COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: LM080Jul19/PPA040Jun20

In the *application for postponement* between:

ITHUBA HOLDINGS (RF) (PTY) LTD	First Applicant
and	
ZAMANI MARKETING AND MANAGEMENT CONSULTANTS (PTY) LTD	Second Applicant
v	
HCI INVEST 15 HOLDCO (PTY) LTD	First Respondent
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent

In re: the large merger between:

Case no.: LM080Jul19

HCI INVEST 15 HOLDCO (PTY) LTD	Primary Acquiring Firm
and	
ITHUBA HOLDINGS (RF) (PTY) LTD	Primary Target Firm
ZAMANI MARKETING AND MANAGEMENT CONSULTANTS (PTY) LTD	Primary Target Firm
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	Commission
and	
THE NATIONAL LOTTERIES COMMISSION	Intervenor

Panel:	Ms Yasmin Carrim (Presiding Member) Mr Andreas Wessels (Tribunal Member) Dr Thando Vilakazi (Tribunal Member)
Heard on:	22 June 2020
Reasons issued on:	22 July 2020

REASONS FOR DECISION

INTRODUCTION

[1] On 4 June 2020, the Target Firms, Zamani Marketing and Management Consultants Proprietary Limited ("Zamani") and Ithuba Holdings (RF) Proprietary Limited ("Ithuba"), launched an application for postponement of the Competition Tribunal's ("Tribunal") consideration of the proposed large merger between the Target Firms and HCI Invest 15 Holdco Proprietary Limited ("HCI" or "Acquiring Firm").

[2] On 22 June 2020, after hearing the parties, the Tribunal issued an order granting the Target Firms' application for *sine die* postponement of the hearing of the proposed merger.

[3] Our reasons for the decision follow.

BACKGROUND

[4] On 26 July 2019, the Competition Commission ("Commission") received notice of the hostile merger wherein HCI, an investment holding company, intends to exercise certain management oversight rights in relation to the businesses of Zamani, a management and marketing consulting firm, and Ithuba, the operator of the South African National lottery. Due to the hostile nature of this proposed merger, the merger parties filed separate merger filings after the Commission granted the Acquiring Firm's request to do so.[1]

[1] In terms of Commission Rule 28 of the Rules for the Conduct of Proceedings in the Competition Commission published under GG 22025 of 1 February 2001.

[5] The proposed merger does not result in HCI acquiring any shares in either Ithuba or Zamani, but involves HCI acquiring oversight over the management of the Target Firms brought about by a condition contained in an agreement between the parties.

History of the proposed merger

[6] In November 2013, Zamani and Ithuba concluded an agreement between them referred to as the Management Agreement. This agreement governed the terms by which Zamani would manage Ithuba's business. During 2015, a further suite of finance agreements and amendments were concluded, whereby HCI (among other parties) became party to the Management Agreement through its undertaking to advance loans to Ithuba, and funding the roll-out and operation of the national lottery. In return, as security for the loan, HCI was granted the right – upon the occurrence of certain trigger events and the issue of an election notice – to exercise management oversight over Zamani's business and the manner in which management services are provided to Ithuba.

[7] Ithuba's licence to operate the lottery came into effect on 1 June 2015.

[8] In January 2016, HCI issued various election notices, indicating that it wished to exercise its oversight rights. The Target Firms disputed the validity of the election notices. During June 2016, HCI referred this dispute to arbitration as provided in the Management Agreement.

[9] The arbitration award was handed down on 30 July 2019 in favour of HCI. It found that HCI was entitled to issue the election notices and, subject to the required regulatory approvals,[2] be given management oversight over the business of Zamani.

[2] From the Competition Authorities and from the Minister of Trade and Industry, as advised by the National Lotteries Commission.

Proceedings before the Tribunal

[10] During the merger investigation, the Commission extended its investigation period multiple times. The final extension application was opposed by HCI and heard by the Tribunal on 23 March 2020. On the same day, an order was handed down to the effect that the Commission must file its recommendation with the Tribunal on or before 3 April 2020.

[11] The Commission referred the merger to the Tribunal on 3 April 2020. By direction of the Tribunal issued on 15 April 2020, the National Lotteries Commission ("NLC") was admitted as an intervenor.[3] The timetable for the hearing of the merger was finalised by a direction issued on 24 April 2020 (the "24 April direction"). In terms of this direction the matter was set down from 3-17 July 2020 (except 13 July 2020) and 27 July 2020, for closing argument.

[12] By the time the Target Firms filed their postponement application on 4 June 2020, the parties had partly complied with the 24 April direction – they had exchanged their respective statement of issues; the process of discovery had undergone two rounds of requests (though the Target Firms' request for documents from the Acquiring Firm's subsidiaries remained subject to some contention) and three factual witness statements on behalf of the merger parties had been filed.

[13] Relevant to the context of this postponement application are the three directives, issued by the Tribunal Chairperson for the management of Tribunal hearings during the Covid-19 pandemic. The first directive, detailing the Tribunal's social distancing protocols, was in place from 17 March 2020 and was the regime in terms of which the opposed extension application hearing was held. After announcement of the national lockdown, a second directive was issued on 26 March 2020 to regulate the virtual hearing of matters. This was the prevailing regime in

[3] In a virtual prehearing held on 14 April 2020.

terms of which the 14 April prehearing took place. On 9 June 2020, the Tribunal issued a third directive to regulate the hearing of matters under lockdown level 3 (the "9 June directive"), which directed at paragraph 7 that:

> "*Phase 3 Mergers (very complex mergers that are opposed, as classified by the Commission), Intermediate and Small Merger Consideration applications previously set down for hearing before 1 August 2020 are provisionally removed from the roll.*"

[14] The third directive also provides for the re-enrolment of matters on a case-by-case basis, having regard to:

14.1 the urgency of the matter;

14.2 the necessity to call factual witnesses / economic experts;

14.3 the number of days required;

14.4 whether the case can be heard virtually; and

14.5 whether the Tribunal premises are compliant with all workplace regulations pertaining to the curbing of the spread of Covid-19 for a physical hearing at the Tribunal's premises.

[15] After receipt of the 9 June directive the parties requested a prehearing to consider (i) the 9 June directive; (ii) filing and set down dates for the postponement application; and (iii) disputes regarding the discovery process. A virtual prehearing was held on 12 June 2020 in which it was decided that the postponement application would be heard at a mutually agreed upon time and the parties would regulate the filing of the outstanding pleadings prior to that. In addition, the Commission and the NLC, during this prehearing, indicated their intention to abide by the Tribunal's decision on the postponement application.

Parties' Arguments

[16] The postponement application had been filed on 4 June. HCI filed its answering affidavit on 15 June, the replying affidavit was filed on 18 June and the hearing of the postponement took place on 22 June 2020. Heads of argument were electronically "handed up" on the day of hearing.

[17] The Target Firms argued for a postponement on the basis that they had terminated the Management Agreement and it was therefore likely that the proposed merger would no longer take place. It was submitted that Ithuba has exercised its right to terminate the Management Agreement[4] which is terminable on 3 months' notice.[5] According to the Target Firms, although the Management Agreement had been amended, which introduced the HCI group into the relationship, in their view this did not fetter Ithuba's right to terminate the Management Agreement. However, this notice of termination is being disputed by HCI and the matter has now been referred to arbitration. If Ithuba is successful in the arbitration, the proposed merger will no longer take place.

[18] The Target Firms contend that there was no urgency to hearing the proposed merger for a number of reasons. Firstly, in the likely event that the Target Firms have validly cancelled the Management Agreement, the entire merger hearing proceedings and all the costs associated with participating in, and leading evidence for, a hearing will have been a waste of resources for all concerned, least of all the Target Firms. Furthermore, the Target Firms allege, the Management Agreement is set to terminate on 4 August 2020, which is a week after the scheduled date for the hearing of the parties' closing argument. This is in a context where, not only is competition approval required for HCI to be able to exercise its rights, but the Minister and the NLC also have to approve the proposed transaction, which process has not yet begun.

[19] Secondly, the Target Firms contend that if this merger hearing were to proceed on the dates scheduled, the only likely way for the matter to proceed would be on a virtual platform because the Tribunal's premises is not yet ready for occupation for a physical hearing as it was still being brought into compliance with the Covid-19 occupational, health and safety

[4] Founding affidavit para 21.
[5] It is set to terminate on 4 August 2020.

standards. Hence, they will have had to oppose the merger in circumstances where their ability to cross-examine HCI's witnesses will be materially constrained because it will happen virtually, and not "*in person*". Furthermore, the Target Firms argue, during the 14 April prehearing it was never contemplated that the hearing would proceed virtually.

[20] In its answering affidavit, deposed to by the attorney of the Acquiring Firm, it is alleged that this postponement application constitutes an abuse of process and forms part of a stratagem by the Target Firms to deprive HCI of its rights. This is evidenced, it is argued, by the fact that the alleged termination took place prior to the 24 April direction; at that time the civil litigation was always pending, yet the Target Firms did not, at that stage, seek a postponement. Either way, HCI argues, any alleged termination of the Management Agreement is not relevant to the regulatory competition approval sought now; for the reason that merger analysis is an *ex ante* exercise, not concerned with whether, or how, the proposed merger is finally implemented after it gets approved.

[21] The Acquiring Firm argued that the Tribunal should consider the fact that this matter has been subject to undue delays throughout the process. Saying that (i) the extensions sought and granted during the Commission's investigation of the merger; (ii) the opposed extension heard before the Tribunal; (iii) the delays occasioned during the discovery process; and (iv) the late filing of witness statements by the Target Firms in the main matter; were examples of such delays. It was argued that there is an overarching calculated scheme by the Target Firms to delay this merger; here the Acquiring Firm refers to the changes in legal representation (which took place during the merger investigation) and the litigation before the High Court.[6]

[6] There are three applications pending in the South Gauteng High Court including an application to have the Award reviewed and set aside; which too has become subject to a postponement application (HCI Heads of argument "HoA" para 23).

[22] The attorney for the Acquiring Firm alleged that HCI would be prejudiced by the granting of the postponement application and that their rights were being impeded.

ANALYSIS

[23] Our order of 22 June 2020 postponed the hearing of the merger indefinitely, rather than to a specific date.

[24] The factors taken into account when the decision was made included the possibility that the proposed merger might not take place; the prejudice to the Target Firms of hearing a highly contested matter in the context of the lockdown and Covid-19 pandemic; and the interests of justice.

[25] It is trite that the Competition Act empowers the Tribunal to regulate its processes.[7] In evaluating the merits of a postponement, the Tribunal is guided by the principles of natural justice,[8] the balance of prejudice[9] as well as the interests of justice.[10]

Merger Status

[26] The merger before us is not straightforward in its occurrence. The change in control of the Target Firms results from a condition to an agreement triggered by the Target Firms' failure to repay certain monies owed to HCI. HCI's election to exercise the oversight rights is however resisted by the Target Firms and the proposed merger is therefore hostile, in that, the parties are not *ad idem* on the rationale for it. Hostile merger proceedings

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[7] Section 52(2) read with section 55(1).
[8] Section 52(2)(a).
[9] See, for example, *Competition Commission v South African Airways (Pty) Ltd* (2) [2004] 1 CPLR 235 (CT).
[10] *National Police Service Union v Minister of Safety and Security* [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) ("*National Police Service Union*") para 4.

are usually highly contested, and this case is no exception. In such cases the procedural rights of both parties have to be carefully balanced.

[27] While it is not necessary for us to deal with the merits of the Target Firms' opposition to the proposed merger in this application, it is important to note that the Target Firms have put up, *inter alia*, three grounds for resisting the merger. The first is that there are competition concerns flowing from the merger; the second that they have put aside in a trust account the monies allegedly owing to HCI and hence there is no need for an exercise of oversight rights by HCI; and third that HCI intends, in the exercise of its oversight role, to replace top management in the Target Firms which would have an adverse effect on its BEE shareholding.

[28] The hostility between the merger parties is palpable, with many long drawn out legal battles. As an example of this is the dispute regarding the election notices. It first arose in 2016. The merger was only notified in 2019, some three years later. While this application was being considered, the merger parties were engaged in yet other high court battles including a review of the arbitration award.[11]

[29] The postponement application was sought primarily because the Target Firms exercised what they view as their rights to terminate the Management Agreement, which is set to terminate on 4 August 2020. This termination has now been disputed by HCI, thus adding to the many legal battles already being waged in other fora.

[30] The termination of the Management Agreement does give rise to a real possibility that the proposed merger would not take place at all, and therefore raises complex questions of our jurisdiction. This is not irrelevant for the consideration of the merger. A merger needs to at least have some likelihood of being implemented in order for the jurisdiction of

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[11] HCI HoA para 23.

the competition agencies to be triggered.[12] In the above context we should exercise caution in utilising public resources to hear a matter that might not be implemented and more so to hear this matter in the difficult circumstances of the Covid-19 lockdown as we discuss below.

Balance of prejudice

[31] While HCI has mapped out the many delays and hurdles placed in its path to the exercise of its oversight rights; it has not, in our view, made out a case for commercial urgency or prejudice to its business. The issue of whether its rights could be exercised has already been fought out in a long drawn legal battle. Furthermore, apart from approval for the proposed merger from the competition authorities it also requires regulatory approval from the NLC and the Ministry of Trade, Industry and Competition, a process that has not yet been started.

[32] The proposed merger does not amount to a sale of shares and only permits HCI to exercise contractual rights over the business of Zamani. As raised by the Target Firms and, inadequately addressed by HCI, is the fact that commercial prejudice to HCI's business has not been shown. It is merely intimated that the funds from the loan (that occasioned the oversight rights) would be more easily recovered by its creditors through the exercise of its contractual rights acquired through this transaction. It has not put up any facts as to why its commercial interests will be jeopardised by the postponement.

[33] On the other hand, prejudice to the Target Firms is highly likely if the matter was not postponed at this stage. They will have to incur the time and costs of opposing the matter, which depending on the outcome of the termination dispute, might not be implemented at all.

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[12] *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* [2019] ZACC 2 paras 27 and 45; see also *Competition Commission and Edgars Consolidated Stores Ltd and Others* (95/FN/Dec02) [2003] ZACT 19.

[34] HCI submitted that the 9 June directive need not apply and that the Tribunal in its discretion could hear the matter on a virtual platform. It is true that, at the time, the Tribunal had elected to, as an experiment, hear another contested matter on a virtual platform. However, this is not a matter that lends itself well to hearing over a virtual platform. First, this is a hostile merger. The merger parties in this matter have historically been very far apart from one another on issues of both substance and process. The primary parties to the transaction are not *ad idem* and differ on almost every aspect of the matter, including whether the matter should be heard virtually. Virtual hearings present many different challenges not experienced in live/real hearings. For example, there may be concerns with the integrity of the evidence given by witnesses who are in disparate locations, all the participants are reliant on self-sourced internet, with different bandwidth speeds all needing to be adequate to sustain clear audio-visual transmission. Disruptions due to freezing and interference in bandwidth are a common occurrence, placing a greater burden on panel members, to hear evidence and observe the demeanour of witnesses.

[35] In circumstances where the case is hotly disputed such as this one, a virtual hearing would present even more challenges and would, in our view, raise questions of fairness to the parties. As already indicated by the Target Firms they would be constrained by such technical glitches to cross-examine witnesses over a virtual platform and would consider it prejudicial to them.

[36] Given that the Target Firms have terminated the Management Agreement we found that it would be fair and judicious to await the readiness of the Tribunal's premises for a live, socially-distanced hearing, where the issues between the parties could be fully ventilated without being beset by technical glitches and other procedural challenges.

Interests of Justice

[37] The Constitutional Court has also said in the context of the consideration of a postponement, that what is in the interest of justice is determined by what is in the interest of the immediate parties as well as what is in the broader public interest.[13]

[38] While we are under a duty to hear mergers expeditiously, we are also required to act in the interest of justice.

[39] In the context of the Covid-19 pandemic – where resources are scarce and budgets have been tightened – the competition authorities have had to prioritise matters.

[40] In our view, to utilise scarce resources in a time like this for a highly disputed matter such as this one, and in which there is a likelihood of the proposed merger not taking place at all, would not be in the interests of justice.

[41] In our view it would be more appropriate for the merger parties to approach the Tribunal for the re-enrolment of the matter, once the dispute about the termination of the Management Agreement has been resolved, for it to be heard when the Tribunal's premises and court room are deemed ready for occupation and use.

[13] *National Police Service Union* para 5.

[42] Accordingly, the matter was postponed *sine die*.

22 July 2020

Ms Yasmin Carrim	**Date**

Mr AW Wessels and Dr T Vilakazi concurring

Tribunal Case Managers:	Mpumelelo Tshabalala, Lumkisa Jordaan and Camilla Mathonsi
For the Applicants:	Adv Gavin Marriot *instructed* by Johan Roodt and Dawie Beyers of Roodt Incorporated *on behalf of* Ithuba and Zamani
For the First Respondent:	Adv Arnold Subel SC *assisted* by Adv Pieter Lourens *instructed* by Ahmore Burger-Smidt of Werksmans Attorneys *on behalf of* HCI