



CONSTITUTIONAL COURT OF SOUTH AFRICA

Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another

CCT 296/17

Date of hearing: 16 August 2018

Date of judgment: 01 February 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday 01 February 2019 at 10h00 the Constitutional Court handed down judgment in an application for leave to appeal by the Competition Commission of South Africa (Commission) against an order of the Competition Appeal Court (CAC). The CAC overturned a decision of the Competition Tribunal (Tribunal) to the effect that the proposed transaction between Hosken Consolidated Investments Ltd (HCI) and Tsogo Sun Holdings Ltd (Tsogo) does not constitute a notifiable merger in terms of the Competition Act and therefore need not be brought to the attention of the competition authorities.

In 2014, HCI notified the Commission of its intention to acquire Tsogo. The merger was subsequently approved unconditionally by the Commission and confirmed by the Tribunal. The nature of the transaction approved was such that HCI would acquire additional shares of Tsogo in order to increase its shareholding from between 47% and 48% to more than 50% of Tsogo's issued share capital. In 2017, HCI decided to consolidate all of its gaming interests (other than its sports betting and lottery interests) by transferring such interests owned indirectly by one of its subsidiary companies, Niveus Investments Limited, to Tsogo (2017 transaction). HCI was of the view that the 2017 transaction would not constitute a notifiable merger given that its sole control of Tsogo had already been anticipated in 2014. HCI subsequently requested an advisory opinion from the Commission to confirm that the 2017 transaction would not constitute a notifiable merger. The Commission advised HCI that the transaction amounted to a notifiable merger.

Dissatisfied with the Commission's advisory opinion, HCI and Tsogo applied to the Tribunal for a declarator that the 2017 transaction was not notifiable. The Tribunal dismissed the application with costs and held that it does not enjoy the power to grant the declaratory order because the Commission's advisory opinion does not constitute a decision or a finding by the Commission. It further held that the Tribunal's jurisdiction in respect of a proposed transaction is only triggered when the Commission has been notified of that transaction first. HCI and Tsogo appealed the decision of the Tribunal in the CAC and the CAC upheld the appeal, finding that the Tribunal has powers to grant the declaratory order. The CAC further held that the proposed transaction does not constitute a notifiable merger because the competition authorities previously approved the acquisition of sole control of Tsogo by HCI when they approved the 2014 merger transaction.

In the Constitutional Court, the Commission submitted that the Tribunal does not enjoy the power to be approached to grant the declaratory order as there was no live dispute between the parties that would trigger the Tribunal's jurisdiction. The Commission further submitted that the 2017 transaction was a notifiable merger in terms of the Competition Act as HCI would hold more than 50% of Tsogo's shareholding, which would constitute a notifiable acquisition of control of one firm by another. HCI's submission is that the CAC correctly granted the declaratory order that the Tribunal had the power to entertain and determine the application on a reading of the Competition Act and that the 2017 transaction is not a merger within the meaning of the Competition Act; and if it is, the transaction was in any event approved under a comprehensive merger approval granted to HCI in 2014. It was in these circumstances entirely appropriate for the CAC to exercise its discretion in favour of granting the declaratory order sought.

In a unanimous judgment penned by Basson AJ (Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse, AJ and Theron J concurring) this Court held that the mere fact that parties had a difference of opinion regarding an important jurisdictional issue suggests that there was a live dispute. It was thus within the Tribunal's powers, to grant a declaratory order in order to resolve this dispute. It held further that the approval of a merger is a once-off affair. The need for notification of a merger is triggered when a firm acquires control of another and once approval for such merger is granted then no further investigation is allowed other than to confirm that assurances made and conditions placed by the Commission have indeed been met.

The Constitutional Court also held that the 2017 transaction was not a notifiable merger in terms of the Competition Act since the acquisition of Tsogo by HCI was notified and approved in 2014. The 2017 transaction was merely the implementation of the 2014 merger and the Commission therefore cannot reinvestigate the 2014 merger, but may, in line with its powers to revoke merger approval, investigate that the assurances made in 2014 were not subsequently reneged on in implementing the 2017 transaction.

Although the declaratory order sought was found to be within the Tribunal's power, it is no longer necessary to grant that order since the recent Constitutional Court judgment which supports the determination that merger approval is a once-off affair. In the result,

the appeal is partially upheld to the extent that HCI is not obliged to notify the 2017 transaction in terms of the Competition Act, and this does not preclude the Competition Commission from investigating assurances made in the 2014 merger.

In a concurrence penned by Froneman J, a cautionary note is made to the effect that although the order is necessary to clarify the legal position, it should not be read as an invitation to flood the Tribunal with applications for declaratory orders of this kind. In exercising its discretion in relation to declaratory orders the Tribunal should also keep in mind the Commission's need to investigate further substantive competitive assessment and public interest issues that a transaction may have in future.