THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

In the matter between 166/CAC/Jul18

MURRAY & ROBERTS HOLDINGS LIMITED Appellant

and

ATON GMBH First Respondent

THE COMPETITION COMMISSION Second Respondent

JUDGMENT: 29 October 2018

THE COURT

Introduction

[1] This appeal concerns the question of whether a shareholder is entitled to exercise certain of its voting rights pursuant to its shareholding in a target company once it has exhibited a firm intention to acquire sufficient shares in the company which would, if the intention is implemented, constitute a merger as defined in the Competition Act 89 of 1998 ('the Act').

[2] The immediate reason for this Court having to answer this question is that appellant has appealed against the order of the Competition Tribunal in which it dismissed an urgent application to interdict first and second

respondents (collectively 'Aton') from voting certain of its shares in appellant until such time as it obtained the requisite approval from the competition authorities[1] to acquire control of appellant in terms of the Act.

The factual matrix

[3] In 2015, Aton acquired 9 974 339 shares in appellant which amounted to approximately 4.49% of its issued share capital. Between February and April 2017, Aton acquired a further 113 440 000 shares in appellant which approximated 25.51% of appellants issued share capital. In this manner, Aton's shareholding in appellant had increased to 29.9985%.

[4] On 23 March 2018, Aton acquired a further 13 671 480 shares in appellant (being a further 3% of the issued share capital) which increased its shareholding in appellant to 33.1%, with voting rights of approximately 33.2%. On 23 March 2018, Aton notified appellant of its intention to make a voluntary offer to appellant's shareholders to acquire all of the issued shares in appellant which were not already owned by it. Six days later, on 29 March 2018, it irrevocably agreed to acquire an additional 29 005 926 shares in appellant which would have meant that it would then own 39.6% of appellant's issued share capital.

[5] On 18 May 2018, appellant released a cautionary statement in which it announced that it had reached "an in principle" agreement with Aveng Limited regarding a proposed transaction between the two companies. A cautionary statement announced that a general meeting would be held on 19 June 2018 to consider a resolution concerning appellant's proposed transaction with Aveng. On 24 May 2018, Aton notified the Competition Commission of its proposed merger with appellant, seeking approval for the merger as required by the Act. A day later, on 25 May 2018, the Takeover Regulation Panel required Aton to withdraw its voluntary offer and to make a mandatory offer,

[1] By competition authorities is meant the Competition Commission, the Competition Tribunal and on appeal this Court.

which it duly did on 04 June 2018 at a higher price than had been the case with its voluntary offer.

[6] At the meeting of 19 June 2018, Aton's exercise of its voting rights in appellant did not represent a majority of the votes cast and thus it was outvoted on the proposed Aveng transaction which was considered at that meeting.

[7] The transaction with Aveng, which was to be voted upon at the shareholders meeting of 19 June 2018, caused appellant to institute an urgent application on 15 June 2018 before the Competition Tribunal, in which it sought to interdict and restrain Aton or their agents from voting or otherwise exercising any rights attached to any shares in the ordinary share capital of appellant in excess of the approximately 29.99% of the shares it held as at 23 March 2018. This translated into approximately 33.2% of the voting rights.

[8] A limited interdict was granted by the Competition Tribunal which had the effect of restraining Aton and their agents from voting any shares which it held in the ordinary share capital of appellant in excess of 50% less 1 of the votes cast in respect of the Aveng transaction which was to be voted on at the shareholders general meeting of appellant on 19 June 2018.

[9] Notwithstanding that the events which gave rise to the urgent application before the Tribunal have come and gone, and that Aton was unsuccessful in its bid to vote down the Aveng transaction, it was common cause between the parties that the dispute between the parties was not moot. Whether Aton may vote so-called affected shares (that is to say shares acquired by Aton after it held a firm intention to acquire control of the Appellant) is still a live question in that what shares Aton might vote at a further shareholders' meeting, prior to a decision on the proposed merger by the competition authorities, requires a definitive answer. There was also some debate as to the scope of an earlier decision of this court in *Goldfields Limited v Harmony Gold Mining Company Limited* [2005] 1 CPLR 774 (CAC) which, according to the parties, requires clarification. We are satisfied that the appeal

before us is not moot and we should determine whether the approach adopted by the Tribunal and its decision was correct.

The relevant provisions of the Act

[10] The key section of the Act which is relevant to the determination of this dispute is s 13 A(3) which provides:

> 'The parties to an intermediate or large merger may not implement that merger defined in 12(1)(a) until it has been approved, with or without conditions, by the Competition Commission in terms of s 14 (1) (b), the Competition Tribunal in terms of s 16(2) or the Competition Appeal Court in terms of s 17.'

[11] As observed, Aton has notified 'a large merger' to the Competition Commission which is still considering the merger in terms of s 12 A of the Act. Appellant contends that, a party in the position of Aton cannot vote any shares which it acquired after 23 March 2018, once it had addressed a firm intention letter to appellant indicating that it intended to make an offer to appellant's shareholders to acquire 100% of the total issued share capital of the company. In short, the contention was that, while Aton could vote shares acquired prior to the firm intention letter and which represented the voting rights of 29.99% of the issued share capital of appellant, it could not exercise voting rights in respect of any shares acquired after it held a firm intention to acquire control of appellant.

[12] Mr Harris, who appeared together with Mr Gotz and Mr Ismail of behalf of appellant, placed emphasis on the following words in s 13 A (3): 'the parties to an intermediate or large merger may not implement that merger'. According to Mr Harris, the words 'that merger' refer to an intermediate or large merger. In terms of s 11 (5) of the Act, a large merger is defined and 'includes a proposed merger'. As the facts of this case indicate, Aton proposed to effect a merger from the time that it sent the firm intention letter. In Mr Harris' view, s 13 A (3) prohibited Aton from implementing 'that merger'; that is voting those shares acquired pursuant to its proposed acquisition of control of appellant.

[13] In support of this argument, Mr Harris referred to the *Goldfields* judgment which, in his view, supported appellant's case. To understand this submission, it is necessary briefly to consider the facts of that case. Goldfields Limited ("Goldfields") reached an agreement with IAMGold to merge their assets outside of South Africa. A meeting of Goldfields' shareholders was convened to approve the transaction. Prior to the meeting, Harmony Gold Mining Company ('Harmony') proposed a merger between itself and Goldfields. In its public announcement and circular Harmony had structured its bid in two steps: an early settlement offer and a subsequent offer. In terms of the early settlement offer, Harmony offered to acquire 34.9% of the share capital of Goldfields, the only condition attaching thereto being that certain resolutions would be passed at a meeting of Harmony's shareholders. A subsequent offer would be made for the balance of the shares. Significantly, the largest shareholder in Goldfields, Norilsk (holding 20% of the share capital) provided an irrevocable undertaking to Harmony that it would vote against the IAMGold transaction, that it would not accept the early settlement offer and that it would accept the subsequent offer.

[14] On the basis of these facts, Goldfields instituted an application seeking an order to prevent Harmony from implementing a merger within the meaning of the Act. The question for determination, as the Court defined it, was as follows.

> 'Whether on the facts there was a proposal to implement a transaction that, when so implemented, will involve the acquisition of control by first respondent either on its own or with another party over the whole of party of the business of appellant. If the answer is positive then, on the basis of s 13 A (1) there is an obligation to notify.' (at 84)

[15] Mr Harris emphasised the following passage from the judgment:

> 'Mr Unterhalter conceded that there was an obligation in terms of s 13 A (1) read with s 13 A (3) for first respondent to notify and obtain approval <u>of its proposed merger</u> before the merger was implemented. That conclusion <u>clearly followed from the definition of large mergers</u> in s 11 of the Act which provided that 'for purposes of this Chapter ... a large merger means a merger <u>or</u>

proposed merger with a value at or above the higher threshold established in terms of sub-section (1) (a).' (at 84 our emphasis). On the basis of this passage, he contended that this Court had interpreted s 13 A (3) as prohibiting the implementation of a proposed merger, in addition to an actual merger.

[16] However, this interpretation of the case does not take account of the essential argument with which the Court was confronted in *Goldfields*, namely that the effect of the early settlement offer and the irrevocable undertaking of Norilsk, permitted Harmony the ability to enjoy *de facto* control over Goldfields in terms of s 12 (2) (g) of the Act. This species of control comes about if a person acquires the ability materially to influence the policy of a firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)[2]. Thus, the central holding in *Goldfields* rests upon the finding that Harmony had acquired *de facto* control and was not permitted to exercise this control until the merger was approved. *Goldfields* does not hold that the firm intention of Harmony to gain control of Goldfields placed Harmony under a disability not to vote the shares it acquired pursuant to the early settlement offer. The disability arose from the position of *de facto* control that Harmony secured as a result of the early settlement offer, taken together with Norilsk's irrevocable undertaking. This is made clear in the following passage in the judgment:

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[2] Section 12 (2) provides as follows:

(2) A person controls a firm if that person –

(a) beneficially owns more than one half of the issued share capital of the firm;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in s 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of close corporation, owns the majority of members' interests' or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) had the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

'As a result of the early settlement offer and the irrevocable undertaking from Norilsk, first respondent will be able to effect a permanent and irreversible change to the very structure of its competitor; at the very least it will be able to materially interest key policy of appellant by ensuring that appellant's log-term strategy of entering into IAMGold transaction could not be implemented....
The early settlement, if implemented, would constitute a large merger that must be notified in terms of s 13 A(1). For this reason the acquisition by first respondent of 34.9% of the issued share capital of appellant read together with the irrevocable undertaking of Norilsk would constitute an assumption of control in terms of s 12(2) (g) of the Act.' (at 92)

[17] The *dictum* in *Goldfields* that an acquiring firm can continue with its proposal to effect a merger but 'it will be prohibited in terms of s 13 A from implementing the merger until the latter has been approved' (at 81) needs to be read with the facts of the *Goldfields* case. As the passage cited makes plain, if the proposal to effect a merger gives rise to an acquisition of control, then the acquirer may not exercise that control or, to use the language of the Act , may not implement the merger, before obtaining the required approval

[18] It is for this reason that the Court found that the acquisition by Harmony of 34.9% of the issued share capital of Goldfields, taken together with the irrevocable undertaking of Norilsk, constituted an acquisition of control in terms of s 12 (2)(g) of the Act. Read accordingly, the decision in *Goldfields* is not authority for the proposition that the voting of shares is prohibited in terms of s 13 A (3), where the shares so voted cannot give control to the voting shareholder over the target company in terms of any of the provisions of s 12 (2) of the Act .

[19] S 13 A (3) of the Act prohibits the implementation of a merger until it has been approved. This provision does not prohibit a merger from taking place until it is approved. That is so whether a person acquires control or proposes to do so. As this Court explained in *Caxton*[3], the various types of

[3] *Caxton and CTP Publishers and Printers v Media 24 (Pty) Ltd [2015] 2 CPLR 354 (CAC) at 366 - 367*

control set out in s 12 (2) confer a power to steer the firm or appoint those who may do so. The acquisition of such a power is not the same thing as the exercise of that power. A power must be acquired to be exercised, but a person may acquire a power and not exercise it. S 13A (3) prohibits the exercise of the powers by which control comes about. That is why s 13A (3) references and prohibits the implementation of a merger, absent approval; the sub-section does not prohibit mergers from taking place. If that were so, the language of s 13A (3) would have prohibited parties to an intermediate or large merger from merging. That is not what the sub-section provides.

[20] On a proper reading of *Goldfields* and s 13A(3), a party is not prohibited from acquiring and voting shares in a target company up until the point that these shares vest the acquirer with control of the target company, control being defined in terms of s 12 of the Act, and even then what s 13A(3) prohibits is the implementation of the control acquired.

[21] To return to the phrase "that merger" as it appears in s 13A (3), appellant contended that the interpretation of these words must be read in the light of s 11 (5) of the Act, which refers to an intermediate or large merger as 'a merger or proposed merger'. By contrast, merger, is defined in s 12, as follows 'a merger occurs when one or more firms is directly or indirectly acquired or established direct or indirect control over the whole or part of the business of another firm'.

[22] The correct interpretation of s 13A (3) must, in the first place, engage the text. The reference to "that merger" may mean, by extension, the proposal to merge, as the appellant would have it. Or it may mean the merger that is proposed. On this reading, it is the merger that is proposed and not the proposal to merge that may not be implemented. This interpretation is the more compelling. First, the legislative purpose of a prohibition upon prior implementation is to prevent a person exercising control over a firm, and thereby (at least potentially) affecting the firm's prospective power to exercise competitive constraint in a relevant market , before the competition authorities have been able to make a proper assessment. There seems little point in

preventing a person from engaging in conduct to pursue a proposal to acquire control, when that conduct can have no competitive effects in a relevant market. Nor is this what the competition authorities investigate when the approval of a merger is sought.

[23] Second, the place of s 11(5) in the scheme of the merger control provisions in the Act is to differentiate small, intermediate and large mergers; and to do so by reference to the value of a merger or proposed merger. The controlling definition of a merger is to be found in s 12. The language of "that merger" in s 13A(3), more naturally references the controlling definition of a merger in s 12, which is the true subject matter of regulatory approval.

[24] Thirdly, there is a textual reason to prefer the interpretation suggested by us. Had the legislature wished to expand the scope of the prohibition against implementation to a proposal to merge it would have more clearly said so or at least adopted a formulation along the following lines: the parties may not implement an intermediate or large merger until it has been approved. The legislature did not do so. Rather it adopted a formulation that references "that merger". If "that merger" means simply that parties may not implement the merger that falls within the definition of s 12, then the scope of the prohibition against implementation pending approval is the same as the scope of the regulatory approval that is sought from the competition authorities. This conceptual identity makes sense because a party to a merger may then not do what it seeks permission from the competition authorities to do. If a wider construction is given to the prohibition than to the permission, as the appellant seeks to argue, it is hard to understand why the legislature would have sought such asymmetry.

[25] Lastly, merger control aims to prevent harm to competition and defined public interests. The interpretation of s13A(3) and s11(5) should not be read so expansively so as to yield unintended consequences. One of these is to skew the terms of engagement in a hostile takeover. Hostile takeovers or the threat of such takeovers can be a wholesome antidote to the complacency of incumbent management. Sterilizing shares acquired after a firm intention to acquire control is announced would broaden the scope of the prohibition

against implementation and thereby place a thumb on the scale in favour of incumbency. That is not what the legislature intended.

[26] While it is possible to qualify the phrase 'that merger' with the words 'a proposed merger', this interpretation leads to significant difficulties. Does a proposal to merge suffice, in that a proposal to merge may never be translated into a merger, or does 'proposed merger' indicate that there is already a measure of inevitability in respect of this proposal such that the merger will, in effect, take place subject to approval from the competition authorities? Secondly, the purpose of s 13 A (3) is to cater for the situation that confronted this Court in *Goldfields*, that is power possessed by a firm which already enables it to assume control in terms of one of the tests as set out in s 12 (2). Were it not for s 13 A (3) of the Act, the acquiring firm would then be able to implement the merger without more. The Act did not envisage, as is evinced from its clear purpose, that, an interdict can be sought from the Tribunal, where there is no evidence that control, on any of the bases as set out in s 12 (2), has taken place.

[27] This case provides a luminous justification of this conclusion. Notwithstanding the fire and the fury of the litigation between the parties, prior to 19 June 2018 Aton did not possess the voting power sufficient to vote down the Aveng transaction. Had Aton, as was the case in *Goldfields*, been shown, on a factual basis, to be able to materially influence the policy of appellant in a manner comparable to a person in ordinary commercial practice, as where it owned more than one half of the issued share capital of the company or was entitled to vote the majority of the votes that may be casted at a general meeting of the firm, the result would have been entirely different.

The Bright line argument

[28] Mr Harris submitted, in support of his main submission, that there were compelling policy considerations to create a bright line, whereby notification of an intention to merge froze the voting rights of a shareholder in respect of shares after the disclose of the intention. In his view, this interpretation would

mean that s 13 A (3) would prohibit the exercise of any voting rights that attached to shares so acquired by a party, although it could continue with its proposal to gain control before the approval of the competition authorities had been obtained. This result would ensure that there would be no potential for implementation of a merger, whether inadvertently or by a party seeking to exploit the uncertainty of the factual position. In his view, this construction of s 13 A (3) facilitated the monitoring and the compliance duties of the Competition Commission, pursuant to its overall regulatory function. This approach would recognise that it might be extremely difficult to determine precisely the level of shareholding in terms of which *de facto* control is acquired or whether, in relation to any particular meeting of shareholders, a party such as Aton holding, as in this case approximately 44.1% of the voting rights in appellant, would be vested with *de facto* control.

[29] The problem with this submission is that s 12 (2) (g), on which the submission is essentially based, invariably involves a fact intensive inquiry in order to determine whether, on the facts of the particular case, a party has the ability to materially influence the policy of the target firm in a manner comparable to a person in ordinary commercial practice exercising control over the target company. Section 12 (2) (g), by reason of the wording employed therein and the varieties of ways in which *de facto* control may come about, can never give rise to bright lines. That is to say, it is extremely difficult to conceive of a 'one stop' test which would constitute a line over which a party cannot step, if it is to be found to exercise control over the target firm as set out in s 12 (2) (g) of the Act. Each case must be determined on its own facts in order to determine whether the acquiring firm has the power to influence the policy of the company as is envisaged in this provision. There is no reason to give the prohibition against implementation a wide remit on prudential grounds when a proper interpretation of s13A(3) does not support such a reading. There is a correct answer to the question as to whether a person has acquired *de facto* control, even if there may be reasonable differences that can be maintained on the question. That uncertainty is not best cured by the unwarranted expansion of the prohibition against implementation.

The alternative argument

[30] As an alternative, appellant contended that Aton had already obtained *de facto* control over the appellant in terms of s 12 (2) (g) of the Act. Mr Harris contended that Aton was by far the largest shareholder in appellant, holding 44.1% of the voting rights. Other than the PIC, which held approximately 23% of the shares, the remaining shareholders held small parcels of shares. Attendance at shareholder's meetings from 2012 to 2017 indicated that a 44% shareholding, on average, would have given Aton more than 50% of the votes cast of a meeting of appellant's shareholders. By contrast, first respondent contends that only at three meetings during this period would Aton's shareholding have given it more than 50% of the votes cast. Furthermore, at the meeting on 19 June 2018, where the attendance was above 92% and notwithstanding that Aton voted its full complement of shares, the resolution passed by 52.06%. The outcome of this meeting evidences that Aton's current shareholding did not vest it with *de facto* control of appellant in respect of a strategically important resolution. There is insufficient evidence to suppose that the outcome would be any different if any further such resolutions were to arise (of which there is no direct evidence), prior to merger approval being obtained by Aton for its proposed merger.

[31] This disputed evidence does not provide a sufficiently sound basis, on the probabilities, to conclude that, in terms of s 12 (2) (g) of the Act, Aton already had control of appellant. As the European Commission's Consolidated Jurisdictional Note on the Control of Concentrations between Undertakings (208/C 95/01 at para 59) states:

> 'Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders', a minority shareholder is <u>likely to have a stable majority</u> of the votes at the shareholders' meeting, <u>then that large minority shareholder is taken to have sole control.</u>' (our emphasis)

[32] A further consideration in this regard is the undertaking given by Aton that, pending a decision on its merger notification by the competition authorities, it will not vote any percentage of voting rights that represents more than 50% less 1 of the votes cast in respect of any resolutions proposed at any

future ordinary or extra ordinary general meeting of appellant's shareholders within this timeframe. Under all these circumstances, the alternative argument must fail.

Costs

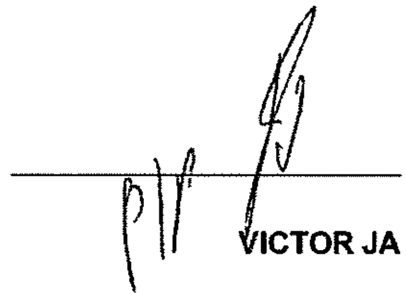
[33] Appellant contends that the Tribunal should have granted an order that it was entitled to costs. By contrast respondent refers to the decision of the Constitutional Court in *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and others* 2014 (2) SA 480 (CC) to the effect that the Tribunal has no power to award costs against the Commission as; 'The Act prescribes that, as a general rule, each party in proceedings before the Tribunal must pay its own costs.' (para 31) The Court later said in respect of s 57 of the Act; 'The correct interpretation is, therefore, that the Tribunal has no powers to award costs against the Commission under the Act.' (para 40)

[34] Section 57 (2) of the Act deals only with costs awards under Chapter 2 of the Act and hence does not deal with merger cases which fall under Chapter 3. Therefore, there does not appear to be a legal basis for the Tribunal to have awarded costs, however partially, to appellant.

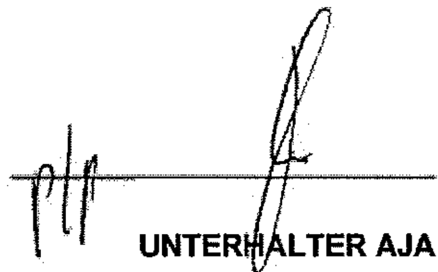
[35] That having been said, the Tribunal ordered extremely limited relief and hence no order as to costs appears to be a justifiable conclusion.

[36] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel.

DAVIS JP



VICTOR JA



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