REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 154/CAC/Sept17

In the matter between:

HOSKEN CONSOLIDATED INVESTMENTS LIMITED	FIRST APPELLANT
TSOGO SUN HOLDINGS LIMITED	SECOND APPELLANT

and

THE COMPETITION COMMISSION	RESPONDENT

JUDGMENT

Delivered 30/10/2017

VICTOR et MNGUNI AJJA:

[1] Two issues require determination in this appeal. The first concerns the question whether the Competition Tribunal ('the Tribunal;) has jurisdiction to entertain a matter in circumstances where a party has not notified a transaction in terms of s 13 of the Competition Act 89 of 1998 ('the Act'). The second concerns whether an acquiring company, having obtained an unconditional prior approval from

the Competition Commission (the Commission) to acquire sole control of an entity over which it exerts control must still obtain merger approval before entering into a subsequent transaction with that entity.

[2] These issues arose in this appeal under the following circumstances: Prior to 2014 Tsogo Sun Holdings Limited ('Tsogo') was subject to the joint control of Hosken Consolidated Investments Limited (HCI) and SABMiller plc (SABMiller). In 2014 SABMiller announced that it was divesting itself of its shareholding in Tsogo which would have the effect of leaving HCI as the sole controller of Tsogo. In the same year HCI sought merger approval from the competition authorities for the acquisition by HCI of sole control of Tsogo. HCI and Tsogo sought such merger approval because HCI intended to acquire over 50 per cent of the shares in Tsogo within the meaning of s 12(2)(a) of the Act. The Commission conducted an investigation of the proposed transaction and made recommendations to the Tribunal that the proposed transaction should be approved without conditions.

[3] The Commission and the Tribunal evaluated the merger on the basis that HCI would acquire and exercise sole control over the gaming of Tsogo. The Tribunal unconditionally approved the merger on that basis. Pursuant to this merger approval, HCI increased its shareholding in Tsogo to approximately 47.5 per cent, thereby exercising sole control over Tsogo within the meaning of s 12(2) (g) and (c) of the Act. Now HCI wishes to consolidate all its gaming interests (other than betting and lottery interests) currently held in its Niveus subsidiary into the Tsogo Group which will result in an increase of 50 per cent in its shareholding in Tsogo, resulting in the same outcome contemplated in the 2014 merger approval.

[4] At this stage the entities which are role players in this application need to be introduced. HCI is a listed black empowerment investment holding company in the financial sector which currently has a beneficial shareholding of 47, 61 per cent in Tsogo, primarily held through Tsogo Investment Holding Company (Pty) Ltd ('TIHC'). HCI currently indirectly holds 100 per cent of the shareholding of TIHC through TIH Prefco (Pty) Ltd which in turn holds 90, 357 per cent of TIHC. Tsogo is a level 1 BBBEE contributor status company listed in the travel and leisure sector. With its shareholding of 47, 61 per cent, HCI is the *de facto* sole controller of Tsogo and is the largest shareholder in Tsogo by a considerable margin.

[5] The Tsogo Group's operations can be subdivided into two principal business activities which are gaming and hotels. Tsogo's gaming interests are held through Tsogo and Tsogo Sun Gaming (Pty) Ltd. The Tsogo Group, through its various subsidiary companies currently operates 14 gaming and entertainment complexes in the country. Tsogo's non-casino hotel interests are held through Sun Hotels (Pty) Ltd and Southern Sun Offshore (Pty) Ltd and their respective subsidiaries and its casino hotels through each licenced Tsogo Group Company. Southern Sun Hotels manages all of these non-hotel interests and offers a variety of hotel brands tailored to suit individual guest requirements from world class luxury to budget priced hotels.

[6] Apart from its controlling shareholding in Tsogo, HCI also has a controlling interest in Niveus (52.28%), which wholly owns Niveus Investment 19 Limited ('Game Co') which, in turn, wholly owns Galaxy Gaming and Entertaining Proprietary Limited ('Galaxy Gaming') and Vukani Gaming Corporation Proprietary Limited

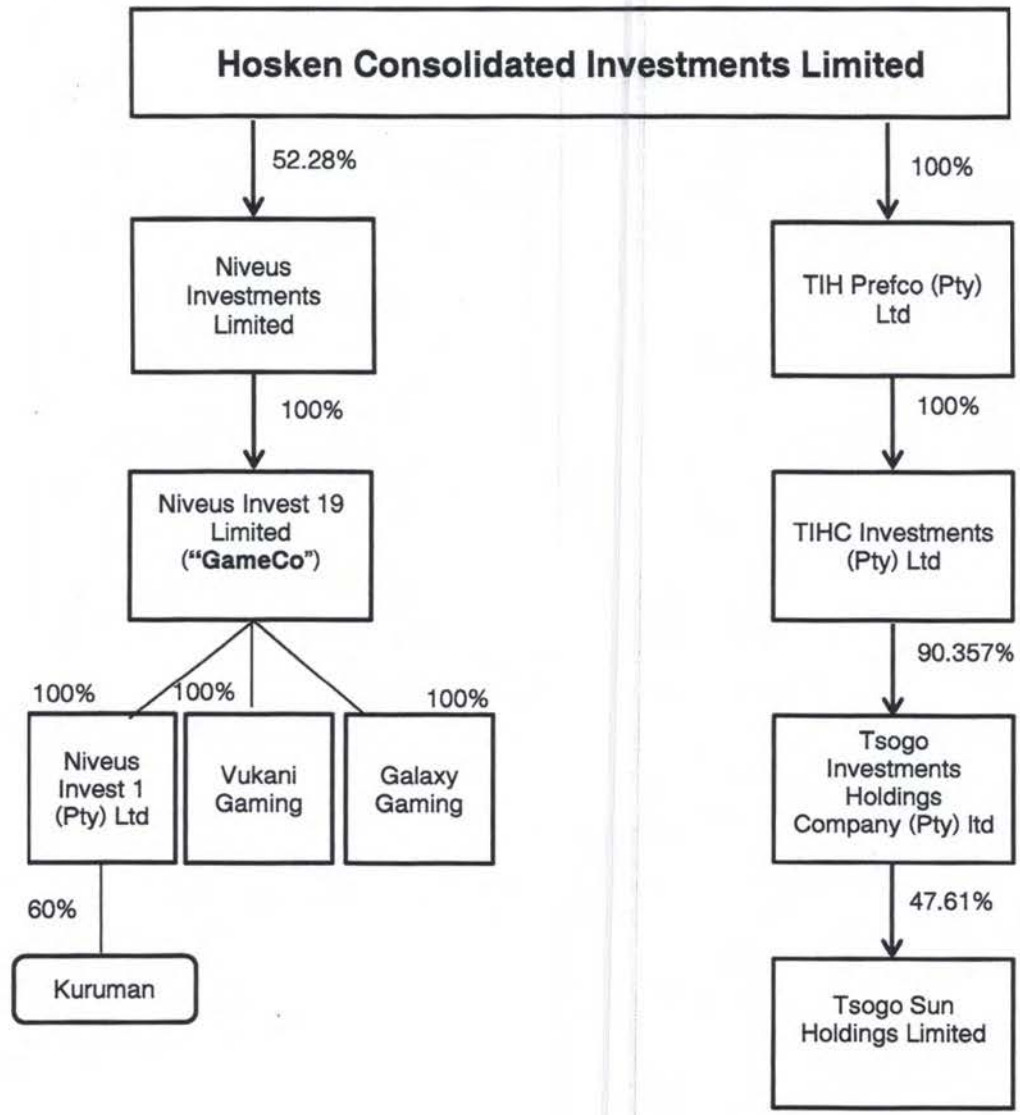
('Vukani Gaming'). Game Co comprises of all of the South African gaming interests of Niveus other than its sports betting and lottery interests.

[7] The Commission was informed that the proposed transaction involves a number of steps which will ultimately entail the transfer of the special purpose vehicle, Game Co, to Tsogo.

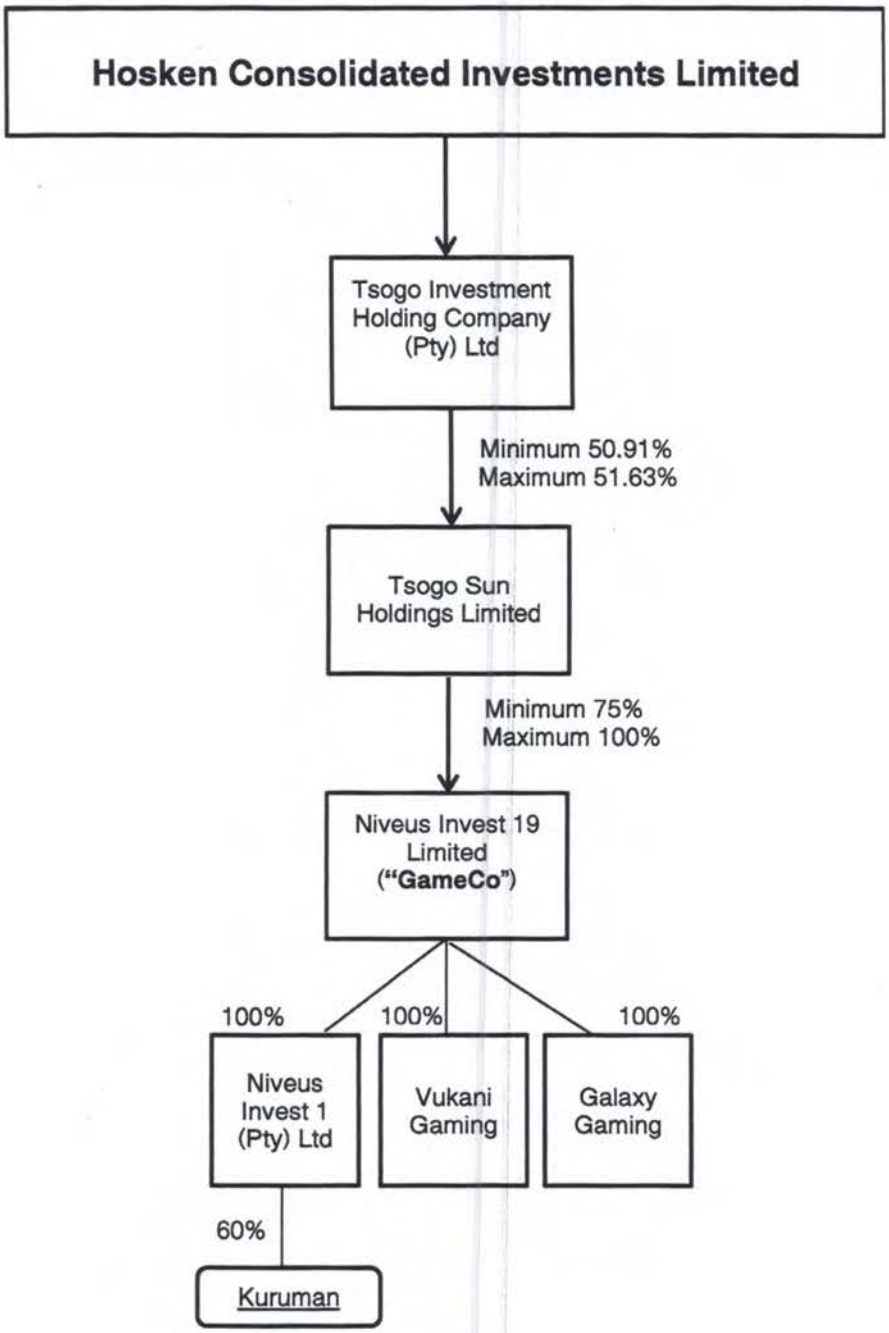
[8] The Commission was asked to confirm the proposed consolidation of all of HCI's gaming interests (other than its sports betting and lottery interests) under Tsogo through the transfer of the said gaming interests currently owned by one of HCI's subsidiary companies, Niveus, to Tsogo would not constitute a notifiable merger for the purposes of s 12 of the Act. The rationale offered for the proposed transaction is to consolidate the HCI group's South African gaming interests under Tsogo over which HCI exerts sole control. HCI and Tsogo contend that, by this consolidation, Niveus shareholders will be able to realise the value of their investments in the Limited Payment Machine ('LPM') and bingo industries and provide the Niveus shareholders with more diversified exposure in gaming, leisure and property through the Tsogo consideration shares.

[9] The pre and post transaction structures can be depicted thus:

Pre-Transaction



Post-Transaction



[10] On 7 August 2017, the representatives of the Commission met with the legal representatives of HCI and Tsogo to discuss HCI's request for an advisory opinion. At that meeting the Commission requested certain information from HCI and Tsogo

relating to the shareholding structures of the companies in question. The requested information was supplied to the Commission on 8 August 2017. On 10 August 2017 the Commission requested further information from HCI and Tsogo relating to the voting patterns of HCI through TIHC at Tsogo's shareholders annual meetings. The requested information was furnished to the Commission on the same date.

The Commissions Advisory opinion

[11] On 16 August 2017 the Commission issued its advisory opinion in which it expressed the view that the proposed transaction was notifiable for, inter alia, the following reasons:

(a) The proposed transaction would result in the crossing of a bright line as HCI through TIHC would increase its shareholding in Tsogo from the current 47.61 per cent to more than 50 per cent resulting in HCI beneficially owning more than one half of the issued share capital of Tsogo within the contemplation of s 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 legislature deemed should be notified to the Commission. In short, the crossing of this bright line triggers notification of a merger.

(b) Circumstances had changed since 2014 and the structure of the market had altered which meant that a merger investigation rather than an advisory opinion was appropriate. The Commission also emphasised that a non–binding opinion was part of its advocacy role and it could not be held to the terms of a non-binding agreement.

(c) The Commission considered that the transaction involved a different firm namely Niveus, and other factors would be relevant such as the public interest which may involve considerations of retrenchment. The Commission opined that the past authorisation was for a specific transaction and that different considerations would apply to this transaction as it had different transactional structure. The Commission found it to be a notifiable transaction and that it had to be notified prior to its implementation. The appellants argued to the contrary. The consequences that flow from this difference of opinion between the Commission and the appellants is, in our view, a live dispute between the parties.

[12] The Commission made it clear in its advisory opinion that the views expressed therein were not binding on the Commission or any party and that its views may change on the basis of further information provided by HCI and Tsogo. The Commission also emphasised that it provides the advisory opinions to the parties on request as part of its advocacy functions. HCI and Tsogo contended that the reasons advanced by the Commission in reaching the conclusion that the transaction should be notified were flawed because HCI already has sole control of Tsogo, pursuant to approval by the Tribunal in 2014 and HCI and Tsogo were not seeking the acquisition of sole control. In the second instance, HCI and Tsogo contended that there is no time limit imposed in the Act for the validity of an approval under the merger control provisions.

Tribunal Decision

[13] Arising from this legal uncertainty HCI and Tsogo approached the Tribunal on urgent basis seeking an order as foreshadowed in the notice of motion. At the hearing of the matter before the Tribunal, the parties were requested to address the Tribunal on the question of whether the Tribunal enjoyed jurisdiction to consider this application because the Tribunal took the view that a transaction is only triggered when that transaction has first been notified to the Commission.

[14] On 12 September 2017 the Tribunal heard and dismissed the application and stated that the reasons for such an order will be issued in due course. On 29 September 2017 the Tribunal gave its reasons. The Tribunal found that it does not have the power to grant declaratory relief in terms of s 27(1)[1] and also in terms of s 58[2] of the Act. An analysis of s 58 demonstrates the wide range of powers the

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[1] Section 27(1) reads as follows: '**27. Functions of Competition Tribunal.**-(1) The Competition Tribunal may-

(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in *this Act*;

(b) adjudicate on any other matter that may, in terms of *this Act*, be considered by it, and make any order provided for in *this Act*;

(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*.'

[2] Section 58 reads as follows:'**58. Orders of Competition Tribunal.**-(1) In addition to its other powers in terms of this Act, the Competition Tribunal may—

(a) make an appropriate order in relation to a *prohibited practice*, including-
(i) interdicting any *prohibited practice*;
(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a *prohibited practice*;
(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
(iv) ordering divestiture, subject to section 60;
(v) declaring conduct of a *firm* to be a *prohibited practice* in terms of this Act, for purposes of section 65;
(vi) declaring the whole or any part of an *agreement* to be void;
(vii) ordering access to an *essential facility* on terms reasonably required;

Tribunal enjoys. Obviously the transaction must be considered on a case-by-case basis. It also 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[3] and

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(*b*) confirm a consent *agreement* in terms of section 49D as an order of the Tribunal; or

(*c*) subject to sections 13 (6) and 14 (2), condone, on good cause shown, any non-compliance of-
(i) the Competition Commission or Competition Tribunal rules; or
(ii) a time limit set out in *this Act*.

(2) At any time, the Competition Tribunal may adjourn a hearing for a reasonable period of time, if there is reason to believe that the hearing relates to a *prohibited practice* that might qualify for exemption in terms of section 10.

(3) Despite any other provision of *this Act*, if the Competition Tribunal adjourns a hearing in terms of subsection (2), the *respondent* may apply for an exemption during that adjournment.'

[3] Tribunal Rule 31 reads as follows: **'31. Preliminary merger decisions.**-(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*) For an order extending time in terms of section 14A (2).

(*b*) An appeal against directions by the Commission concerning the application of the Threshold requirements and fee calculations, in terms of Competition Commission Rule 26 (3).

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

(*d*) An appeal against Form CC 13 (2) issued by the Commission in terms of Competition Commission Rule 30.

(*e*) An appeal against a Demand for Corrected Information issued by the Commission, in terms of Competition Commission Rule 32.

(*f*) For an order for a remission of filing fees, in terms of Competition Commission Rule 34 (2).

(2) A person appealing against Form CC 13 (2) in terms of both Competition Commission Rule 30 (4) and Competition Commission Rule 33 (3) must combine both appeals on a single Notice of Motion.

(3) A Notice of Motion and affidavit filed in terms of this Rule-

(*a*) must be served on the Commission, or if the Commission is the applicant, on the firm that filed the Merger Notice; and,

(*b*) if the applicant seeks an order in terms of Competition Commission Rule 33 (3), must also be served on the other primary firm.

(4) Upon receiving a Notice of Motion and affidavit filed in terms of this Rule, the registrar must set the matter down for hearing at the earliest convenient date.

Commission Rule 33. It also found that notification of a transaction to the Commission is a jurisdictional requirement to trigger their function. The Tribunal found that HCI and Tsogo were not entitled to approach the Tribunal directly for the order that they sought. The Tribunal also held that even if they accepted jurisdiction is triggered by a direct application they would in any event find no justification for the exercise of their discretion in favour of HCI and Tsogo.

[15] Although the Tribunal found that it does not have jurisdiction to consider the matter, it nevertheless went on to consider whether it ought to exercise its discretion in favour of HCI and Tsogo. The Tribunal concluded that there was no live dispute between the parties that required its intervention. The Tribunal went further and stated that the applicants approached the Commission for an advisory opinion. They were not required to do so but the fact that they did suggest 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.

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(5) A motion in terms of sub-rule (1) (*a*) may be heard by a single member of the Tribunal in terms of section 31 (5).

(6) Division E, other than the requirements set out in Rule 42 (1) and (3), does not apply to a Notice of Motion brought in terms of this Rule.

(7) Upon hearing an appeal in terms of Competition Commission Rule 30 (3), the Tribunal may make an order-

(*a*) Setting aside Form CC 13 (2) entirely;

(*b*) Confirming any or all of the requirements set out in Form CC 13 (2);

(*c*) Substituting other requirements for any of the requirements set out in Form CC 13 (2); or

(*d*) Combining any or all of the requirements set out in Form CC 13 (2) with additional or substitute requirements.'

[16] Aggrieved by these findings, HCI and Tsogo launched this appeal contending that the Tribunal should have found that it has jurisdiction to grant declaratory relief sought by HCI and Tsogo on the same legal basis that it has jurisdiction to interdict the implementation of notifiable mergers and to order their notification to the competition authorities for approval under the Act and in particular in terms of s 27 (1) (d) of the Act. The primary thrust of HCI and Tsogo's attack against the Commission's advisory opinion is that the proposed transaction constitutes the further implementation of a merger approval previously granted to HCI to acquire sole control of Tsogo and that, even if the proposed transaction involves an acquisition of an additional instance of control within the meaning of s 12(1), HCI and Tsogo have already obtained approval for such acquisition of control in the form of the 2014 merger approval.

[17] This is then the convenient stage to deal with the two issues as foreshadowed in para 1 above. We first deal with the question relating to the jurisdiction.

[18] Counsel for HCI and Tsogo contended that in terms of s 27 (1) of the Act, in particular, s 27 (1) (d) thereof, the powers of the Tribunal are wide and include the power to grant declaratory relief in the circumstances of this case. To bolster his submission, he referred to a number of the decisions where the Tribunal had exercised its discretion and granted declaratory relief. First is *Bulmer*.[4] In this case the Tribunal held that it has the power to declare that a specific transaction constitutes a merger and to order its notification by the parties to the transaction.

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[4] *Bulmer SA (Proprietary) Limited and another v Distillers Corporation (SA) Limited and others* Case No: 94/FN/Nov00;101/FN/Dec00.

This decision of the Tribunal was confirmed by this Court on appeal.[5] Second is *Goldfields.*[6] In this case this Court held that the Tribunal had the power to grant interdictory relief to prevent the implementation of a notifiable merger. This court stated in this regard that, if, in exercising its merger powers, the Tribunal found that a proposed transaction constituted a merger and the parties were intent on implementation, say before notification, it would be a legislative curiosity if the Tribunal did not have the power to grant an appropriate order to prevent a breach of the Act in circumstances where the breach was so flagrant. This court interdicted Harmony from voting any of the rights associated with the shares it had acquired as a result of the so-called early settlement offer putting beyond any doubt that the competition authorities have the power to interdict the implementation of mergers and the power to compel the notification of mergers by the parties to the merger in question.

[19] Third is *Supersport.*[7] In this case the Tribunal made a declaratory order regarding the notifiability of the relevant transaction in that case as a merger. Fourth is *Novus.*[8] In this case this court ordered the parties to notify an agreement as a merger having found that the new agreement falls within the meaning of s 12(1). Fifth is *SABC*[9]. In this case this court overturned the Tribunal's decision not to order the transaction parties to notify the transaction between them as a merger. In this

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[5] *Distillers Corporation (South Africa) Limited & another v Bulmer (SA) (Pty) Ltd & another* 08/CAC/May01.
[6] *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* 43/CAC/Nov04.
[7] *Caxton CTP Publishers and Printers Limited and Naspers Ltd/Electronic Medial Network Ltd/Supersport International Holdings Ltd/Competition Commission* (16/FN/Mar04) [2004] ZACT 25 (13 April 2004) para 45.
[8] *Caxton CTP Publishers and Printers Limited and Media 24 Holdings Ltd, Novus (Pty) Ltd, Adbait (Pty) Ltd, Lambert Philips Retief* 136/CAC/March 2015.
[9] See footnote 26 below

case this court held that the Tribunal has inquisitorial powers and that these should be deployed to determine whether or not the transaction constituted a merger.

[20] In *Johnic*[10] the Tribunal accepted that it had the power to grant a declaratory order that the transaction in question constituted a merger:

> '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 ... has been dispelled by the decision of the CAC in the first of the *Goldfields/Harmony* cases, where this power was affirmed and such an interdict was granted.'

[21] In *Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd and another*[11] the Tribunal accepted that it had the power to grant an interdict restraining the implementation of a transaction pending receipt of a merger approval.

[22] In terms of s 62 of the Act, the Tribunal and this Court have exclusive jurisdiction to hear any matter that the Act defines[12]:

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[10] *Johnic Holdings Limited v Hosken Consolidated Investments Limited and Another* Case Number 65/FN/Jul05.

[11] [2006] 1 CPLR 410 (CT).

[12] **'62. Appellate jurisdiction.**-(1) 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).'

[23] The Commission accepts that the Tribunal and this court have made orders of various kinds in relation as to whether a transaction constitutes a merger such as *Johnnic*, *Gold Fields* and *Cape Empowerment Trust, Distillers.* The Commission however argues that the orders are not declaratory orders but are merely analogous to declaratory orders.

[24] On a fair reading of these cases, we find that it is manifest that the orders granted therein are akin to declaratory orders. The Tribunal contends that, despite the fact that the Tribunal had previously made orders relating to a determination of whether a transaction constitutes a merger, this did not apply to advisory opinions of the Commission. It applied to mergers where there has already been notification to the Commission. In our view this conclusion by the Tribunal is a misdirection.

[25] Ordinarily the High Court would, but for the exclusive jurisdiction provisions contained in the Act, have the power to grant the declaratory relief sought in this application. It therefore follows that a party who seeks declaratory relief regarding the notifiability of a transaction under the Act would not be able to approach the High Court for such relief. The only body that HCI and Tsogo can approach for such declaratory relief is the Tribunal and, on appeal, this court. It seems to us that if this court were to endorse the Tribunal's finding that it did not have the power to grant declaratory relief, a party seeking such relief in respect of the notifiability of transactions under the Act would be deprived of the right to seek such relief from any forum and would be left without a remedy. In the circumstances, this will result in an untenable situation where a party will be deprived of their right to access to court

enshrined in s 34 of the Constitution.[13] In any event, in *Seagram*[14] the High Court confirmed the exclusivity of the competition authorities in respect of the merger control provisions.

[26] As correctly pointed out by Counsel for HCI and Tsogo it would lead to an incomprehensible reading of the Act to concluded that if the Act conferred upon the Tribunal the power (i) to declare that a transaction constitutes a merger, (ii) to order the parties to notify the merger, and (iii) to order the parties not to implement the transaction, pending approval, but, at the same time, preclude the Tribunal from being able to issue declaratory relief that a transaction does not constitute a merger when approached by the parties for such relief. In our view, the jurisdictional basis has been established that the Tribunal's powers do include orders for declaratory relief. This then is dispositive of the jurisdictional issue. The exclusivity provisions as contained in s 62 of the Act would result in an unsatisfactory interpretation of the powers of the Tribunal and results in a barrier to justice.

[27] Having found that the Tribunal's jurisdiction under the Act was triggered, the next step is to determine whether, in the circumstances of this case, the Tribunal ought to have exercised its discretion in favour of HCI and Tsogo. At the outset it must be emphasised that declaratory orders can provide legal certainty to each party in a matter when this could resolve or assist in a dispute. Declaratory orders are discretionary and the facts must justify the relief. It is settled that once the Commission had given approval it was a "*once-off affair*" and in this case there were

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[13] The Constitution of the Republic of South Africa, 1996.
[14] *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd& others* [2001] 1 All SA 484 (C).

no conditions imposed relating to mode or timing of the acquisition or exercise of control.[15]

[28] In *Ex parte Nell*[16] it became settled law that a live dispute is a requirement for the granting of a declaratory order. The full court in *Minister of Finance v Oakbay* Investments[17] stated the following:

> '[59] *Herbstein and van Winsen* extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:
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> [59.1] the existence or absence of a dispute;
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> [59.2] the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;
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> [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;
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> [59.4] considerations of public policy, justice and convenience;
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> [59.5] the practical significance of the order; and
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> [59.6] the availability of other remedies.' (Footnotes omitted)

[29] In *Rail Commuters*[18] O'Regan J held that a declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations. In *Shells Annandale Farm*[19] Davis J in relation to a tax matter accepted that where a matter is not abstract or academic a declarator is appropriate but the court still had to exercise

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[15] In *Caxton and CTP Publishers and Printers Limited and Others v Multichoice (Pty) Limited and Others* Case Number 140/CAC/March2016.
[16] 1963 (1) SA 754 (A).
[17] *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.
[18] *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC).
[19] *Shells Annandale Farm (Pty) Ltd v Commissioner for the SARS* 2000 JOL 5948 (C).

its discretion. He also cautioned against a floodgate of declarators where parties may seek to obviate procedural provisions of a statute.

[30] In *Cordiant*[20] the Supreme Court of Appeal postulated a two-stage approach to the consideration of an application for declaratory relief. Firstly the applicant must have an interest in an existing, future or contingent right or obligation and secondly if the court is satisfied of such a condition then it has to exercise its discretion by deciding to either refuse or grant the order sought.

[31] As regards the first leg of the test, HCI and Tsogo clearly have a legal interest in the declaratory relief sought in their application as it relates to the question whether or not they have a legal obligation to notify the proposed transaction to the competition authorities for approval. In addition, the relief sought relates to an existing or contingent right or obligation of HCI and Tsogo, in particular, the question whether or not they are obliged to notify the proposed transaction to the competition authorities for approval. As regards the second leg of the test, there is a live dispute between HCI and Tsogo and the Commission regarding the notifiability of the proposed transaction. The legal uncertainty has been created due to the stance taken in the Commission's advisory opinion that the proposed transaction constitutes a notifiable merger. In *Seagram*[21] the High Court observed that an advisory opinion, albeit not binding, reflects the views of the Commission on a particular matter (i.e., the notifiability of transactions), and can be acted upon. In *Bulmer*[22] the Tribunal stated that it would be "highly artificial" not to regard an advisory opinion as reflecting the Commission's position on the notifiability of a transaction.

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[20] *Cordiant Trading CC v Daimler Chryster Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).
[21] *Seagram* note 13 above.
[22] Note 5 above at 458.

[32] The Commission confirmed in its answering affidavit in the present matter that it regards the proposed transaction as a notifiable merger, and went so far as to make a counter-application for an order directing HCI and Tsogo to notify the proposed transaction to the Commission as a notifiable merger. The fact that the Commission withdrew that counter-application during the Tribunal hearing does not detract from the fact that there is clearly a dispute between the parties, and legal uncertainty, regarding the notifiability of the proposed transaction under the Act. The declaratory relief sought by HCI and Tsogo will settle the dispute between the parties regarding the notifiability of the proposed transaction, and remove the legal uncertainty in relation thereto.

[33] In *Goldfields*[23] this Court held that the Tribunal did have power to grant interdictory relief. This court found that the Tribunal in issuing an interdict found: 'that the Tribunal in exercising its merger powers found that a transaction constituted a merger but the parties were intent on implementation before notification it would be a legislative curiosity if the Tribunal did not have the power to grant an appropriate order to prevent a breach of the Act'.

[34] In summary, HCI and Tsogo have a legal interest in the declaratory relief as it relates to whether there is a legal obligation to notify the competition authorities about the proposed transaction. There is a live dispute between the appellants and the respondent regarding the notification of the transaction. There is legal uncertainty and the Commission has already indicated a set intention that the

[23] *Goldfields Limited v Harmony Goldmining Company Limited and Another* 43/CAC/Nov04.

transaction is a notifiable merger. In *African Media Entertainment*[24] the court found that a non-binding advisory opinion reflects the views of the Commission on a particular matter such as notifiability of transactions and can be acted on.

[35] As already stated, prior to 2014, Tsogo was subject to the joint control of HCI through various subsidiary companies and SABMiller plc. In 2014, SABMiller announced that it was divesting itself of its shareholding in Tsogo which would have the effect of leaving HCI as the sole controller of Tsogo in 2014, HCI notified the Commission of its intention to acquire sole control over Tsogo. After investigation of the merger as notified, the Commission recommended that the merger be approved unconditionally and following a hearing, the Tribunal approved the transaction without conditions as reflected in its decision in TIHC and Tsogo, ('the 2014 Tsogo Decision'). In its decision, the Tribunal recorded that the primary target firm is Tsogo which is jointly controlled by TIHC and SABSA Holdings Ltd (SABSA) with 41.3 per cent and 39.6 per cent respectively and that post-merger HCI will ultimately acquire sole control of Tsogo.

[36] This will occur through Tsogo purchasing the shares in GameCo from HCI and the other shareholders of Niveus, after the shares in GameCo have been unbundled by Niveus. Tsogo will pay for these shares through a combination of shares and cash, which will result in HCI acquiring a shareholding in excess of 50 percent in Tsogo. HCI controls Tsogo through various subsidiary companies and all of the subsidiaries through which it holds shares in Tsogo.

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[24] *African Media Entertainment Limited v David Lewis NO and Others* Case Number 68/CAC/Mar07.*Africa (Pty) Limited and Stellenbosch Farmer's Winery Limited, Stellenbosch Farmer's Winery Group Limited Distillers Corporation SA Limited* 7759/00CBD.

[37] The merger that was approved unconditionally by the Tribunal in the 2014 Tsogo decision was the acquisition of sole control by HCI over Tsogo. It was also expressly recognised in the Tribunal's decision that HCI would acquire control of Tsogo by ultimately increasing its shareholding in Tsogo to over 50 per cent. Consequently, the Commission and the Tribunal conducted the merger assessment required in terms of section 12A of the Act on the basis that HCI would exert sole control over the gaming interests of both Tsogo and Niveus. In unconditionally approving HCI's move from joint to sole control of Tsogo, the Tribunal concluded that such acquisition of control did not give rise to any concerns under s 12A of the Act, notwithstanding that HCI also enjoyed sole control of Niveus's gaming interests.

[38] Counsel for the Commission submitted that the contentions advanced on behalf of HCI and Tsogo which appear to be premised on a unitary concept of control are of no assistance to HCI and Tsogo because it does not change following the implementation of the proposed transaction. Relying on Bulmer[25] and Distillers[26], he submitted that notification is intended to be as extensive as possible; hence the breadth of the language in s 12. Once a transaction presents the essential features of a merger it is notifiable. If this were not the case, there would be a danger that mergers that may have adverse effects might go undetected because the jurisdictional barriers in terms of s 12 had been set too high. It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired

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[25] *Bulmer SA (proprietary) limited and another v Distillers Corporation (SA) Limited and others* case number 94/FN/Nov*0101/FN/Dec00.
[26] *Distillers Corporation (South Africa) Limited and another v Bulmer (SA) (Pty) Ltd and another* 08/CAC/May01.

and this purpose provides a strong pro-pointer in favour of a broad interpretation of s 12.

[39] He submitted that this Court's judgement in Distillers is binding authority for the proposition that the provisions of s 12(1) do not exclude a transaction between a company and its wholly owned subsidiary. In this regard, in responding to the contention by the appellant in Distillers that, when s 12(1) of the Act refers to 'the direct or indirect acquisition or direct or indirect establishment of control', it is exclusively to 'ultimate control' and, unless 'ultimate control' changes as a result of the transaction in question, such a transaction falls outside the scope of s 12 of the Act, this Court disagreed. It held that such an interpretation is not mandated by the express wording of s 12(1). To the contrary, s 12(1) makes no express provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of merger.

[40] Counsel for the Commission expressed the view that the legal question relating to whether s 12(1) of the Act applies to a transaction between a company and its subsidiary is a question that has already been settled by this Court and that this is an important factor that has a bearing on the exercise of this court's discretion against granting the declaratory relief sought.

[41] On the question of sole control, HCI and Tsogo referred to the voting patterns at Tsogo's most recent shareholders' meetings which revealed that at the 2015 Tsogo's annual general meeting HCI voted its full allocation of 43, 18 per cent as its per shareholding at the time and its full allocation of 47, 6 per cent at the 2016 annual general meeting. The Commission accepted that a minority shareholder may

be deemed to have acquired sole control on a legal or *de facto* basis in accordance with historic voting patterns at shareholder meetings. HCI achieved a majority of 51, 09 per cent and 56, 84 per cent votes at the Annual General Meetings and this was acknowledged by the Commission in paragraph 9.1 and 9.2 of its advisory opinion. The Commission however argued that this represented volatility. HCI's voter turnout based on control over Tsogo and that a 2 year assessment of the voting patterns of shareholders at meeting was too short a period to assess stable sole control. The Commission did not suggest an appropriate historic benchmark period which was required to establish stable sole control. We are of the view that it is significant that HCI did command majority of votes in Tsogo.

[42] The importance of de facto control was also recognised in Caxton.[27] In this matter the Commission accepted that HCI has acquired sole control over Tsogo by virtue of its shareholding. It also accepted that HCI exercised sole control over Tsogo under sections 12(2) (g) and (c) of the Act by virtue of its shareholding. The Commission also accepted that since 2014 HCI had exercised sole control over Tsogo in accordance with s 12(2) (g) and (c) of the Act by virtue of its shareholding. The appellants contend that this potentially volatile situation will be countered because the proposed transaction will move to majority control in terms of s12 (2) (a) of the Act, thus moving HCI away from the dependence of other shareholders at the meetings. In AME[28] 'manifestly control per se is relevant to determining whether a merger exists and thus whether the Tribunal has jurisdiction to examine the transactions in terms of the factors set out in s12.'

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[27] *Supra*

[28] *African Media Entertainment Limited v David Lewis NO and Others* Case Number 68/CAC/Mar07.

[43] Counsel for HCI and Tsogo argued that the 2014 Tsogo decision led to the acquisition of sole control by HCI over Tsogo. At that time the competition authorities had conducted a merger assessment in terms of section 12A of the Act and were aware that in time HCI would exert sole control over the gaming interests of Tsogo and Niveus. At the same time HCI also enjoyed sole control of Niveus gaming interests. He correctly submitted that, in analysing s12 (2), it becomes clear that the section does not purport to define control in terms of an exhaustive list. In this regard he pointed out that very often, at the time of merger notification, details may not be clear, for example as to how many shares will be purchased by the acquiring firm or when they will be purchased or from which shareholders but these factors do not prevent merger approval. He emphasised that the important factor in assessing whether the transaction constitutes a merger or not is the question of prior and post transaction control. He argued that in this case the facts insofar as HCI's pre and post transaction control are clear.

Is a Rule 33 application necessary?

[44] In *Ethos*[29] the Tribunal required the parties to file an application to have the question of jurisdiction determined. From what is stated above, it follows that the content of the appeal in terms of Rule 33 would be precisely the same information as the application for declaratory relief. Counsel for HCI and Tsego submitted that the Rule 33 procedure would be costly, unnecessary waste of time and would be pointless. Based on the facts in this case and in particular the approval granted in 2014 we find that a Rule 33 application is unnecessary.

[29] *Ethos Private Equity Fund IV and Tsebo Outsourcing Group (Pty) Limited* Case Number 30/LM/Juno3.

[45] HCI and Tsogo contend that the acquisition of sole control is a "*once-off*" affair and accordingly that, once they have received approval for HCI to acquire sole control over Tsogo, there is no requirement for HCI to obtain any further permission to increase its shareholding in Tsogo over 50 per cent or to restructure the assets over which it holds sole control. In any event, HCI and Tsogo contend that the current proposed transaction does not involve an acquisition of control within the meaning of s 12(1) of the Act, given that HCI already exerts sole control over Tsogo in terms of the 2014 merger approval. In Ethos[30] this court found that a change of control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required.

[46] Confronted with these difficulties counsel for the Commission sought to overcome them by submitting that the 2014 Tsogo Transaction involved the exit of a significant minority shareholder, SABMiller, and the acquisition by HCI through TIHC of additional shares in Tsogo. However, in the proposed transaction, not only will HCI through TIHC acquire additional shares in Tsogo, the proposed transaction also involves the transfer of a business GameCo which currently houses the gaming interests of HCI. As a result, GameCo, the wholly owned subsidiary of Niveus, will no longer be directly controlled by Niveus, rather GameCo would be directly controlled by Tsogo with a shareholding of between 75 per cent to 100 percent.

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[30] *Ethos Private Equity Fund IV v The Tsebo Outsourcing Group (Pty) Ltd.*

[47] He submitted that the commission's recommendation and the Tribunal's decision was to approve the 2014 Tsogo transaction was based on the following submissions:

(a) In respect of the competitive assessment, it should be noted that in the 2014 Tsogo Transaction, the Commission did not conclude on the relevant product market but it assessed the effects of the 2014 Tsogo transaction on the narrow market for casino gaming and found to be no geographic overlap between the activities of the merging parties due to the distance between the Kuruman Casino and Tsogo Sun's casinos. The Commission then concluded that the 2014 Tsogo transaction was unlikely to substantially prevent or lessen competition in the casino gaming market.

(b) The Commission noted that Tsogo did not own any LPMs, Bingos and sport betting facilities in Kuruman and the Northern Cape Province. The Commission then found that on the broader product market that included other forms of gambling Tsogo was unlikely to constrain the Kuruman Casino given that it did not operate any gambling activities in the Kuruman region or area. The Commission noted that HCI also did not own any LPMs, Bingos and sport betting facilities in Kuruman and the Northern Cape Province resulting in the Commission to conclude that, the Kuruman casino, which was not operational at the time of the Commission's assessment which was to operate in the Kuruman and the Northern Cape Province would not result in any market share accretion and/or market concentration since HCI did not at that time perform any gambling activities in the area or region.

(c) With regard to the public interest in the 2014 Tsogo Transaction, HCI, through TIHC, submitted that the transaction would not result in any job losses or retrenchments as the businesses of HCI and Tsogo will not be integrated. In the Commission's investigation report in the 2014 Tsogo transaction the merging parties submitted that 'it is not envisaged that the transaction will bring significant change in the operations of Tsogo Sun as HCI through TIHC is prior to the proposed transaction already a controlling shareholder of Tsogo.' As such, no duplication of functions was expected as a result of the merger. The merging parties further submitted that 'Tsogo Sun's casino and hotel operations will continue to be managed and operated in the same manner as they were prior to the proposed transaction by the same management team and employees. The day-to-day operations of all the casinos and hotels within the Tsogo will be unaffected by the proposed transaction, which will simply result in one of the previous joint controlling shareholders of the company acquiring a majority equity interest in the business'.

[48] The Commission submitted that the merger control scheme in the Act is an investigative system; therefore, the declaratory orders are not well suited for an investigative system which has its bespoke processes. This has direct implications on the discretion that a court has to exercise when confronted with an application for declaratory relief especially when such declaratory relief emanates from the issue of a non-binding advisory opinion.

[49] Counsel for the Commission further submitted that in the current proposed transactions many variables remain unknown. In the new merger filing HCI and Tsogo would have to submit their strategic plans including human resource plans in relation to the proposed transaction. The plans will have to indicate whether or not an integration of the two businesses is envisaged; whether there will be any duplication of roles; whether there will be any changes in management and daily operations of the gaming activities of the merging parties. In the Commission's experience firms' strategic plans including human resource plans are never always constant and are subject to review and changes from time to time. He argued that a merger filing is therefore required in order to conduct this assessment.

[50] Counsel submitted that in the 2014 Tsogo transaction, the Commission contacted all the relevant unions who had been duly served with the merger filing. The unions indicated that the 2014 Tsogo transaction would not raise any public interest concerns. He asserted that in the present case, the Commission would need to solicit the views of the relevant unions to establish whether or not the restructuring will raise public interest concerns. He submitted that the competitive and public interest assessments cannot be undertaken under the guise of an advisory opinion and must be undertaken in a merger investigation.

[51] He submitted that the subsequent acquisition of a majority shareholding in Tsogo and the combination of the Niveus gaming interests under Tsogo, constitutes a separately notifiable merger as it involves a further acquisition of control in terms of s 12(2) (a) of the Act. As indicated above, the Commission accepts that HCI applied

for (and was granted) approval to acquire sole control over Tsogo on the basis of an intended shareholding in Tsogo of over 50 per cent. Counsel contended that because that 50 per cent shareholding will now come about pursuant to a subsequent transaction that is distinct from the transaction contemplated in the 2014 merger approval, a further merger notification and approval is now required, with a further merger assessment under section 12A of the Act.

[52] The grant of a declaratory order in this kind of case must be considered very carefully. The power should be exercised sparingly, lest the investigative powers of the Tribunal be undermined. But this case is one of those rare exceptions. As already stated, it is common cause that HCI was granted approval to, and did in fact, acquire sole control of Tsogo following the 2014 merger approval, pursuant to its increased shareholding in Tsogo of 47.5 per cent. By virtue of that shareholding, HCI acquired sole control of Tsogo in terms of section 12(2)(g) and section 12(2)(c) of the Act. HCI currently exercises sole control of Tsogo. There is no further acquisition of establishment of control that is brought about by its acquisition of over 50 percent of the shares in Tsogo within the meaning of s 12(2) (a) of the Act and this is a further implementation of an existing sole control structure which was approved by the Tribunal in 2014 and which permitted HCI to conduct the operations of Tsogo as it saw fit.

[53] S 12(2) therefore does not list different kinds of control, each of which is separately notifiable but illustrates different ways in which control might be acquired within the meaning of section 12(1) of the Act. Once sole control has been approved and acquired in one of the ways contemplated in section 12(2), it does not require

separate approval if it is subsequently implemented in one of the other ways contemplated in section 12(2). Merger approval is thus a "once off" affair. We find that the proposed transaction does not constitute a notifiable merger because the competition authorities have previously approved the acquisition of sole control of Tsogo in 2014 by HCI, and because HCI already exerts sole control of Tsogo pursuant to the 2014 merger approval. We were unable to find any authority on the proposition. While the Commission's argument about crossing bright lines raises important policy considerations, the latter would, on the present wording of the Act require amendment to be given the kind of legislative force advocated by the Commission.

Sole Control

[54] Much of the debate centred on the nature of the control exerted by appellants over Tsogo. Appellants referred to the voting patterns at *Tsogo's* most recent shareholders meeting and found that it was stable in that the minority of institutional investors were acquiescent.

[55] We are of the view that it is significant that HCI commanded the majority of votes in Tsogo. The importance of *de facto* control was also recognised in *Caxton*, *supra*. In the present matter the Commission accepted that HCI had acquired sole control over Tsogo by virtue of its shareholding. It also accepted that HCI exercised sole control over Tsogo under sections 12(2) (g) and (c) of the Act by virtue of its shareholding. The Commission also accepted that the since 2014 HCI exercised sole control over Tsogo in accordance with s 12(2)(g) and (c) of the Act by virtue of its shareholding. The appellants contend that this potentially volatile situation will be

countered because the proposed transaction will move HCI to a position of majority control in terms of s12(2)(a) of the Act. This moves HCI away from the dependence of other shareholders at the meetings.

[56] The appellants submit that it is clear that the 2014 Tsogo decision led to the acquisition of sole control by HCI over Tsogo. At that time the Commission and the Tribunal conducted a merger assessment in terms of section 12A of the Act. It was aware that in time HCI would exert sole control over the gaming interests of both Tsogo and Niveus. At the same time HCI also enjoyed sole control of Niveus' gaming interests.

[57] In analysing s12 (2), it is clear that it does not purport to define control in terms of an exhaustive list. The appellants argue that very often at the time of merger notification details may not be clear, for example, as to how many shares will be purchased by the acquiring firm or when they will be purchased or from which shareholders. These factors do not prevent merger approval. The important factor therefore in assessing whether a transaction is simply that or whether the transaction constitutes a merger is the question of prior and post transaction control. In this case, the facts are clear concerning HCI's pre and post transaction control.

[58] The present internal restructuring by HCI of its assets does not give rise to a situation of a change in qualitative control. A helpful test was suggested regarding sole control in the Official Journal of the European Union C95/16

> '(54) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking... determine the strategic commercial decisions of the other

undertaking and where one shareholder can veto strategic in an undertaking' has sole control.'

Conclusion

[58] In our view the Commission cannot require the notification of a transaction based on a reason that it wishes to assess the implications of such transaction. It is important to emphasise that the effects of an acquisition of control are considered and determined when the approval of the merger is sought and obtained which is done on a forward-looking assessment of the likelihood of competition harm and the public interest and cannot be revisited once it has been determined.

[59] Having carefully considered the particular facts of this case we are driven to conclude that the Tribunal has the jurisdiction to grant declaratory relief; that the requirements for the exercise of that jurisdiction are met and that the proposed transaction in this case does not amount to a notifiable merger under the Act.

[60] Coming to the issue of urgency, HCI and Tsogo have predicated urgency on the fact that the proposed transaction involves a series of interconnected transactions between three listed companies with the purchase price to be discharged by a combination of cash and shares. The long stop date for regulatory approval on the agreement was originally 30 September 2017 and the parties are currently seeking to negotiate a brief extension of this date. They assert that there is an urgent need for regulatory certainty regarding the notifiability of the proposed transaction prior to the expiry of the long-stop date. Consistent with the urgency of this matter, HCI and Tsogo have sought to achieve certainty regarding their legal

obligations with all due expedition. The Tribunal dealt with the issue of urgency in para 76 of its decision. In light of the decision that we have come to on the merit of the application, we find it unnecessary to deal with the issue.

[61] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. However, in this application Counsel for the Commission submitted that the facts of this case do not warrant an order for costs against the Commission. Counsel for HCI and Tsogo rightly so conceded.

Order

1. The appeal is upheld.
2. It is declared that the proposed transaction in terms of which Hosken Consolidated Investments Limited will increase its shareholding in Tsogo to more than 50 per cent and will consolidate all of its gaming interests (other than its sports betting and lottery interests) under Tsogo Sun Holdings Limited, an entity over which it exerts sole control pursuant to a decision of the Tribunal in 2014 (Case No. 019372), by transferring such gaming interests owned indirectly by one of its subsidiary companies, Niveus Investments Limited to Tsogo Sun Holdings Limited, does not require approval by the completion authorities in terms of the merger control provisions of the Competition Act 89 of 1998.

VICTOR AJA

MNGUNI AJA

DAVIS JP concurred

Appearances

Heard:	02 October 2017
Delivered:	October 2017
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