COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019174

In the matter between:

TIGER EQUITY (PTY) LTD AND
MURRAY & ROBERTS (PTY) LTD Applicants

And

THE COMPETITION COMMISSION Respondent

Panel	: N Manoim (Presiding Member)
	: A Roskam (Tribunal Member)
	: T Madima (Tribunal Member)
Heard on	: 24 July 2014
Order Issued on	: 24 July 2014
Reasons Issued on	: 4 August 2014

Reasons for Decision

Introduction

[1] This is an application brought by the parties to a merger to set aside a decision by the Competition Commission ("**Commission**") to classify their

merger as a large merger in circumstances where they contend the merger is a small merger.

[2] On 23 July 2014 we issued an order setting aside the Commission's classification. Our reasons for making this decision follow.

Background

[3] Before we consider the facts of this case we must discuss why the distinction matters. In terms of section 11(5) of the Competition Act, 89 of 1998, ("**the Act**") mergers are classified into three types; small, intermediate and large. Whilst the classification is not relevant to the substantive issue of what type of transaction constitutes a merger. Section 12, which provides for the definition of a merger, applies to all three kinds. It is however relevant to certain procedural and jurisdictional consequences for the merger, which differ depending upon the classification.

[4] Some of the important consequences of the classification are: [1] whether the merger is to be approved by the Competition Commission or the Competition Tribunal; whether a filing fee is payable and if so, its size; and the time period given to the relevant decision maker to consider the merger.

[5] Since these distinctions in classification have important consequences for both the merging parties and the Commission, the Commission Rules make provision for this. When parties file a merger they are obliged to state their opinion on whether the merger is small, intermediate or large and, where appropriate, pay the requisite filing fee.[2]

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[1] We have not dealt with other consequences which are set out in Chapter 3 and inter alia, concern differences in procedure for consideration – the Commission acts administratively whilst the Tribunal acts adjudicatively ; the rights of appeal (small merger and intermediate mergers can be appealed to the Tribunal by way of a broader natured appeal termed a consideration, large mergers are appealed to the Competition Appeal Court by way of conventional appeal confined to the record before the Tribunal.

[2] See rule 27(1)(a) of the Rules for the Conduct of proceedings in the Competition Commission (the 'Commission rules'). Whilst there are filing fees for large and intermediate mergers there is no filing fee for a small merger. See Commission rules 10(5) and 10(6).

[6] The Commission then has a period of time to review a notification from merging parties.[3] A filing has to comply with the criteria laid down in the rules, *inter alia*, requiring correct classification of the merger. If the merging party has not correctly classified the merger, the Commission must issue a 'Notice of Incomplete Filing' on Form CC 13(2) ("**the Notice**") to the merging parties.[4] The consequence of this Notice is that until the deficiency is rectified, the time periods in which the Commission must consider the merger are suspended.[5]

[7] A merging party however has the right to apply to the Competition Tribunal in terms of its rules to have the Notice set aside.[6] If the Notice is set aside, the clock reverts to the original position i.e. the filing is deemed to have been complete from the business day after the date it was filed.[7]

[8] In this case the Commission has issued a Notice to the merging parties, premised on an allegedly incorrect classification of the merger as a small one. The merging parties have applied in terms of Commission rule 30(4), read with Tribunal rule 31(d), to have the 13(2) Notice set aside.

[9] Before we consider the facts of this case we must briefly look at how the Act provides for the classification of mergers.

Legal regime applicable

[10] How a merger is classified depends on whether the merger is in value above or below two determining thresholds, referred to in section 11(5) of the Act as the higher and lower thresholds. The value of the thresholds is contained in

[3] For small and intermediate mergers the Commission has 20 business days to consider them. It can however, within that period, issue an extension certificate to the merging parties the effect of which is to extend the 20 day period by another 40 business days and thus, if so extended amounts to a total of 60 business days. If it has not come to a decision at the end of the 20 day period, if not extended, or the 60 day period if validly extended ,the merger is deemed to be approved. With large mergers the Commission is given 40 business days to make its recommendation but that period may be extended by periods of up to 15 days by the Tribunal on application. With large mergers there is no ceiling as to the number of extensions that can be applied for, nor is there any deemed approval provision even if the Commission does not get or obtain an extension as the approval of the merger remains in the discretion of the Tribunal.

[4] Commission Rule 30(1)(b).

[5] This is the effect of Commission Rule 29(2).

[6] Commission rule 30 (4) read with Tribunal Rule 31(d).

[7] Commission rule 29 read with 30(6).

regulations made by the Minister, from time to time, in consultation with the Commission, termed the Determination of Threshold and Method of Calculation ("**Threshold regulation**").[8] Those mergers whose value places them equal to or above the higher threshold are deemed to be large; those below this threshold, but equal to or above the lower threshold are deemed intermediate. Those below the lower threshold are classified as small. Unlike large and intermediate mergers, small mergers are not ordinarily subject to the compulsory pre-merger notification regime.

[11] Determining the value of the merger involves two considerations. Deciding which firms must be counted and then deciding how to count them. The first exercise requires an interpretation of the Act. The Act defines the terms 'acquiring' and 'target' firm and whilst determining the latter is not usually 'controversial', the former can be, as in this particular case, as the acquiring firm concept is not limited to the firm which does the actual acquiring, but also its controllers, if any, as well. We go on to consider this issue more fully later, as on this turns the decision in this case.

[12] The second exercise involves applying the accounting rules in the Threshold regulation to determine the turnover or asset size of the firms to be counted. These accounting rules set out what the rand values of the two thresholds are and how one calculates them. As this exercise is not controversial in this case we need not consider it any further.

[13] For our purposes, only one issue in the Threshold regulation is relevant and that is the requirement that for the purpose of determining the turnover or asset size of the acquiring party one includes <u>all</u> the acquiring firms.[9] Thus if the firm directly acquiring the shares of the target firm, let's call it firm A, is controlled by another firm, firm B, one counts the values of both in determining the threshold. It is thus possible that despite the primary acquiring firm having a value below the lowest threshold, it might be deemed to be

[8] The most recent threshold regulation was published in Government Gazette number 31957 under Government Notice number 216 on 6 March 2009.

[9] Items 2 and 3 of the Threshold regulation.

controlled by a parent whose turnover may exceed the higher threshold and this would make that merger a large merger.

Provisions of the Act

[14] The Act defines the entity which acquires control as the primary acquiring firm. In this case the primary acquiring firm is Tiger Equity One (Pty) Ltd ("**Tiger One**") as that firm has acquired the business of Tolcon from the seller Murray and Roberts Limited. However as noted, the threshold rules count not just the turnover of the primary acquiring firm, but all the acquiring firms. The Act extends the definition of acquiring firm beyond the primary firm to include its parents. This so by virtue of the definition section in 1(1) where a primary acquiring firm is defined in 1(1)(i)(a) 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".*
> But the definition goes further to include the primary firm's parents, grandparents and even antecedents going further back in its family tree, by virtue of 1(1)(i)(b), which states that an acquiring firm is also one: *"... that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a)".*

[15] In this case the central legal issue to be decided is whether Tiger One's shareholders control it in sense contemplated in section 1(1)(i)(b), because if they do, the merger would be a large merger, as the value of at least one of those shareholders, would take the merger value above the higher threshold. Note that Tiger One is a shelf company created for the purpose of this transaction and presumably does not have any asset value or turnover at present. However it is common cause that if at least the turnover of one of Tiger One's shareholders, Corvest 5 ("**Corvest**") is to be included, because it

must be considered an acquiring firm, then its turnover alone would be sufficiently large to make the merger a large merger.[10]

Facts of the case

Procedural history

[16] The procedural history has not been clearly set out by either party in its papers and has had to be supplemented by oral submissions during the hearing to piece it together coherently. It appears the merging parties sometime in April 2014 filed the merger as an intermediate merger. At that stage no shareholders agreement had been filed. The Commission's merger department queried whether or not the merger was an intermediate merger and suggested that given that the primary acquiring firm had no turnover or asset size that this might indeed be a small merger.[11] However since the Commission was advised that a shareholders agreement in respect of Tiger One's shareholders was in the process of completion, the Commission suggested that the merger be re-filed once this agreement had been concluded as it might influence the categorisation of the merger.

[17] The merging parties accepted this advice and re-filed the merger on 30 May 2014, this time however as a small merger. At this stage a shareholders agreement in respect of the shareholders of Tiger One had been concluded and this was included in the filing although it seems to have been sent to the Commission to consider already sometime prior to the second filing. The reason the merging parties have given for filing what they consider is a small merger and thus one not necessary to file, was that the Commission has a policy that firms that are subject to prohibited practice investigations are obliged to file even small mergers with the Commission. The selling firm, Murray and Roberts, is currently the subject of investigations into collusion in the construction sector we were advised.

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[10] Corvest, as we discuss later, is a subsidiary of a large financial institution Rand Merchant Bank.

[11] Commission answering affidavit at para 11

[18] Having reviewed the new filing with the shareholders agreement now included, the Commission took the view that based on its terms, Tiger One was controlled jointly by all its shareholders. Once this conclusion had been reached, the merger was in the Commission's view, a large merger, and had not been properly notified. A Notice of Incomplete Filing was served on the merging parties on 13 June 2014. It is competent for the Commission to issue such a Notice if a merger is incorrectly classified by the merger party responsible for the filing.[12]

[19] The merging parties decided to challenge this Notice and brought an application to have the Notice set aside which explains the present proceedings before us. The merging parties' case is simple. No shareholder controls Tiger One and neither the Memorandum of Incorporation nor the shareholders agreement can be read to confer joint control by all the shareholders over Tiger One.

[20] The Commission filed an answering affidavit opposing the relief sought and essentially repeated the legal argument set out in the 13(2) Notice.[13]

The Notice

The terms of the Notice that are germane to this decision are that the merger had been incorrectly classified as a small merger. As the Commission put it:

"Contrary to the submission made by the merging parties that Tiger One is neither controlled directly or indirectly by an individual or a firm, it is our view that Tiger Equity One is controlled by Corvest, Tiger Equity Two, Tiger Equity Three, and Management shareholders as envisioned in sections 12(2)(b) and 12(2)(c) of the Act." [14]

[12] Commission rule 30(2)(a) read with rule 30(3)

[13] These allegations are summarised in paragraph 32 of the Commission's answering affidavit as follows "*the Commission concludes that Tiger Equity is jointly controlled by its shareholders as envisioned in section 12(2)(b) and (c) of the Act. This is due to the fact that the shareholders are entitled to vote a majority of the votes that may be cast at a general meetings and the fact that they have the right to appoint Directors. In addition, the shareholders retain certain powers indicative of their joint control over Tiger Equity One as alluded in specific clauses above...*"

[14] 12(2)(b) states, A person controls a firm if that person 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

[21] The Commission then explains that it relies on certain provisions in the Tiger One shareholders agreement for coming to this conclusion. We go on now to consider the shareholders agreement.

The shareholders agreement

(i) Parties shareholdings

[22] It is common cause that the primary acquiring firm is an investment vehicle known as Tiger Equity (One) Pty Ltd ("**Tiger One**") and that it is purchasing from Murray and Roberts Limited what is described as its Tolcon business.[15] Tiger One is a special purpose vehicle formed for the purpose of the transaction and has no turnover or assets at present. In terms of the shareholders agreement Tiger One is owned by the following shareholders in these proportions:

TABLE OF SHAREHOLDERS AND THEIR EQUITY

Name of Shareholder	Percentage of Equity
Judy Van Es**	9%
Grant Patmore**	6%
Ian Symon**	5%
Tiger Equity (Two) (Pty) Ltd (Tiger 2)*	26%
Tiger Equity (Three) (Pty) Ltd (Tiger 3)*	26%
Corvest 5 (Pty) Ltd ('Corvest')*	28%

*Referred to as the equity shareholders

**Referred to as the management shareholders.

The shareholders collectively own 100% of the company

directly or through a controlled entity of that person. 12(2)(c) states, A person controls a firm if that person is able to appoint or to veto the appointment of a majority of the directors of the *firm*.

[15] The term primary acquiring firm is explained below.

[23] The rights of the shareholders are contained in Tiger One's Memorandum of Incorporation and an accompanying shareholders agreement. Each shareholder has the right to appoint a director to the board. At board level that director would vote in the same proportion as the shareholder appointing him/her has equity in the company.[16] The same applies at shareholders meeting. Most decisions are made by ordinary resolution for which the requisite majority is more than 50%. Some issues require a special resolution for which not less than a 70%, majority is required.[17]

(ii) The Commission's argument

[24] The Commission contends that all six shareholders jointly control the company and for that reason they are to be regarded as joint controllers. As noted, the Commission relies on certain clauses in the shareholders' agreement for this proposition. However these clauses do not take the matter further. They provide for the voting rights at board and shareholders meeting level, the majority required for the passing of ordinary and special resolutions, the fact that certain strategic decisions require a special resolution to be passed and that the management shareholders manage the company subject to the direction of the board.

[25] The shareholders agreement confirms the voting majorities for ordinary and special resolutions set out in the Memorandum of Incorporation. Given the respective holdings of shareholders as set out in the Table, no single shareholder is able to block either an ordinary or special resolution. Even the largest shareholder, Corvest, at 28%, would be unable on its own to veto the passing of a special resolution. Nor would the director nominee of any single shareholder be able to block the board from passing a board resolution for which a simple majority is required.

[26] Of course an alliance between two or more shareholders might be able to do so. However that is not the Commission's case. Its case is that all the

[16] Memorandum of Incorporation clause 23.2

[17] Clauses 17.2 and 17.3 respectively of the Memorandum of Incorporation.

shareholders control the company and hence constitute acquiring firms for the purpose of the Act. Superficially that observation is correct. If all the shareholders voted en bloc they would control the company. But that is not the test on which one assesses whether shareholders are controlling shareholders.

[27] If the Commission's argument is correct any company with a finite number of identifiable shareholders, who collectively may appoint the board of directors, would be controlled by them and each would be an acquiring firm. As the merging parties pointed out in argument this would have the consequence that if any of them sold their shareholding, say in this case a 5% shareholder that would trigger a new notification obligation. However this is to mistake the fact that just because shareholders have agreed certain minimum ground rules, essentially over the constitution and governance of the company, they have agreed on its strategic direction, which is entirely another matter and the one relevant for competition law purposes when diagnosing for control. Clearly there needs to be something more to glue the respective shareholders together, than this limited form of agreement.

[28] It is certainly correct that a company can be controlled by more than one shareholder, a relationship normally referred to as joint control. We have, following other jurisprudence recognised this in our law as early as our decision in *Iscor/ Saldanha,* which held that where a firm is jointly controlled and one of the joint controllers sells its equity to the other, this triggers a notification, as it amounts to a change in control, as joint shareholding is a form of control distinct from sole control.[18]

[29] The case law of joint control developed from a situation of a two-firm parent model, where two firms own equity in a target firm and have equal voting rights. The distinctive feature of these arrangements is that the controllers are required to act together in controlling the target company, as without co-operation, the other controller can veto a decision of the target.

[18] ISCOR Limited and Saldanha Steel (Pty) Ltd (67/LM/Dec01)

[30] However joint control can also exist when there are more than two shareholders and can exist on either a de facto or de jure basis.[19] However the distinguishing feature of such an arrangement, again, is the ability of each of the joint controllers to enjoy a veto right over issues that are strategic to informing the commercial behaviour of the target firm.

[31] The ability joint controllers have to veto the proposals of another, forces them, out of self-interest, to work together in controlling the target. However the situation is very different on the current facts. No single shareholder can veto any resolution, whether ordinary or special. There is therefore nothing in the agreement indicating that shareholders collectively are forced to work together. Resolutions will either get the required majority or they will not. There is no guarantee that a shareholder that is part of a majority at one meeting may not constitute a minority at the next.

(iii) Comparative approach

[32] Both parties relied on the European Commission's Consolidated Jurisdictional Notice ("**the EC Guidance**") to support their arguments. We consider the EC Guidance useful persuasive authority on these issues.[20] However, read in its totality the EC Guidance is supportive of the merging parties argument not that of the Commission. Whilst it is true that in the EC Guidance it is recognised that joint control over company may exist where two or <u>more</u> shareholders have the "*...possibility of exercising decisive influence over another undertaking...*" "*....and that decisive influence is normally understood to mean*" "*...the power to block actions which determine the strategic commercial behaviour of an undertaking*".[21]

[19] Whish R and Bailey D, Competition Law (7th edition) at page 836-7
[20] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 (2008/C95/01) on the control of concentrations between undertakings. This notice is a guidance concerning the Commission's application of the EU Merger Regulation. The European Merger Regulation whilst not identical to our Act's section 12(1)(a) contains similar language for present purposes. The relevant provision, Article 3 (1)(b), provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.
[21] Ibid at para 62

[33] The EC Guidance also provides that joint control might still exist, despite the fact that there is no equality in shareholders' rights or where there are more than two shareholders. For instance the EC Guidance envisages that a special majority might be required for strategic decisions, which would give a minority shareholder a right to veto decisions that are "*...essential for the strategic behaviour of the joint venture*".[22]

[34] Thus far these excerpts might be seen to support the Commission's line of reasoning. However the EC Guidance goes on to make the following observations that limit the application of the approach set out in the previous excerpts. First the EC Guidance points out that inclusions of minority protections for shareholders giving them veto rights over normal shareholder protections, it cites by way of example resolutions to change the articles of association or increase or decrease capital, do not confer "*...joint control on the minority shareholder concerned*".[23]

[35] By way of contrast, the Guidance regards a veto over a budget is regarded as symptomatic of decisive influence over the commercial policy of a company, since without approval of a budget, the company's commercial behaviour is constrained. In the present case however, as noted, whilst budget approval requires a special resolution of over 70% of the shareholders, no single shareholder has on its own the ability to block such a resolution. Even Corvest at 28% is not able to do so unless acting together with another shareholder.

[36] The Guidance does contemplate situations where *de facto* minority shareholders might act together to vote on issues where they have strong common interests. But as it goes on to caution, "*The greater number of parent companies involved in such a joint venture, however, the more remote is the*

[22] Ibid at para 65
[23] Ibid at para 66

likelihood of this situation occurring".[24] However and perhaps most saliently for purposes of this case the Guidance observes:[25]

> "*In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking.*"

[37] In this case, belatedly during the argument, the Commission suggested that a commonality of interest might exist between the so-called equity shareholders, as Corvest had a significant minority shareholding in each of Tiger 2 and Tiger 3. Corvest is a subsidiary of Rand Merchant Bank and according to the shareholders agreement, responsible for providing a guarantee to the seller on behalf of the acquirers and is also the provider of the largest shareholder loan.[26] That may well have been the beginning of an interesting argument for alleging the existence of such a coalition amongst the three equity shareholders based on a commonality of interest or the ability of Corvest, acting on its own, to exercise material influence over the other equity shareholders and hence the target firm a form of control contemplated in section 12(2)(g).

[38] However this was not the case made out by the Commission either as a basis for issuing the 13(2) Notice or even in its answering affidavit. The Commission's case must stand or fall on the basis of the reasons stated in the Notice; that case was premised on *de jure* control by all the shareholders in terms of sections 12(2)(b) and (c).

[24] Ibid at para 74
[25] Ibid at para 80
[26] See shareholders agreement clauses 10.2.2 and 11

[39] Since the extent of the Commission's case is limited to the contents of the shareholders agreement read with the Memorandum of Incorporation, there is no evidence to suggest that all the shareholders will agree all the time on strategic commercial issues. Given the shareholder configurations amongst the six shareholders, at any time some shareholders might ally against others, to get through or block resolutions including special resolutions. Thus, to use the language of the EU Guidance, the possibility of changing coalitions is evident.

[40] For this reason we find that taken collectively the shareholders of Tiger One cannot be found to control that entity based on the provisions of the existing shareholders agreement. As this is the only evidence before us on which to decide the matter, the 13(2) Notice cannot be sustained as a matter of law and we accordingly granted the relief sought to set it aside.

Consequential issues

[41] During the course of argument in this matter the panel members asked what the consequences of setting aside a Notice in terms of section 13(2) are. The merging parties argued that the rules provide for this and that if the notice is set aside the status quo resumes. In terms of Commission rule 29(1) read with rule 30(6), if the Form 13(2) is set aside, the merger period is deemed to run from the day after the filing. This means that the time period that has elapsed since the issuing of the Notice and the order to set it aside is no longer suspended and the time period that has elapsed during that period of suspension counts against the Commission.

[42] This has serious consequences for the Commission, where, as in this case, the Form 13(2) determination is set aside and what it considered a large merger is now found to be what the parties notified it to be, a small merger. Recall that with small and intermediate mergers the Commission is subject to a mandatory time period to reach its decision and if it does not do so, the period cannot be further extended. The merger is deemed to have been approved.

[43] Although the Act permits the Commission within 20 business days, to extend the time period for consideration by 40 days, it appears that in this case, relying on the correctness of its Form 13(2) it had not done so. The panel asked both the merging parties whether a declaration of invalidity of the Notice could be accompanied by a declaration suspending that invalidity for a period that would allow the Commission to still discharge its investigation within a reasonable period. Since this issue had not been contemplated by either side on the papers, and in fairness to them, neither had had the opportunity to prepare on this point, we have therefore not decided whether we have such a power and secondly, if we do, in which circumstances we would exercise it in favour of the Commission.

[44] We would observe that the Commission going forward may wish to consider the consequences of a Notice being set aside as a real possibility and to avoid this outcome it should continue to investigate a merger notwithstanding, and further to be mindful of the need to extend the merger period in terms of section 13(5) or 14(1)(a), depending on whether the merger is small or large. Where a Notice has been issued within the time periods set out in the Commission rules and if an application has been brought to set it aside within the time periods the rule provides, a total period of 15 business days since the filing of the merger, the Commission will still have 5 business days for it to issue an extension notice or even if an application has not yet been brought, to, *ex abundante*, if there is some indication that a party disputes the validity of the Notice, to still extend the period.

[45] Of course there is always the danger that parties filing a merger may not give the Commission the full facts on which it can make a determination as to whether the target firm's shareholders or some of them, may be considered controlling firms for the purpose of the Act and hence the correct classification of the merger. Although we do not need to decide this point in this case it seems that the Commission can rely on both the provisions of section 15(1)(a) of the Act which empowers it to revoke its own decision to approve a merger

where based on incorrect information or utilise the penalty provisions of section 59(d)(i).[27]

Conclusion

[46] Form CC 13(2) issued by the Commission to the merging parties in this matter dated 13 June 2014 is set aside. A copy of our order to this effect which is dated 23 July 2104 is annexed hereto marked A.

Norman Manoim — 4 August 2014 DATE

Anton Roskam and Takalani Madima concurring

Tribunal Researcher:	Moleboheng Moleko
For the merging parties:	Rudolph Labuschagne – Bowman Gilfillan
For the Commission:	Ngoako Moropene and Xolela Nokele

[27] Section 59(d)(i) provides for the imposition of an administrative penalty if the parties to a merger failed to give notice of a merger as required by Chapter 3. Section 13 A of the Act, which is found in Chapter 3 states that a party to an intermediate or large merger must notify the merger to the Commission in the prescribed manner and form.