CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 296/17

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

HOSKEN CONSOLIDATED INVESTMENTS LIMITED First Respondent

TSOGO SUN HOLDINGS LIMITED Second Respondent

Neutral citation: *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* [2019] ZACC 2

Coram: Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgments: Basson AJ (unanimous): [1] to [92]
Froneman J (concurring): [92] to [93]

Heard on: 16 August 2018

Decided on: 01 February 2019

Summary: [Competition Act 89 of 1998] — [chapter 3] — [mergers] — [section 12(2)] — [forms of control] — [notifiability of a merger]

[Once-off principle] — [Competition Commission] — [investigatory powers] — [Competition Tribunal] — [jurisdiction] — [declaratory orders]

ORDER

The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld to the limited extent set out in paragraph 4.
4. The order made by the Competition Appeal Court is replaced with the following:

   "It is declared that:

   (a) Hosken Consolidated Investments Limited is not obliged to notify the 2017 transaction in terms of section 13A of the Competition Act; and

   (b) the order in (a) does not preclude the Competition Commission from investigating assurances made in the 2014 merger in terms of sections 15 and 16(3) of the Competition Act.

   (c) There is no order as to costs."
5. There is no order as to costs.

JUDGMENT

BASSON AJ (Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Competition Appeal Court. In 2017, the first respondent, Hosken Consolidated Investments Limited (HCI), proposed to increase its shareholding in the second

respondent, Tsogo Sun Holdings Limited (Tsogo), to more than 50%. HCI already exerted *de facto* control over Tsogo pursuant to an unconditional prior merger approval issued by the Competition Tribunal (Tribunal) in 2014. After the Tribunal refused to do so, the Competition Appeal Court subsequently issued a declaratory order that the proposed transaction did not require approval by the Competition Commission in terms of the merger control provisions of the Competition Act (Act).[1]

[2] This judgment deals with the following two issues: first, whether the granting of a declaratory order was appropriate. Second, whether a transaction is notifiable in circumstances where an entity had already obtained prior approval from the Competition Commission for a merger that resulted in the acquisition of *de facto* (factual) control over an entity but subsequently transforms the nature of the existing control to *de jure* (legal) control. Both questions were considered by the Competition Appeal Court and decided in favour of HCI and Tsogo.

The parties

[3] The applicant is the Competition Commission of South Africa (Commission) established in terms of section 19 of the Act. HCI is a black empowerment investment-holding company listed on the Johannesburg Stock Exchange. HCI's major stakeholder is the SACTWU Investment Group which is an investment vehicle for the South African Clothing and Textile Workers Union. HCI's areas of investment include, *inter alia*, the casino and non-casino gaming and entertainment sectors. The second respondent, Tsogo, is a subsidiary of HCI. Both respondents form part of a corporate structure (the HCI Group), of which HCI is the holding company.

Factual background

[4] The facts are not in dispute. Before 2014, Tsogo was subject to the joint control of HCI and SABMiller plc (SABMiller). HCI held 39% and SABMiller 41% of the shares in Tsogo. In 2014 SABMiller disinvested itself of its shareholding in Tsogo with

[1] 89 of 1998.

the effect that HCI's beneficial shareholding in Tsogo, which it held through Tsogo Investment Holding Company (Pty) Limited (TIHC), would increase to 47.61%. HCI became the largest shareholder in Tsogo by a considerable margin and the *de facto* controller of Tsogo.

[5] At the time HCI also had a 51.7% controlling shareholding interest in gaming and leisure activities through its subsidiary Niveus Investments Limited (Niveus), which wholly owned Niveus Invest 19 Limited (GameCo) which in turn wholly owned Galaxy Gaming and Entertainment Proprietary Limited (Galaxy Gaming), Vukani Gaming Corporation Proprietary Limited (Vukani Gaming) and Niveus Invest 1 Proprietary Limited. GameCo comprises all of the South African gaming interests of Niveus (other than its sports betting and lottery interests). HCI held its gaming interests through Niveus and its hotel and casino interests through a number of subsidiaries in Tsogo.

[6] The dispute arose in 2017 when HCI sought to effect its proposed restructuring. In terms of this HCI would increase its shareholding in Tsogo to more than 50% and would consolidate all of its gaming interests (other than its sports betting and lottery interests) under Tsogo by transferring such gaming interest owned indirectly by one of its subsidiary companies Niveus to Tsogo.

The 2014 merger notification

[7] As a result of the disinvestment of SABMiller, HCI approached the Commission and applied for merger approval for the acquisition of sole control of Tsogo (the primary target firm).[2] HCI also notified the Commission of its intention in the future to acquire more than 50% of Tsogo's issued share capital within the meaning of section 12(2)(a) of the Act. Although HCI at the time did not manage to cross the 50% shareholding specified in section 12(2)(a)[3] of the Act, it was common cause that HCI effectively

[2] It was common cause that the merger was a large merger as defined in section 11(5)(c) of the Act.

[3] See para 42 below.

exerted *de facto* control over the gaming of Tsogo within the meaning of section 12(2)(g) of the Act.

[8] The Commission investigated the large merger as notified and recommended that the merger be approved unconditionally. The Commission specifically recorded in its report that it was the intention of HCI, post-merger, to ultimately increase its shareholding in Tsogo beyond 50% and thus acquire *de jure* control over Tsogo. It also accepted that HCI already enjoyed sole control over Niveus' gaming interests. The Tribunal unconditionally approved the proposed merger.

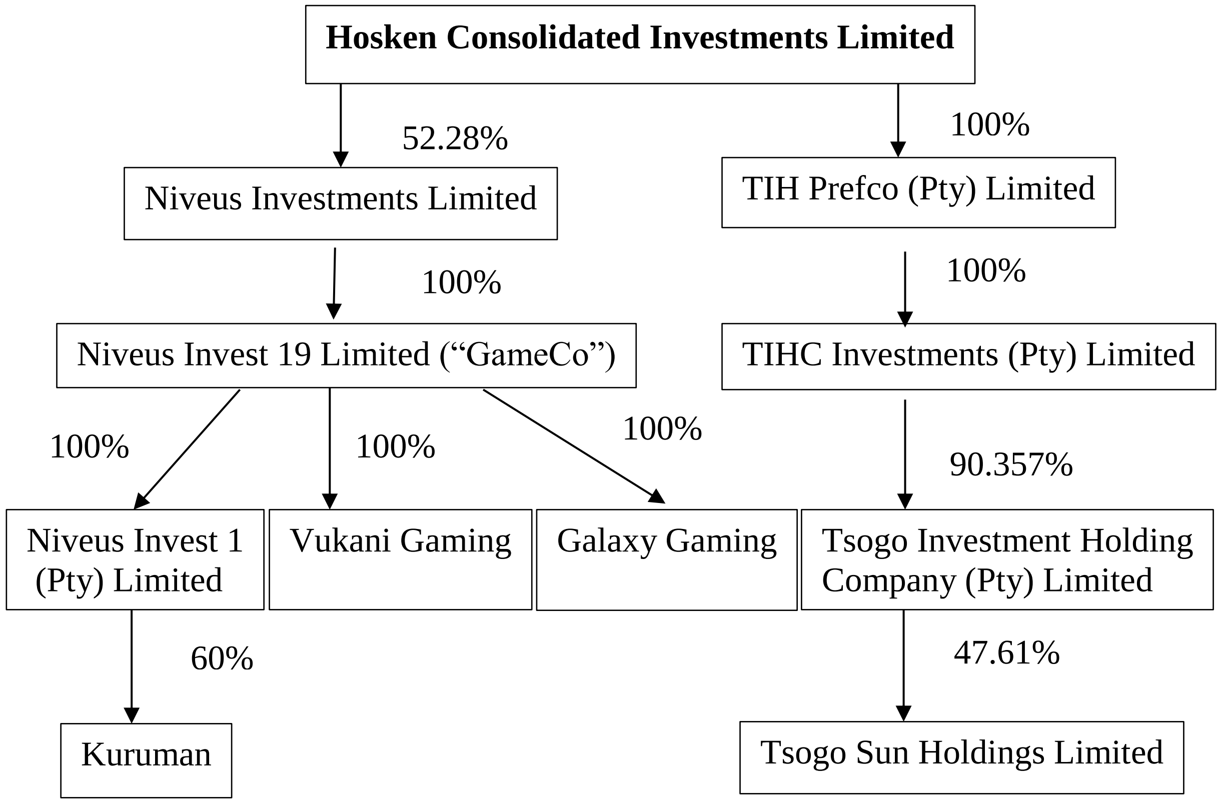
[9] After the implementation of the 2014 merger transaction, both Niveus and Tsogo fell under the sole control of HCI in terms of the statutory definition. The Commission noted that the merger did not raise competition concerns nor was there a geographical overlap between HCI and Tsogo in respect of casino gaming. The report further noted that no merger-related job losses were envisaged at the time.

The 2017 transaction

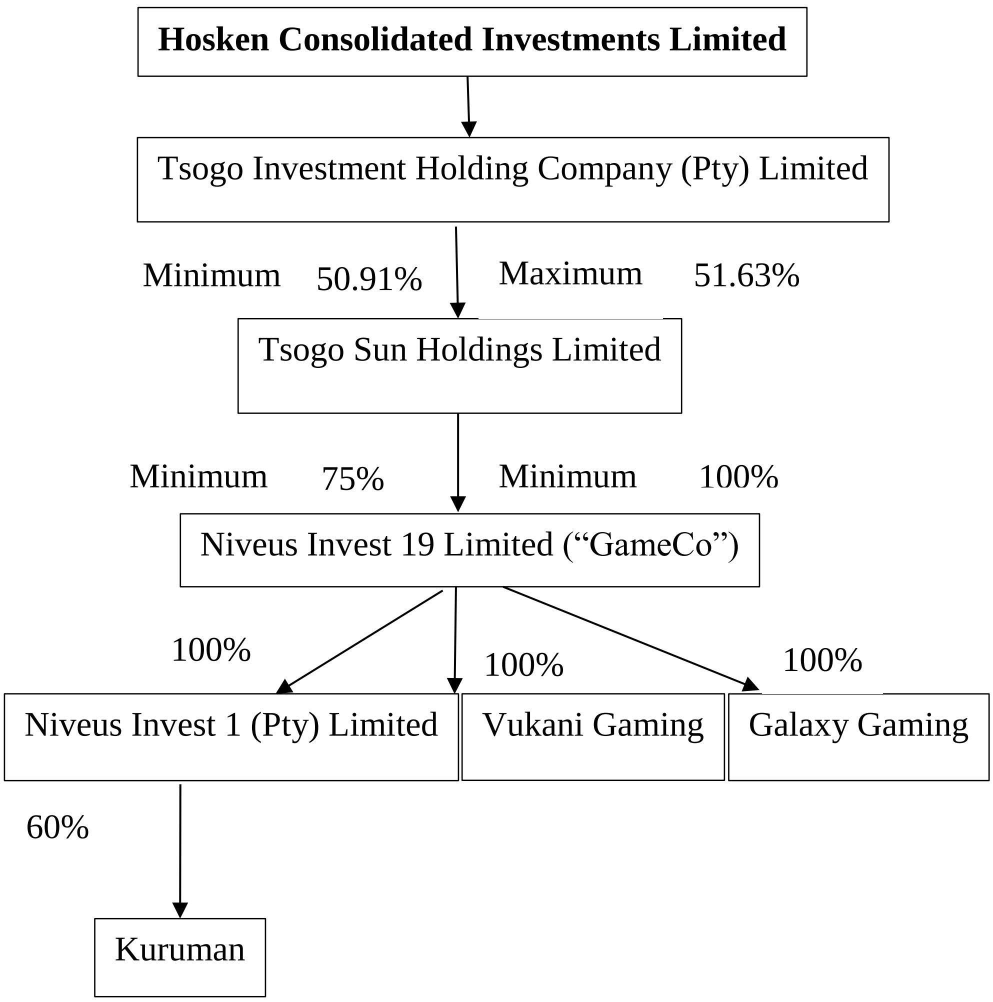
[10] In keeping with its stated intention to acquire more than 50% of the shares in Tsogo, HCI took a decision in December 2016 to reorganise and consolidate all of its various gaming interests (other than its sports betting and lottery interests) owned indirectly by one of its subsidiary companies (Niveus) under Tsogo through the transfer of gaming to Tsogo. The transaction resulted in HCI increasing its shareholding in Tsogo from 47% to between 50.91% and 51.63%. HCI therefore acquired *de jure* control of Tsogo after the second transaction as contemplated by section 12(2)(a) of the Act.

[11] The following diagrams illustrate the corporate structure before and after the 2017 proposed transaction.

Pre-transaction corporate structure



Post-transaction corporate structure



The Commission's advisory opinion

[12] HCI approached the Commission in 2016 with a request for an advisory opinion to confirm whether the proposed consolidation of all of HCI's gaming interests (other than its sports betting and lottery interests) under Tsogo would constitute a notifiable merger for the purpose of section 12 of the Act. HCI explained that it approached the Commission for an opinion despite its own view that the proposed transaction did not require notification in terms of the Act, but that it believed that it was important to engage with the competition authorities in respect of the proposed transaction both as a matter of courtesy and in the interests of transparency.

[13] In the request for the advisory opinion, HCI set out the rationale for the proposed transaction and informed the Commission that the transaction constituted an internal restructuring involving two entities that are ultimately controlled by HCI. HCI also stated that the combination of the various gaming interests of HCI was simply a manifestation of the previous approval by the Commission in 2014, and further that the proposed 2017 transaction did not entail an acquisition of control as it only involved the combination of assets that were already subject to the sole unfettered control of HCI. HCI further submitted that the competition authorities have, in any event, already effectively considered and approved the consideration of HCI's gaming interests. In addition, HCI submitted that, given the fact that both Tsogo and Niveus are controlled by HCI, the proposed transaction would simplify HCI Group's structure and would provide investors with a "single entry point for gaming exposure".

[14] The Commission requested the following information regarding the proposed transaction: the breakdown of the shareholdings and various Tsogo entities as well as the voting results in shareholding meetings; whether the market conditions in the Northern Cape Province in respect of the business activities of Tsogo and Niveus had not changed since the 2014 transaction and information pertaining to HCI's exercise of voting rights. All of the above were furnished by HCI.

[15] The Commission identified the following two issues as determinative: first, whether the proposed internal restructuring would amount to a change of control, and second, whether the change of control had already been considered by the competition authorities in 2014.

[16] The Commission issued its advisory opinion on 17 August 2017. It stated that the opinion—

> "does not constitute a decision or a finding by the Commission as to whether or not the proposed transaction constitutes a notifiable merger as defined in section 12 of the Act. It merely serves as a guide on the approach the Commission is likely to adopt in assessing the matter. The Commission ordinarily needs to conduct an investigation before it makes a decision."

[17] The Commission thereafter dealt with the two jurisdictional prerequisites that rendered the transaction subject to the scrutiny of the competition authorities. The first is that the transaction must result in an acquisition or establishment of control by one or more firms over the whole or part of the business of another firm. The second is that the transaction must meet the requisite merger thresholds for notification under the Determination of Merger Thresholds and Methods of Calculation Notice.[4]

[18] The Commission recognised that section 12(2) of the Act anticipates the various ways in which control may be established and that this section sets out a non-exhaustive list of "instances" where there is a change of control. The Commission then considered, with reference to the undisputed facts, whether the change of control which occurred in 2017 must be notified to the competition authorities. It concluded that HCI's 2017 transaction crossed "a bright line" by acquiring control in terms of section 12(2)(a). This made it a notifiable transaction as "the crossing of the bright line has a definite legal implication because it indicates the types of transactions the Legislature deemed should be notified to the Commission". The upshot of the Commission's advisory

[4] Gen N 216 in *GG* 31957 of 6 March 2009.

opinion therefore was that the requirement to notify a merger is triggered once a transaction falls squarely within the purview of section 12(2) of the Act.

[19] Furthermore, although the Commission accepted that the investigations into the 2014 transaction did not raise any competition concerns, it was nonetheless of the view that, because there was a lapse of time between the 2014 transaction and the proposed 2017 transaction and, given the change in circumstances and market structures since 2014, it would not be appropriate to make a determination within the context of an advisory opinion whether the structure of the market has changed. Lastly, the Commission was of the view that the question whether the proposed transaction raises public interest issues, such as retrenchments, also had to be considered in a new merger investigation.

Urgent proceedings before the Tribunal

[20] Dissatisfied with the advisory opinion, HCI and Tsogo approached the Tribunal on an urgent basis for an order declaring that the proposed transaction does not require approval by the competition authorities in terms of the merger control provisions of the Act. HCI considered that it would face a significant risk if it implemented the transaction in the face of the Commission's advisory opinion.

[21] The Commission opposed the application on the basis that HCI would cross the "bright line" as contemplated by section 12(2)(a) of the Act and, for that reason, the transaction was rightly considered to be a notifiable merger. It was submitted on behalf of the Commission, relying on the decision of the Tribunal in *Ethos*,[5] that the bright lines relied on in that decision are instances that trigger notification.

[22] When the matter came before the Tribunal, it declined to assume jurisdiction to issue a declaratory order. It did so principally on the basis that its jurisdiction was triggered only once a transaction had been notified to the Commission. The parties

[5] *Ethos Private Equity Fund IV v The Tsebo Outsourcing Group (Pty) Ltd* Case No: 30/LM/Jun03 (*Ethos*).

were accordingly requested to address the question of jurisdiction before the merits of the matter could be entertained. The Tribunal analysed the provisions of sections 27(1)[6] and 58[7] of the Act and concluded as follows: first, it does not have the power to grant declaratory relief in terms of these two sections; second, the Commission's advisory opinion is not binding on the parties; and third, the jurisdiction

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[6] Section 27(2) titled "Functions of Competition Tribunal", reads as follows:

> "The Competition Tribunal may—
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> (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."

[7] Section 58, titled, "Orders of Competition Tribunal", reads as follows:

> (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;
>
> (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."

of the Tribunal to consider whether a merger falls within the ambit of the Act is only triggered once notification of the merger transaction had been given to the Commission.

[23] Because the respondents elected not to notify the proposed transaction, the Tribunal held that it did not have the jurisdiction to grant declaratory relief. The Tribunal further held that there was no live dispute between the parties as the advisory opinion was not binding and, at best, it gave rise to a difference of opinion. Furthermore, if the parties wished to challenge the Commission's view regarding the proposed transaction they had to do so in accordance with rule 31(1)(c) of the Competition Tribunal Rules and rule 33 of the Competition Commission Rules.

[24] Notwithstanding its refusal to assume jurisdiction, the Tribunal proceeded to consider whether it should exercise a discretion in favour of HCI and Tsogo. It concluded, with reference to the Supreme Court of Appeal decision in *Cordiant*,[8] that the intervention of the Tribunal was not required as there was no live dispute between the parties. Furthermore, according to the Tribunal, the respondents were not without a remedy and had various alternative remedies at their disposal: they could implement the transaction without notifying the Commission; simply notify the transaction; notify the merger under protest and approach the Tribunal on the question of notification in terms of rule 31(1)(c) of the Act similar to *Ethos* and engage the Commission further.

Appeal to the Competition Appeal Court

[25] Aggrieved by these findings, HCI and Tsogo launched an appeal to the Competition Appeal Court. The Competition Appeal Court identified two issues for consideration: first whether the Tribunal had jurisdiction to entertain a matter where a party had not notified a transaction in terms of section 13A of the Act, second whether an acquiring company, having already obtained prior merger approval from the

[8] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; (2005) (6) SA 205 (SCA) (*Cordiant*).

Commission to acquire sole control of an entity, must again obtain merger approval before entering into a subsequent transaction with that entity.

[26] In respect of the Tribunal's finding that the notification of a transaction is a jurisdictional requirement to trigger its function, the Competition Appeal Court concluded: first, that the powers conferred on the Tribunal in terms of sections 27(1) and 58 are wide enough to include a declaratory order. Second, the Tribunal has, in many instances, assumed jurisdiction and granted declaratory orders.[9] Third, it would be an incomprehensible reading of the Act to accept that, on the one hand, the Tribunal has the power to declare that a transaction constitutes a merger, to order parties to notify and not to implement a transaction pending approval of the transaction. On the other hand, to conclude that the Tribunal does not have the power to issue a declaratory order when approached by a party arguing that a transaction does not constitute a merger. Fourth, having regard to the provisions of section 62 of the Act, which confers exclusive jurisdiction on the Tribunal and the Competition Appeal Court in respect of issues falling within their respective jurisdictions, a party would not, in the event the Tribunal declines jurisdiction, be able to approach the High Court for declaratory relief. The Competition Appeal Court concluded that would effectively deprive a party of the right to access courts enshrined in section 34 of the Constitution.

[27] The Competition Appeal Court held that the Tribunal's jurisdiction was triggered despite the fact that the merger had not been notified in terms of section 13A of the Act. Having concluded that there was a jurisdictional basis for the Tribunal to grant a declarator, the Competition Appeal Court then proceeded to consider whether the Tribunal ought to have exercised its discretion in favour of HCI and Tsogo. The Competition Appeal Court acknowledged that the granting of a declaratory order in these kinds of cases must be considered very carefully and that the "power should be

[9] *Bulmer SA (Proprietary) Limited v Distillers Corporation (SA) Limited* [2001] ZACT 13 (*Bulmer*); *Distillers Corporation (South Africa) Limited v Bulmer (SA)*[2001] ZACAC 4; [2001-2002] CPLR 36 (CAC) (*Distillers*); *Gold Fields Limited v Harmony Gold Mining Company Limited* [2004] ZASCA 106; [2005] 3 All SA 114 (SCA); *Johnnic Holdings Limited and Hosken Consolidated Investments Limited* [2005] ZACT 69; *Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd* (2008) 1 CPLR 410 (T).

exercised sparingly, lest the investigative powers of the Tribunal be undermined".[10] Taking into account that declaratory orders are discretionary and that such orders can provide legal certainty to the parties in this matter, the Competition Appeal Court applying the two-stage approach proposed in *Cordiant*[11] concluded first, that there was a live dispute between the parties in that the respondents clearly had a legal interest in the declaratory relief sought and second, that the proposed 2017 transaction did not constitute a merger.

[28] The Competition Appeal Court analysed section 12(2), pointing out that it does not list different kinds of control each of which is separately notifiable, but that it merely illustrates the different ways in which control may be acquired. Once *de facto* control has been acquired in terms of any one of the subparagraphs, a party need not again notify and seek approval from the Commission for the transaction when control is subsequently acquired in one of the other ways. Merger approval is thus a "once-off affair". In light of the fact that merger approval had already been granted to HCI in 2014 for the acquisition of sole *de facto* control over Tsogo consequent upon the increase in shareholding in Tsogo to 47%, the proposed transaction in 2017 did not constitute a notifiable merger. The Competition Appeal Court also took into account that it was expressly recognised by the Tribunal in 2014 that HCI intended to ultimately increase its shareholding in Tsogo to more than 50%. In respect of the nature of the control exercised by HCI over Tsogo at the time, the Competition Appeal Court emphasised the significance of the fact that HCI commanded the majority of votes in Tsogo and that voting patterns were stable in that the minority of institutional investors were acquiescent.[12]

[29] The Competition Appeal Court concluded that the Commission could not require the notification based on the reason that it wished to assess the implications of the

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[10] See *Hosken Consolidated Investments Limited v The Competition Commission* (154/CAC/Sept17) (Competition Appeal Court judgment) at para 52.

[11] Id at para 53.

[12] Id at para 54.

2017 transaction. It emphasised that the effects of the acquisition of control are assessed at the time approval is sought on a forward-looking assessment of the likelihood of competition harm and the public interest. This cannot be revisited once it has been determined.[13]

Issues in this Court

[30] This Court has to decide whether leave to appeal should be granted; whether it was appropriate for the Tribunal to grant a declaratory order; and whether the 2017 transaction was notifiable in terms of the Act.

Leave to appeal

[31] The Commission plays a vital role in "the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers".[14] The Act further recognises that "an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans".[15] Although the Act grants jurisdiction almost exclusively to competition authorities in matters relating to economic competition, the ambit of the competition authorities' investigatory powers is manifestly a constitutional issue and as such engages this Court's jurisdiction.[16] Subsections 62(3)(b) and (4) of the Act also provide for this Court's jurisdiction in respect of matters that raise constitutional issues.

[32] An arguable point of law on the interpretation of the Act that has a significant impact on the functions of the Commission is raised. This Court is called upon to decide whether a transaction is notifiable when the nature of control over an entity changes

[13] Id at para 59.

[14] See the long title to the Act.

[15] See the preamble of the Act.

[16] *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; 2018 JDR 1674 (CC); 2018 (12) BCLR 1533 (CC) (*S.O.S*). See also *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 JDR 0579 (CC); 2012 (7) BCLR 667 (CC) (*Senwes*) at para 17.

from *de facto* control as contemplated in section 12(2)(g) to *de jure* control as contemplated by section 12(2)(a) of the Act.

[33] A further question of general public importance is whether the Tribunal has the power to issue declaratory orders. Leave to appeal must be granted.

Condonation

[34] The applicant filed its application for leave to appeal one day late. The delay is negligible and the explanation for the delay reasonable. Condonation is therefore granted.

Was there a merger, and if so, was it notifiable?

[35] An important function of the Commission is to "authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3".[17] This Court in *S.O.S* explained:

> "As a specialist regulator, the Commission is tasked with, among other things, the regulation of mergers that have an anti-competitive effect in South Africa. In terms of section 20(1) of the Competition Act, the Commission is independent, subject only to the Constitution and the law and must be impartial and perform its functions without fear, favour or prejudice. It is empowered to approve a proposed merger outright, approve it subject to conditions, or refuse merger approval where the proposed transaction will lead to a substantial lessening of competition, and cannot be justified by merger-specific pro-competitive gains or in the public interest."[18]

[36] Parties to a notifiable merger are obliged to notify the Commission in the prescribed form[19] and may not implement the proposed merger until it has been

[17] Section 21(e) of the Act.

[18] *S.O.*S above n 16 at para 32.

[19] Section 13A(1) and (2) of the Act.

approved by the Commission.[20] A failure to do so empowers the Tribunal to impose an administrative penalty.[21]

[37] The Commission has the power under the Act to investigate not only whether a notified merger should be approved but also the anterior question of whether or not the transaction constitutes a notifiable merger in the first place. This Court in *S.O.S* explained:

> "The power to investigate whether a transaction constitutes a notifiable merger stems from section 13A(1) and (3) read with section 59(1)(d)(i) of the Competition Act. Section 13A(1) obliges a party to an intermediate or large merger to notify the Commission of the merger. Section 13A(3) prevents prior implementation of a notifiable merger without the approval of the Commission, the Tribunal or the Competition Appeal Court. If the Commission finds that a notifiable merger has been implemented without approval, it must refer that transaction to the Tribunal for adjudication. Section 59(1)(d)(i) empowers the Tribunal to impose an administrative penalty on firms that fail to give notice of a merger or implement a notifiable merger without prior approval. The necessary implication of these provisions is that the Commission is authorised to investigate transactions to determine whether they constitute or give rise to a notifiable merger as defined in the Competition Act, and whether proceedings should be initiated in the Tribunal to impose appropriate penalties."[22]

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[20] Section 13A(3) of the Act provides:

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

[21] In terms of section 59(1)(d) of the Act an administrative penalty may be imposed in the following circumstances:

> "[I]f the parties to a merger have—
>
> (i) failed to give notice of the merger as required by Chapter 3;
>
> (ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
>
> (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
>
> (iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act."

[22] *S.O.S* above n 16 at para 43.

[38] For a transaction to require notification, the transaction must first constitute a "merger" as contemplated in section 12(1) of the Act. Once a transaction meets the definition of a "merger" as contemplated in section 12(1) of the Competition Act, the vast investigative powers of the Commission will come into play. This Court in *S.O.S* confirmed that the obligation to notify the Commission of a proposed transaction is dependent on two jurisdictional facts: first, where the proposed transaction meets the definition of a "merger" in terms of section 12 of the Act, and second, where the proposed transaction meets the financial threshold for an intermediate or large merger.[23] Section 12A of the Act further makes it clear that the substantive merger consideration process provided for in this section only applies to a transaction that constitutes a "merger" within the meaning of section 12.[24]

[39] Here the Commission operated from the premise that there was a merger and contends that the only question is whether the merger was notifiable. HCI and Tsogo argue that there was no merger within the meaning of section 12 of the Act. Therefore the question of notifiability does not arise. They further submit, relying on the once-off principle, that even if there was a merger, the 2017 transaction was already approved by the Commission in 2014.

[40] In light of the respondents' insistence that there was no merger in the first place, it is necessary to consider whether the 2017 transaction in this matter constituted a merger for purposes of the Act.

[41] Mergers are regulated in terms of Chapter 3 of the Act. The definition of a merger in section 12(1) states that "a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". Two or more entities are contemplated in the merger

[23] Id at para 33.

[24] Section 12A(1) specifically deals with the consideration of "mergers":

> "Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2)."

transaction: the acquiring firm and "another firm" (often referred to as the target firm). An "acquiring firm" is defined as "a firm" that "as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm".[25]

[42] Section 12(2) sets out statutory instances or the common forms of control for purposes of section 12(1). Section 12(2) reads:

> "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 section 1(3)(a) of the Companies Act, 1973 (Act 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 a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
>
> (g) has 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)."

[43] The acquisition of control is central to the definition of a "merger". The term "control" is, however, not defined in the Act. Section 12(2) goes no further than to list instances of what constitutes control for purposes of the definition of a merger in terms

[25] Section 1 of the Act.

of section 12(1). The list is not exhaustive and it is accepted that other instances of control than those listed in section 12(2) may be sufficient to establish control for the purposes of the definition of a merger.

[44] Instances of control range from ownership of more than half of the issued share capital of the firm (section 12(2)(a) - what we would call *de jure* control) to a more general and widely couched form of control provided for in section 12(2)(g) of the Act. This includes the mere power to "materially influence" the policy of a firm to the extent that it can exercise an element of control referred to in paragraphs (a)-(f) of the Act (what we would call *de facto* control).[26] The "ability to materially influence" is central to the definition of control in section 12(2) of the Act.

[45] Although different degrees of control are contemplated in section 12(2)(a)-(g), all the listed instances have in common the acquisition of direct or indirect control over the whole or part of "another" firm. If a transaction falls within the ambit of any one of the instances listed in section 12(2) of the Act, it will be a merger and will trigger the investigative powers of the Commission.

[46] Pertinent here is the "bright line" principle in the context of section 12(2). An example is to be found in *Ethos* where the Tribunal stated:

[26] The Tribunal in *Ethos* above n 5 at para 32 stated:

> "Merger policy is not confined to an assessment of control via the legal form. The Act recognises that control is not confined to exercise through the same legal form and that a firm can be controlled by another's economic or commercial leverage over it. Because of this, the legislature recognised the possibility of the separation of the economic and 'political' benefits of ownership and so provided for each in section 12(2) through subsections 12(2)(a) and (d) (ownership) and 12(2)(b) and (c) (voting rights). But it also had to go beyond recognising even these two traditional company law forms of control and provide for control over other entities 12(2)(e) trusts and 12(2)(f) close corporations. It went further still, recognising that even these instances may be deficient in capturing all notions of control and so provided a catch-all in 12(2)(g). Notwithstanding sub-section (g), the Court has held that the list is non-exhaustive recognising that control is too elastic a notion to confine to a closed list. In so doing it held that the legislature had instanced separate notions of control. As the Court observed in *Distillers*, there is nothing in the language of section 12(2) to suggest that its specified instances operate exclusively at any one time. Indeed, given the range of possibilities section 12(2) canvasses, it is likely that more than one controller subsists at any given time in any complex commercial structure."

> "For this reason, section 12(2) instances certain 'bright lines' of when control will be assumed. When firms cross that line, as Ethos has, they must notify, albeit that they have not travelled very far in crossing it.
>
> This does not mean that section 12(2) sets out only bright lines. The parties correctly observe that section 12(2)(g) is anything but 'bright'."[27]

[47] Adopting the terminology used in *Ethos*, the obvious example of a bright line is where *de jure* control is acquired in terms of section 12(2)(a) of the Act by virtue of the fact that it beneficially owns more than one half of the issued share capital of the firm. As I read *Ethos*, that does not, however, mean that the other instances of control listed in sub-paragraphs (b)-(g) do not also draw a so-called "bright line" they are just not considered as bright and, in the instance of section 12(2)(g), "anything but bright". Whether the bright lines appear in the obvious instance of *de jure* control contemplated in section 12(2)(a) or in terms of the "catch all" in section 12(2)(g), the lines set to trigger notification are couched sufficiently wide in order to allow for the Commission's wide investigating powers.

[48] The terminology, although helpful, should be used with circumspection. There is no indication from section 12(2) of the Act that, as the Commission argues, one form of control (most notably *de jure* control in section 12(2)(a)) is more significant than any of the other forms of control. Each of the seven instances listed in section 12(1) is freestanding and, each on its own, is sufficient to establish control. Each instance of control therefore constitutes a "bright line" on its own and the fulfilment of each one of the instances is sufficient to constitute a "merger" as contemplated by section 12(1).

[49] It is common cause that the control acquired over Tsogo after the merger in 2014 fell within the ambit of section 12(2)(g) of the Act. The Commission also accepted at the time that HCI exercised sole *de facto* control over Tsogo. So in 2014 the transaction amounted to a notifiable merger because HCI graduated from shared joint control (with

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[27] Id at para 42-3.

SABMiller) to *de facto* control. HCI acquired control of Tsogo that it did not previously have (as contemplated in subsection 12(1)(a)-(g)).

[50] It is also common cause that after the 2017 transaction (which has now been implemented), HCI in addition acquired *de jure* control within subsection 12(2)(a) of the Act. I have already referred to the fact that the Commission was of the view that the crossing of this "bright line" has a definite legal implication because it indicates the types of transaction that the Legislature would require notification.

[51] Two questions arise. First, is the transaction notifiable simply because HCI now acquired *de jure* control in distinction to a different form of control (*de facto* control)? Put differently, does the mere fact that the nature or quality of control changes resulting in a party crossing a further bright (or brighter) line rendering the transaction notifiable? Second, can the respondents rely on the once-off principle to avoid having to notify the 2017 transaction? The latter question is important in light of this Court's decision in *S.O.S.*[28]

Is the acquisition of control "once-off"?

[52] This question is relevant for the following reason: the Commission's advisory opinion expresses the view that, because the proposed transaction in 2017 would result in the crossing of a "bright line", in that the shareholding in Tsogo would have increased from 47% to more than 50%, the transaction was notifiable. Once a transaction results in the acquisition of more than half of the issued share capital, that crossing of a "bright line" renders the proposed transaction notifiable. There were also other reasons why the Commission was of the view that the transaction is notifiable including a change in market structure.

[53] The respondents differ. Their stance is that where a firm has already acquired control of another firm in terms of any means listed in subsection 12(2) of the Act

[28] *S.O.S* above n 16.

(*de facto* control) a transaction need not again be notified simply because the nature of the control has changed and now falls within the contemplation of one of the other paragraphs in subsection 12(2). In this case that means that once HCI acquired sole *de facto* control of Tsogo (within the contemplation of section 12(2)(g) of the Act), it did not acquire any further control in Tsogo when its shareholding increased beyond 50% (as contemplated by paragraph 12(2)(a) of the Act).

[54] The respondents' view is supported by case law. Moreover, if the statute required a new notification once the form of existing control changes to *de jure* control, it would have said so. Once a firm has acquired control over another firm in any of the instances contemplated by section 12(2)(b)-(g), the crossing of a further "bright line" does not result in the acquisition of control that it did not have before. This is consonant with the requirement that control must be acquired over the whole or part of the business of another firm. Where the quality of control over the firm which was already controlled changes, it will not constitute a "merger".

[55] Requiring an entity to notify a further transaction in circumstances where it has previously notified a merger for the acquisition of *de facto* control merely because the nature of control transmutes to a different form of control, is not only unduly formalistic, it is also burdensome. The Tribunal in *Ethos* said:

> "As the Commission has argued, other jurisdictions adopt bright lines not because they are perfect in each case, but because by and large they are consistent with commercial reality and, most importantly, they help create certainty for both regulator and regulated.
>
> Does this mean that *Ethos* might have to notify again if it crosses some other threshold in section 12(2) that it presently does not enjoy now? For instance, if it was able to control or veto the appointment of the majority of the directors of the firm, a power that, as we have seen, it does not presently enjoy.
>
> The answer to that question is no. *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*."[29]

[56] This Court in *S.O.S* supported the once-off principle as set out in *Ethos*, stating that the acquisition of control is a once-off affair for which notification is only required upon the initial acquisition. It said:

> "Parliament has crafted a compulsory 'self-notification' pre-merger regime. The Competition Act obliges parties to notify the Commission of proposed transactions when two jurisdictional facts are present: the first is where the proposed transaction meets the definition of a 'merger' in section 12(1), and the second is where it meets the financial threshold for an intermediate or large merger. *Since merger approval gives the merged firm immunity from any future challenges*, 'firms are obliged to notify mergers before they are implemented and to delay implementation until they get regulatory approval'."[30]

[57] It relied on the decision in *Netcare Hospital Group*[31] where the Tribunal accepted that merger approval gives the merged firm immunity from any future challenges whilst explaining that our merger regime does not allow for the evaluation of mergers after the fact. There it was said:

> "Our merger regime is not designed for evaluating mergers after the fact. One only need examine the language of the section to see its futuristic inclination. For this reason we have a system of compulsory premerger notification. In some other systems which also require mergers to be notified before they are implemented this simply means the merging parties cannot implement for a certain period. Thereafter, unless the authorities indicate an intention to stop the merger the parties can consummate the transaction but still risk the possibility of post merger scrutiny by either the authorities or private parties. Our system requires an active decision by the competition authority once a merger is notified and for this reason a merger cannot be challenged again later;

[29] *Ethos* above n 5 at paras 35-7.

[30] *S.O.S* above n 16 at para 33.

[31] *Netcare Hospital Group (Pty) Ltd v Community Hospital Group (Pty) Ltd* [2007] 2 CPLR 386 (CT) (*Netcare Hospital Group).*

> neither by the competition authorities nor private parties. In this sense, merger approval gives the merged firm immunity from future challenges and thus the comfort of business certainty going forward. In return for this benefit, firms are obliged to notify mergers before they are implemented and to delay implementation until they get regulatory approval. The entire edifice of merger control; notification, evaluation, and recommendation, is premised on this assumption of compliance. The leitmotif throughout this enquiry is 'what will the world look like after the merger'. When a merger has already been implemented, and as in this case for some time, the premise of the entire system is undermined; a system designed to look into the future now has to gaze back in the past. Typically in the *ex ante* merger review, we, in the words of the Competition Appeal Court, 'forecast a likely possibility'. We use the past to make an informed prediction about the future. When a merger has already been implemented and, as in this case for some time, the entire evidential premise of the system is compromised."[32]

The Commission's powers in light of the once-off principle

[58] Although I accept the once-off principle, having regard to the overall purpose of the Act and the fact that the competition authorities play a vital supervisory role in preventing anti-competitive market structures, the once-off principle should not be understood to shackle the Commission from investigating where it suspects potential irregularities or is privy to information in a new economic context.[33]

[59] *Ethos* merely held that the acquisition of control and the notification requirement triggered by acquisition, is once-off. That re-notification may not be required simply because of a change in the nature of the control, does not imply that the Commission may not investigate further. It only means that the acquiring firm need not necessarily re-notify.

[60] I now consider whether the once-off principle applied to the 2017 transaction.

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[32] Id at para 7.

[33] See the discussion in paras [92]-[93] hereunder.

Does the once-off principle apply to the 2017 transaction?

[61] Answering this question necessitates scrutinising the facts. Both the Tribunal and the Competition Appeal Court in their judgments have done so in great detail. I have already alluded to the fact that when the respondents sought merger approval in 2014, the Commission clearly accepted that a two-phased transaction was contemplated which would result in HCI ultimately acquiring *de jure* control of Tsogo "somewhere in the future". When the merger was notified, the Commission investigated and commented on the merger on the basis that it would entail two-phases:

> "In terms of the first phase (the 2014 transaction), HCI will increase its interest in Tsogo from 39% to between 47% and 48% as a result of the withdrawal of SABMiller.
>
> In terms of the second phase (somewhere in the future), HCI intended to increase its shareholding in Tsogo to beyond 50%."

[62] In 2014, this two-phased transaction was approved by the Commission, in the words of the Competition Appeal Court, "on a forward-looking assessment of the likelihood of competition harm, and, in the public interest".[34] Further in the 2014 report the Commission specifically recognised that the activities of Niveus were relevant to the proposed transaction and that, at the time, HCI already held 52% and thus *de jure* control of the gaming and leisure activities through Niveus.

[63] In essence three reasons were advanced by the Tribunal in its advisory award as to why the latest transaction was a notifiable merger. The first is the fact that HCI would be crossing a bright line by increasing its shareholding to more than 50%. According to the Commission, this has definite legal implications. The second is that since 2014 market structures had changed (because of the time lapse). The third is that the transaction involved a different firm and that other factors would be relevant such as the public interest and employment considerations.

[34] Competition Appeal Court judgment above n 10 at para 58.

[64] A comparison between the pre- and post-transaction structures confirms that the corporate structure changed significantly post transaction. The question remains whether the subsequent transaction falls within the ambit of section 12(1) of the Act and constitutes a "merger" for purposes of the Act.

[65] First, regarding the submission that a transaction becomes notifiable if it crosses the bright line contemplated in subsection 12(2)(a) (*de jure* control), as already indicated, once control has been acquired there is no need to re-notify simply because the quality of control changes from *de facto* to *de jure* control. This accords with the once- off principle. Moreover, at the time the Commission evaluated the merger transaction in 2014, they did so with knowledge of the intended transaction to acquire *de jure* control. If there is no merger, then the transaction is not notifiable.

[66] Second, regarding the submission that the transaction in 2014 displayed a very different character from that in 2017, this Court accepts that the Commission retains its wide powers under the Act to investigate any past merger transaction. If HCI and Tsogo, in implementing the 2017 transaction (phase 2 of the 2014 merger), act in a manner that results in adverse effects on employment for instance, then the Commission may revoke its approval in terms of section 16(3) read with section 15 of the Act[35] that

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[35] Section 15 of the Act applies to small or intermediate mergers. Section 16(3) incorporates the provisions of section 15. For a large merger, upon application by the Commission, the Tribunal can revoke merger approval. Section 15, titled "Revocation of merger approval", reads:

> "(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if—
>
> (a) the decision was based on incorrect information for which a party to the merger is responsible;
>
> (b) the approval was obtained by deceit; or
>
> (c) a firm concerned has breached an obligation attached to the decision.
>
> (2) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed."

Section 16(3) of the Act reads:

> "Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger, and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection."

empowers the Commission to revoke its own decision to approve or conditionally approve mergers.

[67] Third, the Commission submitted that the 2014 transaction merely involved the acquisition of additional shares whereas the 2017 transaction involves a transfer of the business GameCo which currently holds HCI's gaming interest to another entity Tsogo. The result would be that Niveus would no longer control GameCo but that GameCo will be directly controlled by Tsogo with a shareholding of between 75% - 100%. The Commission persisted with this submission in this Court.

[68] There is no merit in this submission. Section 12(1)(b) contemplates that a merger in terms of section 12(1)(a) may be achieved not only by the purchase or lease of shares[36] but also through the amalgamation or other combination with the other firm in question [37]. Moreover, if regard is had to the 2014 report it was made clear that what was under consideration was a merger between HCI's hotel and casino interests held in Tsogo and HCI's other gaming interest held in Niveus. The 2017 transaction is therefore not notifiable and formed part of the 2014 merger approval.

Revocation powers of the Commission under sections 15 and 16 of the Act

[69] Pursuant to section 15(1)(c), the Commission retains its powers to revoke its approval of the 2014 merger if a firm has breached an obligation attached to the approval.

[70] The submission that the Commission should be allowed to investigate the 2017 transaction on considerations such as public policy because of the possible impact on employment, therefore has merit. The Commission conducted a public interest analysis in 2014 with specific reference to the effect that the merger could have on employment. It concluded at the time that the proposed transaction would not have any

[36] Id at section 12(1)(b)(i) of the Act.

[37] Id at section 12(1)(b)(ii) of the Act.

effect on employment and that the proposed transaction also did not raise any other public interest concerns.

[71] The Commission thus retains its wide powers in terms of the Act to investigate the assurances given by the parties in 2014. These were that the inclusion of Tsogo within the HCI Group would not give rise to any negative impact on employment. That the Competition Appeal Court granted a declaratory order to the effect that the 2017 transaction does not constitute a notifiable merger, does not restrict the Commission's powers to investigate compliance with the assurances given by Hosken and Tsogo in respect of the effect of the merger on employment and any other public interest concerns.

[72] Counsel for HCI and Tsogo accept that the Commission retains the power to investigate, if it so wishes, the correctness of the information provided by the merger parties as part of their merger notification, and their compliance with any conditions imposed on the merging parties, or assurances provided by them during the merger approval process. In argument, a similar concern was raised by the Commission in respect of possible effects on employment as a result of the 2017 transaction. Counsel for HCI and Tsogo made two submissions. The first submission was made from the bar after having obtained instructions. This was an undertaking that the 2017 transaction would have no adverse effect on employment. The second was that the competition authorities may act against any party who implements a merger in a manner contrary to a condition for approval of that merger.

[73] These concessions are correct and warranted. The Commission has the power in terms of section 16(3) read with section 15[38] of the Act to recommend that the Tribunal revoke a merger where the firm concerned has breached an obligation intrinsic to that decision. Although sections 15 and 16 are not explicit regarding the Commission's investigative powers in such a situation, the power to revoke provided there implies that

[38] See above n 35.

the Commission may investigate any assurances made by a party during the approval proceedings.

The declaratory order

[74] In its written argument the Commission's initial stance was that the Tribunal cannot be approached directly in the absence of a notification in terms of the Act that in turn will trigger the jurisdiction of the competition authorities for a declaratory order in respect of an advisory opinion.

[75] That stance softened considerably in this Court. The Commission now accepts that the Tribunal can be approached directly without there first being a notification in terms of the Act and that the Tribunal has the power to issue declaratory orders.

[76] This view is correct. Section 27(1)(d) of the Act provides that the Tribunal may make any ruling or order that is necessary or incidental to the performance of its functions in terms of the Act.[39] Section 58 of the Act further grants the Tribunal the power to make an appropriate order in relation to a prohibited practice including an order interdicting any such practice.[40] Both of these sections are formulated widely

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[39] Section 27(1)(d) of the Act, which is headed "Functions of Competition Tribunal" provides:

> "The Competition Tribunal may—
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> (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."

[40] Section 58(1) of the Act, which is headed, "Orders of Competition Tribunal", provides:

> "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;

enough to include the power to grant declaratory relief in respect of issues in dispute referred to it.

[77] In addition to the wide powers conferred upon the Tribunal, there are persuasive policy considerations to conclude that the Tribunal has the power to grant declaratory orders. First, the Tribunal has in numerous instances exercised its discretion and granted declaratory relief in a variety of cases.[41] Second, parties would ordinarily have been able to approach the High Court for declaratory relief, but the High Court's jurisdiction is ousted by section 65(2) of the Act.[42] This a persuasive reason to allow parties to approach the Tribunal for declaratory relief. It is apparent from the Act that competition matters are to be dealt with by the competition authorities to the exclusion of the ordinary courts of law.[43] Forbidding parties the option to approach the Tribunal for declaratory relief on an issue which potentially may invoke the Commission's investigative powers could effectively leave a party without a remedy. The predicament that parties then face is underscored by the facts in *Seagram*.[44] There the High Court

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> > (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;
>
> (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."

[41] See *Distillers* n 9 above.

[42] Section 65(2) of the Act titled, "Civil actions and jurisdiction", provides:

> "If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and—
>
> > (a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue."

[43] See the preamble to the Act and section 65 of the Act.

[44] *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd* 2001 (2) SA 1129 (C) (*Seagram*).

concluded that assuming jurisdiction would require interpreting section 12 and this would conflict with the provisions of section 65(3) of the Act. The High Court consequently declined to assume jurisdiction.[45]

[78] Third, declaratory orders can bring clarity and finality to disputes that may, if unresolved, have far reaching consequences for each party. I return to this issue below. Last and most importantly, litigants have a constitutional right to have a remedy to resolve a dispute in an appropriate forum.[46]

[79] The requirements for issuing a declaratory order are non-contentious. What is contentious in this matter is whether a declaratory order ought to have been granted.

[80] Returning to the requirements, the Supreme Court of Appeal in *Cordiant*[47] applied a two-stage approach in considering whether or not to grant declaratory relief: (i) the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and (ii) the court may then exercise its discretion either to refuse or grant the order sought. Declaratory orders are discretionary[48] and flexible as this Court pointed out in *Rail Commuters*:

> "It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to

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[45] Id at 1137F-G.

[46] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC). (*Modderklip*) at para 39. See also *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22.

[47] See above n 10 at para 18.

[48] *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) (*J T Publishing*) at 525A.

> order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."[49]

[81] The parties have not taken issue with this two-staged approach except to the extent that the Commission is of the view that no live dispute existed between the parties and therefore the Tribunal should not have exercised its discretion to grant a declarator.

[82] The absence of a live dispute may militate against the granting of a declaratory order. This is, however, not a hard and fast rule. In *Ex Parte Nell* the Appellate Division held that an existing dispute was not a prerequisite for the granting of a declaratory order.[50] This however does not mean that the court does not retain its discretion to refuse to grant a declaratory order in the absence of a live dispute. In *Oakbay* the High Court followed a similar approach and pointed out that a court is not precluded from granting a declaratory order where there exists uncertainty about a legal question and where it is more practical for a court to decide the issue "without there being an already existing dispute".[51]

[83] The Commission submitted that there was no live dispute and that an advisory opinion is merely "an opinion" which does not translate into a binding decision of the Commission. It was further submitted that there existed only a difference of opinion between the parties which also does not translate into a live dispute. HCI disagreed and submitted that there was a real dispute between the parties and that there was ample reason for the Tribunal to exercise its discretion in favour of HCI.

[84] The Court in *Oakbay* dealt with the existence of a live dispute in some detail and also referred to the factors that must be taken into account in exercising the discretion

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[49] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters*) at para 107.

[50] *Ex Parte Nell* 1963 (1) SA 754 (A) at 759H–760B.

[51] *Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* [2017] 4 All SA 150 (GP); 2018 (3) SA 515 (GP) (*Oakbay*) at para 61.

whether to grant declaratory relief, including, but not limited to, the availability of other remedies.[52]

[85] I am persuaded that there was a live dispute between the parties. The mere fact that parties had a difference of opinion regarding an important jurisdictional issue suggests that there was a live dispute. This is particularly so where the difference of opinion existed between an important statutory entity such as the Commission and parties who are involved in a proposed transaction that may trigger the far reaching investigative powers of the Commission. This difference of opinion and the legal uncertainty was accentuated by the advisory opinion issued by the Commission declaring that the transaction amounted to a notifiable merger. The Commission likewise had a legal interest in obtaining clarity on the question whether the transaction was notifiable.

[86] The notification of a transaction has far reaching consequences for the notifying parties: not only will large fees have to be paid upon notification, the proposed merger transaction may in turn also be delayed for up to 90 days.

[87] I have already pointed out that the Commission contended that no special status should be attached to an advisory opinion. Although I agree that an advisory opinion has no binding force on the Commission, it still, as the Competition Appeal Court pointed out with reference to *Seagram*,[53] reflects the views of the Commission on whether a transaction constitutes a notifiable merger. In *Bulmer,* the Tribunal likewise agreed that the distinction between an advisory award and a decision is "highly artificial and without substance". [54]

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[52] Id at para 59 states:

> "These include (i) the existence or absence of a dispute; (ii) the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties; (iii) whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought; (iv) considerations of public policy, justice and convenience; (v) the practical significance of the order; and (vi) the availability of other remedies."

[53] *Seagram* above n 44 above at 31. See also Competition Appeal Court judgment at para 31.

[54] *Bulmer* above n 9 at 458B-D:

[88] Once a court is satisfied that the applicant has an interest in an existing, future or contingent right or obligation, it will then proceed to the second leg and consider all relevant facts in deciding whether or not to grant a declaratory order.[55]

Conclusion

[89] The Competition Appeal Court did not err in upholding the appeal against the decision of the Competition Tribunal in that HCI and Tsogo were not obliged to notify the 2017 transaction in terms of section 13A. However, the appeal should only succeed partially because it has always been within the power of the Commission to investigate assurances given during the 2014 merger approval proceedings in terms of sections 15 and 16(3).

Costs

[90] As in the Competition Appeal Court there will be no order as to costs.

Order

[91] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld to the limited extent set out in paragraph 4.
4. The order made by the Competition Appeal Court is replaced with the following:

   "It is declared that:

> "The applicants also argued that an alternative procedural basis for them to bring the application could also be found in rule 42(3)(a)(i) which provides for Commission decisions to be reviewed or appealed. The respondents attempted to counter this point by suggesting that the Commission had not made a decision but had merely furnished an advisory opinion. This distinction is highly artificial and without substance. It is quite clear that the Commission has decided that it has no jurisdiction and has abided by that decision; if not, it would have contended otherwise in these proceedings as it had the opportunity to do so since it is cited by both applicants as a respondent."

[55] *J T Publishing* above n 48 at para 15.

(a) Hosken Consolidated Investments Limited is not obliged to notify the 2017 transaction in terms of section 13A of the Competition Act; and

(b) the order in (a) does not preclude the Competition Commission from investigating assurances made in the 2014 merger in terms of sections 15 and 16(3) of the Competition Act.

(c) There is no order as to costs."

5. There is no order as to costs.

FRONEMAN J

[92] I concur in my sister Basson AJ's reasoning that in the circumstances HCI was not obliged to give notice under the Act of a new merger and that the Commission retained its investigative power to determine whether revocation of the 2014 merger approval was justified.

[93] I also agree with the outcome and order she proposes, but with a cautionary note. The order is necessary to clarify the legal position. But it should not be read as an invitation to flood the Tribunal with applications for declaratory orders of this kind. Part of the Commission's objection to the relief sought before the Tribunal was that the proposed transaction entailed further lines of enquiry which the Commission needed to investigate, namely a further substantive competitive assessment and public interest issues. It set these further lines of enquiry and their possible consequences out in some detail. The Act's purposes are not necessarily advanced by granting declaratory orders where the Commission explicitly states that it needs more time for investigation. In exercising its discretion in relation to declaratory orders this is a factor that the Tribunal should also keep in mind in future.

For the Applicant:	D Mpofu SC and T Ngcukaitobi instructed by Ndobela Lamola Inc
For the Respondents:	W Trengove SC, J Wilson SC, S Pudifin-Jones and N Luthuli instructed by Nortons Incorporated