers notification of a merger;

b. There has been a significant time lapse between the *Tsogo Investment Holding Company (Pty) Ltd and Tsogo Sun Holdings Limited*[1] merger ("the 2014 decision") and the proposed transaction and the question as to whether the structure of the market has changed cannot be determined in an advisory opinion. Rather this determination is best suited for a merger investigation. We note that this time lapse is approximately 3 years and that the current transaction, involving different firms at a different time, hopes to achieve what the 2014 transaction could not (i.e. a greater than 50% shareholding in Tsogo by HCI); and

c. The question as to whether or not the proposed transaction raises public interest issues such as retrenchments must also be confirmed in a new merger investigation.

[4] The Commission made clear in that opinion that its views were not binding on itself or any party and that these may change on the basis of further information provided by the

[1] *Tsogo Investment Holding Company (Pty) Ltd and Tsogo Sun Holdings Limited* 019372/LM067Aug14 (19 November 2014).

applicants.[2] At the hearing of the matter the Commission clarified that it provided advisory opinions to parties on request as part of its advocacy functions.[3]

[5] Upon receipt of this advisory opinion, the applicants filed this application on an urgent basis and were accommodated by the Tribunal in their request. In response to the application the Commission sought an order directing the applicants to notify the proposed transaction. However, the Commission did not persist with this at the hearing and explained that the counter-application was merely a misstatement in the drafting of its answering affidavit.[4]

[6] Prior to the hearing of the matter the Tribunal requested the parties to address it on the question whether or not the Tribunal enjoyed jurisdiction to consider the application.[5] We are indebted to both parties who accommodated our request at short notice.

[7] After hearing the matter, the Tribunal declined to issue the relief sought by the applicants. Our reasons for doing so are detailed below.

**Jurisdiction of the Tribunal**

[8] The applicants undertook this exercise by firstly addressing the Tribunal's jurisdiction to issue a declaratory order, and secondly whether the applicant's case satisfied the threshold tests in order for the Tribunal to exercise its discretion in their favour and issue such an order.

[9] The applicant's contended that it was clear that the High Court would (but for the exclusive jurisdiction provisions contained in the Act) have the power to grant such a declarator in the circumstances of this matter. However, due to the exclusive jurisdiction provisions, the High Court jurisdiction is ousted. Therefore, the only body that can, in this instance, be approached by the applicants for the relief sought, is the Tribunal. If the Tribunal did not have the power to grant such relief, this would have the effect of denying the applicants their right to access to courts in terms of section 34 of the Constitution.[6]

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[2] Commission's Advisory Opinion at par 38.
[3] Transcript page 94, lines 16-19.
[4] Transcript page 116, lines 7-15.
[5] See Tribunal letter dated 7 September 2017.
[6] Applicant's heads of argument page 4, par 11.

[10] In terms of section 62(1) of the Act, the Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the interpretation of the merger control provisions.[7]

[11] The consequence of the ouster contained in section 62(2) is, therefore, that a party who is in dispute with the Commission on the issue whether a transaction constitutes a merger would not be able to approach the High Court for declaratory relief in that regard. If, therefore, a party could not approach the Tribunal for such relief, it would be deprived of the right to seek such relief from any forum.

[12] The applicants argued that this is not consonant with the provisions of section 34 of the Constitution.[8]

[13] In any event they submitted that section 27(1)(c) and (d)[9] conferred jurisdiction on the Tribunal to hear any matter that may in terms of this Act be considered by it.[10] The Tribunal in a number of cases has issued interdicts which are in the nature of declaratory orders. Hence the Tribunal enjoyed the jurisdiction to consider this application. However whether it decided to exercise its jurisdiction in favour of the applicants was a matter of discretion and there is ample case law to guide the exercise of the Tribunal's discretion.

[14] The Commission submitted that the merger provisions in the Act do not expressly make provision for the Tribunal to grant declaratory relief. However, it pointed to the fact that the Tribunal has previously made orders relating to a determination of whether or not a transaction constitutes a merger. Those decisions however did not pertain to advisory

[7] Section 62(1) provides that:
"*The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:*

*(a) Interpretation and application of Chapters 2, 3 and 5, other than—*

*(i) a question or matter referred to in subsection (2); or*

*(ii) a review of a certificate issued by the Minister of Finance in terms of section 18 (2); and*

*(b) the functions referred to in sections 21 (1), 27 (1) and 37, other than a question or matter referred to in subsection (2)*".

[8] Section 34 of the Constitution provides that:

"*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*".

[9] Section 27(1)(c) and (d) provide:

"*27(1) The Competition Tribunal may—*

*(c) hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and*

*(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.*"

[10] Transcript page 31, lines 1-25 & page 32, lines 1-21.

opinions of the Commission but to mergers that had already been notified to the Commission.[11] In other words those cases involved a live dispute between the Commission and the merging parties.

[15] We will return to the matter of our discretion. However we disagree with the applicants in their assessments and conclusions on the issue of our jurisdiction.

[16] The central issue for consideration is not whether the Tribunal enjoys a general power to grant declaratory orders (which is contemplated not only in section 27(1) but also in section 58 of the Act) but whether in *this* case the Tribunal enjoys jurisdiction to grant the relief sought.

[17] The first consideration in this enquiry would be to ask whether indeed the matter is a live dispute between the parties as described by the Commission. The answer to that question necessarily must go to understand the nature and purpose of the Commission's advisory opinion.

[18] It is common cause in this matter that the Commission's advisory opinion does not constitute a decision or finding by the Commission that the proposed transaction constituted a notifiable merger as defined in section 12 of the Act. It merely served as a guide on the approach the Commission was likely to adopt in assessing the matter given *inter alia* past experience. In its opinion the Commission has not required the applicants to notify the transaction, its senior officials merely expressed a view based on the information provided to them that the transaction ought to be notified. The opinion had thus not been considered by the Commission's EXCO or by its Commissioner(s).

[19] At the hearing the applicants conceded that the advisory opinion was not binding on them nor on the Commission. It was not a decision of the Commission as contemplated in the Act and was accordingly not reviewable under PAJA. It was possible that a review on the constitutional grounds of rationality could be brought but the applicants were not pursuing this.[12] In other words they accepted that the opinion was *not* binding on them.

[11] Commission's heads of argument page 3, par 3.
[12] Transcript page 136, lines 19-25 & page 137, line 1.

[20] This is a critical concession. If the advisory opinion is not a decision of the Commission (hence not reviewable under section 27(1) or PAJA) and not binding on them, where is the dispute pertaining to rights and obligations?

[21] The Tribunal is not a High Court and does not enjoy inherent jurisdiction. Its powers are circumscribed by the provisions of the Act. The framework of merger enforcement in the Act under chapter 3 does not confer inherent powers upon the Tribunal. Indeed our jurisdiction is only triggered through the provisions of the Act. Section 13A requires a party to an intermediate or a large merger to notify that merger to the Commission. The framework for intermediate mergers then requires the Commission to investigate and make a decision on the merits of the merger within 20 business days. If any party is dissatisfied with the decision of the Commission it can apply to the Tribunal for a consideration under section 16. In relation to large mergers the framework in section 14A requires the Commission to investigate and make recommendations to the Tribunal.

[22] This is the framework of merger control in the Act. The Tribunal's jurisdiction in respect of the merits of a proposed transaction is only triggered when that transaction has been notified to the Commission first.

[23] There is no merger before the Commission, the Commission has not made a decision but has merely provided an opinion which is not binding on any of the parties. How then is the Tribunal's jurisdiction triggered, if at all?

[24] The applicants have incorrectly asserted that there is a live dispute before us. The very nature of a non-binding advisory opinion cannot give rise to a dispute that requires the Tribunal or a court of law to intervene. At best it gives rise to a difference of opinion.

[25] The Commission stated that:

"*the absence of this live dispute it's a factor. It's one of the important considerations for the tribunal to consider in exercising its discretion. Now, the question becomes then does the rendering of a non-binding advisory opinion which is not binding on the commission and is not binding on the parties does it rise to the level of generating a live*

*dispute. In other words how does guidance suddenly metamorphose into a dispute? And we submit not."*[13]

[26] The applicants frame their argument in such a way to indicate they will be precluded from approaching the Tribunal. However they are not because there are mechanisms in the Act that provide for the applicants to approach the Tribunal, in the prescribed manner at the correct stage of the proceedings. These mechanisms are to be found in Commission Rule 33 and Tribunal Rule 31(1)(c).

[27] Tribunal Rule 31(1)(c) reads as follows:

*"(1) An application may be made by filing a Notice of Motion and affidavit, as described in Rule 42(1), for any of the following matters:*

*(a) ...*

*(b) ...*

*(c) An appeal against the opinion of the Commission concerning the jurisdiction of the Act, in terms of Competition Commission Rule 33."*

[28] Rule 31(1)(c) provides that the Tribunal can hear an appeal against an opinion of the Commission concerning the jurisdiction of the Act in terms of Commission Rule 33. Rule 33 is applicable after a proposed merger has been filed with the Commission.

[29] Rule 33 provides –

*"Questions of jurisdiction and categories*

*(1) If the Commission has indicated on Form CC 13(2) that a merger appears to fall outside the jurisdiction of the Act -*

*(a) the Commission must –*

*(i) refund the filing fee to the firm that paid it;*

*(ii) return the Merger Notice to the primary firm that submitted it; and*

*(iii) send a copy of Form CC 13(2) to –*

*(aa) the other primary firm if the filing was in terms of Rule 29; and*

[13] Transcript page 97, lines 1-9.

*(bb) each person identified in the Merger Notice as being entitled to receive a copy of the Merger Notice in terms of section 13A(2); and*

*(b) no party to that merger is required to file any further documents concerning that merger.*

*(2) If the Commission has indicated on Form CC 13(1) or CC 13(2), as the case may be, that the merger appears to fall within the jurisdiction of the Act, the Commission must –*

*(a) send a copy of the Merger Notice and accompanying Statement of Merger Information to the Minister;*

*(b) if it appears to be a large merger, send a copy of the Merger Notice to the Tribunal.*

*(3) Within 5 business days after receiving Form CC 13(1) or Form CC 13(2), as the case may be, the firm concerned may appeal to the Tribunal for an order setting aside the opinion of the Commission –*

*(a) that the merger is within the jurisdiction of the Act; or*

*(b) ….*

*(4) If, upon hearing an appeal in terms of sub-rule (2) –*

*(a) the Tribunal sets aside the opinion of the Commission that the merger is within the jurisdiction of the Act, the provisions of sub-rule (1) apply; or*

*(b) the Tribunal sets aside the opinion of the Commission that the merger falls within a particular category other than that declared on the Merger Notice, the opinion of the Commission is a nullity.*

*(5) If, within the time allowed by sub-rule (4), a firm does not appeal against the opinion of the Commission that the merger falls within a particular category other than that declared on the Merger Notice, or if the Tribunal, on hearing the appeal, confirms the Commission's opinion one of the primary parties must pay to the Commission the difference between -*

*(a) the appropriate filing fee for the category determined by the Commission; and*

*(b) the filing fee previously paid in respect of the merger.*

*(6) The Initial Period for a merger referred to in this Rule begins -*

*(a) On the date following the day that the merger notice was filed if, following the order of the Tribunal, there are no outstanding notification requirements, and*

*(i) The application to the Tribunal concerned only a matter of the jurisdiction of the Act,*

*(ii) The Tribunal set aside the Commission's category determination, or*

*(iii) The Tribunal upheld the Commission's category determination and one of the firms concerned paid the amount required in terms of sub-rule (5) within 5 business days after the Tribunal makes its order; or*

*(b) In any case, on the date determined in accordance with Rule 29(2)."*

[30] Tribunal Rule 31(1)(c) and Commission Rule 33[14] which specifically provide for a procedure to deal precisely with the debate that is the subject matter of this application.

[31] These rules provide that where the parties differ with the Commission on whether or not a merger is within the jurisdiction of the Act they may notify such merger, under protest so to speak, and have the issue of jurisdiction resolved by the Tribunal through the mechanism of Tribunal Rule 31(1)(c) and Commission Rule 33.

[32] The legislature in drafting the provisions of the Act clearly contemplated that situations may arise in complex commercial transactions that the issue of whether and when notification is required might be blurry. This is the mechanism that has been used by many a responsible corporate citizens and would be the logical route for a large listed entity involved in a complex transaction to follow.

[33] Notification of the transaction would indicate a willingness on the part of the firm to comply with regulation, would indisputably confer jurisdiction on the Commission and the Tribunal (because the matter would have been notified), would allow the Commission to have a better and closer look at the transaction because all the details thereof would have been provided in the merger filing and would provide certainty to all the stakeholders by requiring the Tribunal to resolve the issue of whether or not a merger is within the jurisdiction of the Act in the light of fuller facts put up in a merger filing.

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[14] Commission Rule 33 deals specifically with questions of jurisdiction and categories.

[34] Unlike under the aegis of an advisory opinion, a notification under Commission Rule 33 could be to the benefit of the merging parties. They would provide fuller information to the Commission and such information would ultimately become part of the record that is to be placed in front of the Tribunal under Rule 31(1)(c). The Commission on the other hand, unlike in its advocacy role, would be entitled to ask for more information and would be placed in a position to form an informed view about the jurisdiction or not of the Act.

[35] There is no better example of the use of these rules than in the *Ethos Private Equity Fund IV v Tsebo Outsourcing Group (Pty) Ltd*[15] decision. Therein the merging parties also sought an advisory opinion from the Commission, who advised that their proposed transaction in its opinion was a notifiable transaction. In that transaction Ethos was increasing its shareholding in Tsebo from just less than 50% to just over 50%. The merging parties notified the merger and brought the dispute about jurisdiction to the Tribunal as provided in Tribunal Rule 31(1)(c).

[36] Notification is thus a jurisdictional requirement for the Tribunal to exercise its jurisdiction. Hence a party in order to appeal against the opinion of the Commission in respect of whether a merger is within the jurisdiction of the Act must <u>first notify</u> the proposed transaction to the Commission.

[37] But the applicants have elected not to notify the proposed transaction. Hence the status of the advisory opinion is not an opinion that is contemplated in Tribunal Rule 31(1)(c). The Tribunal accordingly has no jurisdiction to consider the matter and grant the order sought by the applicants.

[38] We are of the view that the matter is not one that triggers our jurisdiction simply because there is no live dispute between the parties and the applicants were not entitled to approach the Tribunal directly. If they wish to challenge the Commission's views about their transaction they must do so in accordance with Commission Rule 33 and Tribunal Rule 31(1)(c).

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[15] *Ethos Private Equity Fund IV v Tsebo Outsourcing Group (Pty) Ltd* [2003] 2 CPLR 371 (CT).

[39] Merging parties are not entitled as a matter of right to approach the Tribunal directly (or courts for that matter) simply because they have a difference of opinion with the Commission. Nor should they be encouraged to do so as matter of public policy. The Commission is mandated to perform an investigative and enforcement function, the Tribunal an adjudicative one. While the Tribunal enjoys inquisitorial powers these cannot be exercised so as to undermine the framework of the Act and to exclude the Commission's investigative mandate.

[40] Although we find that we do not have jurisdiction in to consider this matter, we nevertheless for the sake of completeness (and argument) consider whether we ought to exercise our discretion in favour of the applicants.

**The discretion to issue a declaratory order in this matter**

[41] Both the applicants and the Commission submitted that on the assumption that the Tribunal's jurisdiction under the Act was triggered, the Tribunal does indeed enjoy a discretion whether or not to grant a declaratory order.

[42] To this, the Commission cited the principles relating to the granting of declaratory relief, as most recently restated in *Minister of Finance v Oakbay Investments (Pty) Ltd*[16]:

> "*[52] The exercise of the Court's jurisdiction in terms of section 21(1)(c) follows a two-legged enquiry:*
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> > *[52.1] the Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so,*
> >
> > *[52.2] the Court must decide whether the case is a proper one for the exercise of its discretion.*
> >
> > *[53] The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he*

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[16] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* (80978/2016) [2017] ZAGPPHC 576 at [52] – [53].

*has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly, does it proceed to the second leg of the enquiry."*

[43] The onus is thus on the applicants to show that it is a person interested in an existing, future or contingent right or obligation before the Tribunal could decide whether or not it should exercise its discretion.

[44] Following on from the above, the applicants relied on a passage from the Supreme Court of Appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[17] wherein it was stated that:

*"The applicant in a case such as the present must satisfy the court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required."*[18]

[45] The applicants submitted that the current matter does relate to existing, future or contingent rights or obligations in that if the proposed transaction is a merger, the applicants are obliged to notify it and may not implement it. By the same token, the Commission is then under an obligation to investigate the notification under section 14A of the Act.

[46] The second leg of the test relates to whether we deem this case a proper one for exercising our discretion in favour of the applicants.

[47] The applicants once again relied on the Supreme Court of Appeal, again in *Cordiant*[19]:

*"[17] It seems to me that once the applicant has satisfied the court that he/ she is interested in an 'existing, future or contingent right or obligation', the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors".*

[17] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) 205 (SCA).
[18] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) 205 (SCA) at [16].
[19] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) 205 (SCA) at [17].

[48] The relevant factors that *Cordiant* alludes to are to be found (as acknowledged by both the applicants and the Commission) in *Minister of Finance v Oakbay Investments (Pty) Ltd and Others*[20]. The High Court identified the following factors as being relevant to the exercise of a court's discretion when granting declaratory relief:

*"[59.1] the existence or absence of a dispute;*

*[59.2] the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;*

*[59.3] whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;*

*[59.4] considerations of public policy, justice and convenience;*

*[59.5] the practical significance of the order; and*

*[59.6] the availability of other remedies."*

[49] After consideration of the relevant facts of this case as set out below we decided not to exercise our discretion in favour of the applicants.

*No live dispute between the parties*

[50] The first of these is to consider whether there is a live dispute between the parties.

[51] The applicants concede that the need for a live dispute is a factor influencing our discretion to issue a declaratory order:

*"... you do not need to have a live dispute, an existing dispute in order to get a declaratory order, although obviously the fact that there is or is not a live dispute in issue will be*

[20] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* (80978/2016) [2017] ZAGPPHC 576 at [59].

*relevant to the exercise of the discretion of the court, we would say in this case the tribunal, to grant declaratory relief.'*[21]

[52] As we have indicated already in the discussion concerning direct access to the Tribunal, there is no live dispute between the parties that requires our intervention.

[53] The applicants approached the Commission for an advisory opinion. They were not required to do so but the fact that they did suggests that there was some doubt in their minds whether their transaction ought to be notified. The Commission provided an advisory opinion which the applicants concede is not binding on them.

*Alternative remedies*

[54] The applicants, after receiving the Commission's advisory opinion now have several options and are not without remedy.

[55] They could of course implement the transaction without notifying it to the Commission (as they are inclined to want to do) and if pursued by the Commission for having done so without notification could raise in mitigation that they had sought legal advice and had acted in accordance therewith.

[56] They could do the obvious as many other firms have done, for the sake of comfort and legal certainty, simply notify the transaction and allow the matter to run its ordinary course. In this regard the Commission has given the applicants an assurance that the matter would be treated as a phase 1 merger because it is unlikely to involve an overlap in the relevant markets.[22] This would result in the merger being processed relatively quickly.

[57] The applicants could notify the merger under protest so to speak and approach the Tribunal on the question of notification through Rule 31(1)(c) of the Act. It has been the course followed by many other merging parties such as in *Ethos*. In *Ethos* the merging parties notified the transaction but did so under protest, making it clear they were only notifying in order to comply with the advice provided in the Commission's advisory opinion.

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[21] Transcript page 10, lines 6-11.
[22] Commission's Advisory Opinion at par 36.

[58] The Commission has also offered the applicants a fourth option, namely further engagement. The Commission says in its opinion that on the furnishing of further information if might take a different view.[23] At the hearing the Commission expressed surprise at the fact that the applicants had lodged this application when it (the Commission) was under the impression that they were still involved in a process of engagement with the applicants.

[59] The applicants have followed none of these available remedies. In argument the applicants submitted that they wished to avoid the expense and inconvenience of filing a large merger with all its concomitant bureaucracy under Rules 31(1)(c) and 33 only to find themselves back at the Tribunal to debate the very subject matter of this application:

"*Why would you go down that long expensive and resource intensive path in circumstances where the matter can be put to bed one way or the other on this basis. In our submission convenience clearly motivates in favour of a determination at this point in time*"[24]

[60] But such an argument presumes that a filing of the merger and further engagement with the Commission would result in the very same outcome, namely a difference of opinion. It is not a foregone conclusion, and the Commission has repeatedly pointed this out to the applicants, that the two sides will necessarily hold the same views. At the end of that process of engagement it is likely that the Commission might be persuaded otherwise. It is also likely that the applicants would be persuaded otherwise.

[61] All firms face the expense and inconvenience of complying with regulation but large listed companies, the applicant included, provide for the time and costs of compliance. This argument can hardly be relied upon by merging parties to leapfrog provisions of the Act by alleging a live dispute when there is none.

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[23] Commission's Advisory Opinion at par 38.
[24] Transcript page 80, lines 6-10.

*Different transaction and regulatory oversight*

[62] The applicants were of the view that they were not required to notify the transaction because HCI was, in their opinion, the ultimate sole controller of the two groups and that they had received approval in the 2014 transaction for achieving more than 50% in Tsogo.

[63] The 2014 Tsogo Transaction involved the exit of a significant minority shareholder, SABMiller plc ("SABMiller"), and the acquisition by HCI (through TIHC) of additional shares in Tsogo. Prior to 2014, Tsogo was subject to the joint control of HCI (through various subsidiary companies) and SABMiller. In 2014, SABMiller divested itself of its shares in Tsogo, leaving HCI as the sole controller of Tsogo.

[64] The Commission conducted an investigation of the 2014 transaction and made a recommendation to the Tribunal that the transaction, in terms of which HCI (through TIHC) would acquire sole control over Tsogo, according to the information submitted by the merging parties at the time, should be approved without conditions.

[65] The Tribunal subsequently did approve the transaction unconditionally. The Tribunal, in its decision stated "*Post-merger, HCI will ultimately acquire sole control over Tsogo Sun*".[25]

[66] The applicants provide that it was clear from that the merger that was approved unconditionally by the Tribunal in 2014 was the acquisition of sole control by HCI over Tsogo. They further submit that the Tribunal expressly noted in paragraph 8 of its decision that HCI (through various entities) would ultimately increase its shareholding in Tsogo to over 50%.

[67] The Tribunal decision does record the intention of HCI to ultimately increase its shareholding to above 50% through the 2014 transaction which involved a share buyback. However HCI, for reasons unknown to us, did not achieve the intended shareholding in Tsogo through the 2014 transaction and while it currently enjoys *de facto* control with a shareholding of 47.61% it does not enjoy *de jure* control of above 50%.

[68] HCI as the controller of Niveus, indirectly controls GameCo, the wholly owned subsidiary of Niveus. GameCo owns 100% of the issued shares in Vukani Gaming ("Vukani") (which

[25] *Tsogo Investment Holding Company (Pty) Ltd and Tsogo Sun Holdings Limited* 019372/LM067Aug14 at [8].

is mainly engaged in offering Limited Payout Machine gaming services at third-party sites throughout Southern Africa) and Galaxy Gaming ("Galaxy"), an operator of licensed bingo centres and the Kuruman Grand Oasis Casino.

[69] The applicants submitted that the proposed transaction in the current case simply gives effect to the pre-authorized establishment of sole control over both the gaming interests of Niveus and Tsogo and the current transaction merely constitutes a restructuring in line with the approval of the combination of these gaming assets that was implicitly granted by the 2014 decision. The proposed transaction does not entail a move from joint or dual control to sole control, and does not involve an acquisition of control. The proposed transaction is, therefore, not a merger.[26]

[70] In its advisory opinion the Commission however expressed the view based on the information that had been provided by the parties to date, that the transaction ought to be notified. We reiterate the salient grounds on which it formed this view:[27]

a. The proposed transaction would result in the crossing of a "bright line" as HCI through Tsogo Investment Holding Company (Pty) Ltd ("TIHC") would increase its shareholding in Tsogo from the current 47.61% to more than 50% resulting in HCI beneficially owning more than half of the issued share capital of Tsogo within the contemplation of section 12(2)(a) of the Act. The Commission indicated that the crossing of this bright line has a definite legal implication because it indicates the types of transactions that the Legislator deemed should be notified to the Commission. Thus, the crossing of this bright line triggers notification of a merger;

b. There has been a significant time lapse between the 2014 decision and the proposed transaction and the question as to whether the structure of the market has changed cannot be determined in an advisory opinion. Rather this determination is best suited for a merger investigation; and

c. The question as to whether or not the proposed transaction raises public interest issues such as retrenchments must also be confirmed in a new merger investigation.

[26] Applicant's heads of argument page 22, par 71.
[27] Applicant's heads of argument page 26, par 26.

[71] At the hearing the Commission pointed out that it had repeatedly requested the applicants to provide it with information on whether the proposed transaction would result in any retrenchments in light of the fact that, unlike in the 2014 transaction, HCI was intending to move an entire business under GameCo. The applicants have to date not responded to the Commission's request. The Commission further submitted that it will have to perform a new market delineation assessment (bearing in mind that the Commission did not conclude on an exact market definition in the 2014 Tsogo transaction) which will assist it to establish whether there are changes, if any, in the dynamics of competition between HCI and Tsogo since the 2014 transaction.[28]

[72] What is however a critical difference between the 2014 transaction and the proposed transaction is the mechanism through which HCI intends to acquire more than 50% in Tsogo. The 2014 transaction only involved a sale of shares and a share buy-back within Tsogo. It did not as the proposed transaction contemplates involve the transfer of one business (held under GameCo) into another (Tsogo) and the buying out of minorities. This is why the Commission is concerned about whether there would be overlapping functions which could have adverse employment consequences, a matter which the applicants have still not addressed.

[73] It is unclear to us in the proposed transaction whether the moving of the gaming interests of Niveus to under Tsogo, will lead to a market share accretion or any overlap in products or services between the merging parties.

[74] Nevertheless we give due regard to the argument by the Commission that granting a declaratory order that the proposed transaction does not require approval from the competition authorities - in circumstances where there is no live dispute between the parties and where the Commission has given assurances of ongoing engagement and a fast–track phase 1 investigation in the event the transaction is notified by the parties - would be tantamount to shutting the door on the Commission's mandate of regulatory oversight.

[28] Transcript page 114, lines 4-17.

*No Urgency*

[75] The applicants put forward a further reason why they approach the Tribunal in this way namely that there is a matter of commercial urgency. Instead of filing the proposed transaction as a large merger after receiving the Commission's advisory opinion on 16 August 2017, the applicants chose to bring this application by way of an "urgent" application on 28 August 2017.

[76] However, we note that the transaction was proposed as early as 14 December 2016, when HCI released an Initial Announcement on the Stock Exchange News Service of the JSE ("SENS").[29] Hence we can infer that the proposed transaction would have been planned by the applicants, a listed company well versed in regulatory requirements, in advance of the SENS announcement. Yet, the applicants only requested an advisory opinion from the Commission on 04 July 2017 some 6 months after the SENS announcement. No explanation other than "commercial urgency" which the applicants conceded was self-created was put up in support of the urgency ground.

[77] The applicants further submitted that the commercial realities and costs of using the alternate remedy are hugely inconvenient and resource consuming.[30] But this argument seems to suggest that the applicants have through this application sought to avoid complying with the provisions of the Act.

[78] We are not swayed by the merging parties' argument in this regard as the urgency of the matter is clearly self-imposed. The applicants had and still do have sufficient time to notify their transaction should they elect to do so for purposes of comfort. Alternatively should matters be as urgent as they claim, the applicants could proceed to implement the transaction. After all on their own version the proposed transaction amounts to an internal restructuring and they are not bound by the views expressed in the Commission's advisory opinions of the Act.

[29]Record, page 13, par 18.
[30] Transcript page 21 & page 22, lines 21-25.

**Conclusion**

[79] In conclusion we found that the Commission's advisory opinion is not binding on the applicants. The jurisdiction of the Tribunal to consider disputes about whether or not a merger is within the jurisdiction of the Act is regulated by Tribunal Rule 31 and Commission Rule 33. Notification of a transaction to the Commission is a jurisdictional requirement for us to exercise our functions. The applicants have not notified their transaction and the Tribunal accordingly lacks jurisdiction therein. The applicants are not entitled to approach the Tribunal directly for the order that they seek.

[80] But assuming for the sake of completeness that we accept that our jurisdiction is triggered by a direct application such as this, we find that there is no justification for the exercise of our discretion in favour of the applicants. The Commission's opinion is nothing more than that and not binding on any party. It may be that it has some significant status because it encompasses the views of the senior officials of the regulator. But the applicant is not without options and alternative remedies. The applicant could for the sake of comfort notify its merger or notify it under protest and follow the procedures provided in the Act. The Commission has also offered to continue engagements with the applicants. In the event they elect to notify the transaction the Commission has undertaken to treat it as a phase 1 merger so that it can be dealt with timeously.

[81] The urgency that the applicants claim is self-imposed, and the Commission has offered to engage with the parties further.

[82] Finally as the Commission has submitted the proposed transaction is different to the 2014 transaction and were we to grant the order as sought, which they argue we ought not to for the reasons set out above, we will shut the door on the Commission's functions of regulatory oversight which will be against public policy.

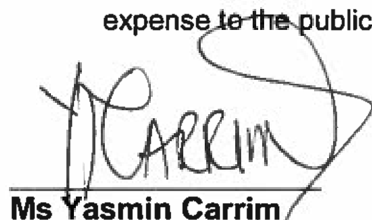
[83] Having regard to all of the above, the appropriate order was to dismiss the application which we issued on 12 September 2017 and which is attached hereto for convenience.

**Postscript**

[84] As a postscript we note with some concern that at the time of writing the applicants had already lodged an appeal against our order of 12 September 2017. When we released our order on 12 September 2017 we did so to accommodate the various requests made by the applicants' attorneys for the release of our order in advance of our reasons due to shareholders' meetings that were scheduled to take place on either 13 or 14 September 2017.

[85] In our order we confirmed that our reasons would follow in due course. The applicants have thus lodged an appeal without any insight into the reasons for our dismissal of their application but have also drawn the Commission at great expense into an appeal, the merits and prospects of which were unknown at the time.

[86] We consider the actions of the applicants in a very serious light especially when regard is given to the fact they and their legal representatives are familiar with the requirements and framework of the Act. The attempt to seek a declaratory order from the Tribunal and then to seek an appeal against our decision in circumstances where they have conceded that the Commission's opinion is not binding on them suggests that the applicants are involved in nothing but a cynical attempt to exclude the Commission's regulatory oversight, at great expense to the public purse.



**Ms Yasmin Carrim** — 29 September 2017 **DATE**

**Mr AW Wessels and Mr Enver Daniels**

Case Managers: Kameel Pancham

For the Applicants: Adv. Jerome Wilson SC instructed by Nortons Inc.

For the Commission: Bukhosibakhe Majenge and Korkoi Ayayee

Annexure

# COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No.: DCO155Aug17**

In the matter between:

| | |
|---|---|
| Hosken Consolidated Investments Limited | **First Applicant** |
| Tsogo Sun Holdings Limited | **Second Applicant** |
| and | |
| The Competition Commission | **Respondent** |

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|---|---|---|
| Panel | : | Y Carrim (Presiding Member)<br>AW Wessels (Tribunal Member)<br>E Daniels (Tribunal Member) |
| Heard on | : | 08 September 2017 |
| Decided on | : | 12 September 2017 |

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## ORDER

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Following the hearing on 08 September 2017, the Tribunal orders as follows:

1. First and Second Applicant's application is dismissed.

2. There is no order as to costs.

3. The Tribunal's reasons will be issued in due course.

p.p. **Presiding Member**
**Ms Yasmin Carrim**

**12 September 2017**
**Date**

**Concurring: Mr AW Wessels and Mr Enver Daniels**