COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: PM249Mar16

In the matter between:

SOVEREIGN FOOD INVESTMENTS LTD	Applicant

And

COUNTRY BIRD HOLDINGS (PTY) LTD	First Respondent
SYNAPP INTERNATIONAL LTD	Second Respondent
KEVIN WILLIAM JAMES	Third Respondent
KEVIN WILLIAM JAMES NO	Fourth Respondent
CLIVE DENNIS KERN NO	Fifth Respondent
CLINTON CHARLES HOLING NO	Sixth Respondent
COLIN RODNEY JAMES	Seventh Respondent
LYALL CLIFFORD McNEILL	Eighth Respondent
MARIELLE COLETTE REGINE LECLUSE	Ninth Respondent
FRITZ GROBBELAAR	Tenth Respondent
THE COMPETITION COMMISSION	Eleventh Respondent

Panel	: Norman Manoim (Presiding Member) : Fiona Tregenna (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	: 22 March 2016
Order issued on	: 24 March 2016
Reasons Issued on	: 07 June 2016

Reasons for Decision

Introduction

[1] In this case the applicant seeks a declaratory order and an interdict against the first to tenth respondents (referred to in the papers in the singular as the "Country Bird group") to prevent them voting their shares at a forthcoming general meeting of the company.[1] The applicant apprehends that the respondents will either themselves or abetted by unknown others, attempt to take control of the company by vetoing certain special resolutions to be proposed at the general meeting. On 24 March 2016 we gave our order dismissing the application (as per Manoim PM and Tregenna TM with Mokuena TM dissenting). The reasons for the dismissal of the application by the majority of the panel and the reasons for the dissent follow.

Majority decision

[2] The relief sought by the applicant is rather lengthy but can be summarised as follows:

2.1. The applicant seeks a declaratory order that if it votes at least 25% of the shares represented at a shareholders meeting to be held on 29 March 2016, so as to enable it to defeat the special resolutions to be proposed and passed there, it will acquire control of Sovereign for the purposes of section 12(2)(a) read with sections 12(2)(b), alternatively 12(2)(g) of the Competition Act, Act 89 of 1998 (the Act).[2]

2.2. Second, a declaratory order that it be obliged to notify the merger in terms of section 13A (1) and not implement it, as required by section 13(A) 3 of the Act.[3]

[3] The declaratory prayers are followed by two more prayers that follow the assumption that the Country Bird group acquires the shares contemplated in the

[1] Although cited as the eleventh respondent the Commission has not filed any papers and has indicated it would abide by the decision of the Tribunal.
[2] Notice of Motion, prayer 2.1.
[3] *Supra*, prayer 2.2.

declaratory prayers: The first is to direct it to notify the merger, and the second to interdict it from implementing the merger *inter alia* by voting any shares it has in Sovereign until the change of control has been approved by the Competition authorities.[4]

[4] The practical effect of this relief is to prevent the Country Bird group from voting against the resolutions at the applicant's general meeting of the 29 March 2016, either by voting these shares if they have them or to discourage them from acquiring them, if they intend doing so.

[5] It is common cause that:

5.1. If the exercise of voting the shares, as contemplated in the Notice of Motion, constituted a merger, then in terms of the turnover and asset size of the parties involved, the acquisition by the Country Bird group would constitute a notifiable merger;

5.2. A notifiable merger may not be implemented without the approval of the Competition Authorities; and

5.3. The Country Bird group has not been given such approval.

[6] The remaining issues are in dispute.

[7] Specifically the application raises three threshold issues; do the respondents presently have the means to effect the veto; alternatively even if they don't at the time of hearing, is there a reasonable apprehension that they might at the time of the general meeting; and thirdly, if this apprehension is found to be reasonable, does the exercise of the vetoing of the resolution constitute a form of acquisition of control by the Country Bird group?

[8] The first two issues relate to the mechanism of acquisition; the third to the substantive content of the resolutions in question and whether vetoing them would constitute a form of control.

[4] Supra, prayers 3.1 and 3.2.

History

[9] According to the applicant, the first to tenth respondents, although separate legal persons, are all interconnected and have the same unity of purpose insofar as the applicant's business is concerned. For this reason the applicant has referred to them as the "Country Bird group", although technically no such entity exits. Since these respondents do not deny that an interconnection exists amongst them, we will simplify issues by using the same terminology as the applicants do to refer to the first to the tenth respondents. As a finding of fact we will assume, because it has not been seriously disputed, that the first to tenth respondents can be considered to be a single grouping for the purpose of this decision.

[10] The applicant's case relies on a history of inter-actions between it and some members of the Country Bird group, which it alleges it will show the latter's intent to control it.

[11] It is necessary for us to consider this history briefly.

[12] Sovereign alleged that the Country Bird group had previously meddled in key corporate and strategic affairs of Sovereign. In support of this accusation Sovereign relied on two episodes of share purchases made by the Country Bird group or some of its constituents, first in 2009 and then later in 2015. Whilst the Country Bird group has not denied the purchases, it does dispute some of the conclusions that Sovereign seeks to draw.

[13] We now go on to consider these acquisitions.

Country Bird's initial acquisition and disposal of shares in Sovereign

[14] In mid-2009, when it was facing financial difficulties, Sovereign announced that it was in negotiations with a possible suitor who could alleviate the cash flow problems it was encountering. The envisaged transaction involved a proposed "reverse" listing of Afgri Operations Limited's ("Afgri") food division into Sovereign. This transaction constituted an important strategic transaction for Sovereign and required a special resolution of Sovereign members to bring it

about. During this time Country Bird acquired a 22.76% interest in Sovereign which resulted in Country Bird being the second largest Sovereign shareholder enabling it de facto to defeat the special resolution. It was common cause that Country Bird was against the implementation of the Afgri transaction, which Sovereign subsequently abandoned.

[15] To address Sovereign's predicament, the board proposed a R100 million rights issue, which once again required a special resolution of Sovereign shareholders. Sovereign alleges that the Country Bird group sought to stymie the rights issue, which it could do by virtue of its stake in Sovereign. Sovereign then decided it could only proceed with a "*claw-back*" offer, because that did not require a special resolution. But the drawback was this restricted its ability to raise capital. Country Bird elected not to follow its rights and subsequently disposed of its shares in early 2010.

Country Bird group's subsequent acquisition of shares in Sovereign

[16] From July 2015 onwards, in a series of transactions, the Country Bird group acquired further shares in Sovereign, so that by October of that year it held 1,263,563 shares. It is unclear what sparked this initial investment in Sovereign shares.[5] In that same month, Sovereign announced an intention to implement certain strategic transactions for which it required the passing of certain special resolutions. The material aspects of these resolutions were:

a. the repurchase of 10% of its shares at a price of R 8.50; and

b. The creation of a trust that would take up these shares that inter alia consisted of a management grouping and a BEEE group ("**the proposed transactions**")

[17] Shareholders were notified that these resolutions were to be proposed for adoption at a general meeting on 14 January 2016 ("**the first meeting**").

[18] On 31 December 2015, being the last day on which shares in Sovereign could be traded for their holders to attend and vote at the first meeting, the Country

[5] The Country Bird Group acknowledges these acquisitions in its answering papers, but does not explain it.

Bird group through one of its investment vehicles acquired another 3.7 million Sovereign shares thus increasing its interest to 6,173,742 shares representing 8.1% of the issued share capital in Sovereign.

[19] Sovereign suggests that because the purchases were made subsequent to the posting of the circular, they were evidence of the Country Bird group's conforming to what it termed its historic strategy of acquiring sufficient of Sovereign's shares to enable the Country Bird group to block its strategic resolutions. Presumably the reference to historic strategy meant the events of 2009 referred to above. The Country Bird group denied this intention and said its reasons were motivated by the discount between the shares as they were then trading, and the buyout premium of R8.50.

[20] However, claims Sovereign, in the ensuing fortnight, the Country Bird group, represented by Investec Bank Limited's corporate finance team, sought to persuade Sovereign's institutional shareholders to vote against the proposed transactions. The Country Bird group chose not to respond to it to this allegation claiming it was vague and unsubstantiated.

[21] At the same time, members of the group:

21.1 Took steps to be represented at the first meeting to speak and vote against the proposed resolutions; and

21.2 Notified Sovereign that the 2nd respondent (Snyapp), the Buzby Trust[6], Colin James (7th respondent) and Marielle Lecluse (9th respondent):

21.2.1 were dissenting shareholders for purposes of section 164(3) of the Companies Act, as regards the resolutions proposed to be passed at the first meeting;[7] and

21.2.2 intended opposing the resolutions as envisaged in section 115(8) of the Companies Act.

[6] Of which Kevin James (the fourth respondent) is a trustee.

[7] The appraisal remedy, provided for **in section 164** of the Companies Act, allows a Shareholder to opt out of the company for a fair cash consideration if the company proceeds with certain corporate transactions with which the Shareholder does not agree.

Sovereign's general meeting of 14 January 2016

[22] Sovereign shareholders representing 84.27% of all the voting shares attended the meeting in person or by proxy. Although the dissenting shareholders voted all their shares (representing about 10% of voting rights at the first meeting) against all the proposed resolutions, each of them was passed by around 85% of all the shares represented at the first meeting.

[23] On 15 January 2016 Sovereign informed the dissenting shareholders of their rights under section 164 of the Companies Act. In response the dissenting shareholders demanded payment at fair value for their Sovereign shares, which was claimed at R8.50 a share.

[24] A war of words then broke out between the Sovereign Board and the Country Bird Group. This involved the intricacies of the appraisal rights of a dissenting shareholder to be bought out in terms of the Companies Act. This dispute was later to form the subject matter of a High Court dispute that need not concern us here. Sovereign seeks to rely on what was stated during the various angry exchanges that took place between the respective parties. Sovereign accused the Country Bird group of attempting to foil its BEE transaction, or weaken the company financially by forcing it to buy it out.[8]

[25] In another twist of the tale Country Bird's James sent an email meant for his attorney, inadvertently to Sovereign's attorney. The email states "*No worries Clint* [the name of Country Bird group's attorney] *we stopping at 9.9%.*"

[26] Sovereign suggests that James intended with this email to either misrepresent Country Bird group's true intentions or that he later changed his mind subsequent to sending his email[9]. James' version is that his email was a response to a preceding email from his attorney warning him that if they exceeded a 10% shareholding, they would have to notify this fact in terms of the Companies Act.

[27] By February 2016 the germ of Sovereign's approach underpinning the current transaction emerged. Sovereign's attorneys accused the Country Bird Group of

[8] See Record page 35, para 71.2.3.
[9] See Record 40 para 83.

acting in concert to defeat a transaction of strategic importance to Sovereign the *"achievement of which would constitute a notifiable merger."*[10]

[28] Although the Sovereign board could have elected to purchase the dissenting shareholders' shares, it chose not to do so. The reason was apparently affordability. Had it repurchased these shares it would have faced the prospect of expending roughly R70 million on the repurchase.

[29] Instead it tried to resolve the problem by proposing an amended special resolution to put to shareholders. The material terms of the BEE transaction remained. What changed was that instead of offering to repurchase 10% of the shares, it reduced the offer to 5%, although the repurchase price remained R8.50.

[30] Sovereign shareholders are required to approve the revised transactions by special resolutions. It is the fate of this resolution that underpinned the present application.

[31] It is common cause that in late February and early March 2016, representatives of the Country Bird group approached institutional shareholders of Sovereign offering to acquire their shares in the company. Discussions were also held between a Marthinus Stander and Ettiene Du Preez, respectively executives of Country Bird and Sovereign, where Stander appeared to feel out the latter around media reports that another poultry producer, Astral Foods, might be interested in acquiring Sovereign. Nothing much came of this discussion. Du Toit alleges that Stander had told him that Country Bird was opposing the BEE resolutions because if they were passed it would increase the costs of Country Birds' intended acquisition.

Sovereign's general meeting of 29 March 2016

[32] On 24 February 2016 Sovereign convened a general meeting on 29 March 2016 (**"the second meeting"**) and notified shareholders of the proposed:

32.1 Revocation of the resolutions passed at the first meeting; and

32.2 Implementation of the revised transactions which were of fundamental importance to the affairs of Sovereign.

[10] Record Page 38 para 78.

[33] Dissenting shareholders whose rights had not been reinstated in terms of section 164(10) of the Companies Act that by virtue of section 164(9), were advised that they would not be entitled to attend or vote at the second meeting unless and until they withdraw their demands to have their shares repurchased at fair value.[11] The last day on which shares in Sovereign could be traded for their holders to attend and vote at the second meeting was 11 March 2016.

[34] Sovereign shareholders are required to approve the revised transactions by special resolutions.

[35] It is common cause that at the date of our hearing on 22 March 2016 the Country Bird Group controlled just under 10% of the shares of the applicant. A special resolution requires the approval of 75% of the members present and voting at the meeting.

[36] It is quite clear that with 10% of the votes, the Country Bird Group cannot veto a special resolution unless less than 40% of its members were in attendance and voted. It is also common cause that on average over the past few years attendance at general meetings of the applicant was 67% and at the recent general meeting this figure was higher than average at 84%. It is also common cause that institutional shareholders representing 70% of the shares have indicated to the company that they will vote in favour of the special resolution. There is no suggestion on the papers that these shares will not be voted at the meeting. This means that the possibility of a low turnout at the general meeting where the quorum is less than 40% is highly unlikely.

[37] It is thus improbable that the Country Bird group can veto a special resolution with its current shareholding.

[38] It is of course possible that of the approximately 20% of the remaining shareholders (if we exclude the 70% institutional shareholders and the 10% of the Country Bird group) some proportion may vote with the Country Bird group to defeat the special resolution.

[11] In terms of section 164(9) a shareholder who has sent a demand in terms of subsection 5, has no further rights in respect of those shares, other than to be paid their fair value unless the shareholder withdraws that demand before the company makes an offer for those shares or allows such offer to lapse.

[39] However, in order to do so it would require an additional 14% of shareholders voting in person or by proxy, all of whom would have to vote against the special resolution.[12] If any voted for it, Country Bird group's task would be even more daunting. This figure exceeds both the average general meeting attendance figure and the higher figure at the recent general meeting where a similar special resolution was to be voted on. One can assume that even if this resolution attracts greater shareholder attention than does the average general meeting, the attendance figure would not be markedly higher than the January attendance figure of 84%.

[40] But even if we are wrong on the probable attendance figure remaining similar to that in January 2016, the arithmetic on its own suggests that the probabilities of success for Country Bird group defeating the special resolution are remote. This also assumes of course in the applicant's favour that the respondents or other dissenting shareholders are not precluded from voting.[13]

[41] Alive to this problem with the shareholder arithmetic, the applicant's chief executive officer Christopher Coombes indicated in his replying affidavit that the precise number of shares the Country Bird group may have acquired might have increased between the time of the filing of the papers and the time of the hearing, sufficient for it to exercise the form of control at issue.[14] He did however make the following concession:

> *"However if it transpires before or on the day of the hearing that the Country Bird group took no steps to increase its interest in Sovereign in the relevant period, then Sovereign accepts that there may be no need for interdictory relief but reserves its rights to seek an order from the Tribunal in terms of prayers 2 and 4 of the Notice of Motion.*[15]

[42] At the hearing the applicant advised us that it had at that time no further information about an increase in the Country Bird group's shareholding.

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[12] This assumes 94% of the shares are voted (70% for the institutional shareholders + 10% for the Country Bird Group plus the additional 14%) Since 25% of 94 = 23.5 it would require 14% of the remaining 20% of shareholders i.e. 70%of them to vote against the resolution.
[13] At the time of our hearing this was an aspect of separate dispute going before the High Court.
[14] Applicant's replying affidavit paragraphs 9-11 record pages 284-5
[15] Applicant's replying affidavit paragraph 12 of the record page 285.

[43] One would have thought that this would have been the end of the matter.

[44] However, the applicant at the hearing shifted the emphasis of its application from actual apprehension to a reasonable apprehension.

[45] This too arises from the replying affidavit. After receiving the answering affidavit the applicant's attorneys wrote to the respondents' attorneys to request:

"... an unequivocal confirmation that no Country Bird group member or associate whether directly or indirectly and/or beneficially, through nominee companies or third parties:

...acquired any additional shares in Sovereign in the relevant period; ... and/or secured any contractual or other rights in and to additional shares in Sovereign, with the intention of voting them in concert with the respondents, in the relevant period."[16]

[46] This undertaking was refused. The Country Bird group's attorneys wrote back to say that their clients had answered the factual averments made in the founding affidavit in their answering affidavit and accused the applicant of using the letter to extend the relief sought beyond that contained in the application. They advised that for this reason they were not willing to provide such confirmation.[17]

[47] The thrust of the applicant's argument now has been to seize on this refusal to justify the grant of a declaratory order. According to Coombes in his replying affidavit the refusal to provide the confirmation was significant as it *"... would have been easy to provide such confirmation if it were true."*

[48] Mr Snyckers, who appeared for the applicant, focused his case on this point. He argued that the situation was analogous to the situation of an applicant who asks a respondent who has threatened him or her with violence to give an undertaking that he would not carry out the threat in future. If the respondent refused, the applicant would have sufficient basis to apprehend harm and seek interdictory relief.

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[16] Replying affidavit supra paragraph 15.
[17] See letter from Bowman Gilfillan dated 17 March 2016, record page 317.

[49] However, we do not think the analogy is apposite in this case. Voting shares is, unlike an assault, not a *prima facie* unlawful act which a party seeking to reassure another that its actions were lawful might be expected to confirm. Ordinarily the voting of shares is a lawful act and the Country Bird Group's refusal to submit to the applicant's set of interrogatories cannot form a basis to infer an apprehension of unlawfulness.

[50] Nor should the applicant be allowed to make its case out in reply.

[51] Thus on this basis as well the case should fail.

[52] However, just in case we are wrong on this point we must then consider the further or third leg of the case, which is whether the act of vetoing against the special resolutions constitutes an acquisition of control.

[53] On this point the applicant relied strongly on a decision of the Competition Appeal Court (CAC) in the case of *Gold Fields Limited v Harmony Gold Mining Company Ltd and Another* where the court interdicted a shareholder from voting its shares pending notification of the acquisition as a merger.[18]

[54] Gold Fields had proposed a resolution to its shareholders to vote on at a general meeting. The resolution was to permit Goldfields to pool its assets outside of SADC with those of another firm IAMGold. In return Goldfields would receive 70% of the equity of IAMGold. The sale was considered by Gold Fields to add to it a significant portfolio of non-SADC assets.[19] It also constituted a significant restructuring of Gold Fields as it transferred significant assets of its own into another firm albeit that it would hold 70% of that firm.

[55] One shareholder Norilsk, which held 20% of Gold Fields, had indicated to the board its opposition to the proposal but was unsuccessful in this.

[56] The situation changed when Harmony, a rival gold miner entered the fray with its own proposal. Structured in two stages, the Harmony offer, in its first stage, was to acquire only 34.9% of the shareholders shares. In terms of the second

[18] 2005 1 CPLR 74(CAC).
[19] See Gold Fields supra page 91.

stage, Harmony offered to acquire further Gold Fields shares, so that at the end it would acquire more than 50% of the shares.

[57] At the same time Harmony obtained an irrevocable undertaking from Norilsk that it would vote with Harmony at the Gold Fields general meeting to veto the IAM Gold resolutions.

[58] At the time of the general meeting in question it was possible that if shareholders accepted the first stage of the Harmony offer, it together with Norilsk could vote at least 54% of the shares and thus successfully vote against the IAMGold transaction.

[59] Although parts of the decision, and an earlier one by the Tribunal, deal with question of whether the Harmony two-part offer was severable, we do not need to consider that question now.

[60] What the applicant relies on, and it is clear the CAC made findings on as well, was the question of whether, if the first offer had been accepted by the time of the general meeting, and that Harmony and Norilsk voted their 54% shares to torpedo the IAMGold transaction, this would constitute an acquisition of control for the purpose of section 12(2)(g) of the Act.

[61] Harmony had argued that it wasn't an acquisition of control as the resolution was a temporary alliance. The argument was that if shareholders were to be construed as joint controllers (neither on its own had a voting majority) then there must at least be some showing of an interest that they would always or almost always vote together on material decisions.

[62] The CAC rejected this interpretation and held that *"... there was no textual basis for distinguishing between short and long term control particularly when the wording of section 12(2)(g) is carefully considered."*

[63] But although the court seems to have rejected the idea that the acquisition of control required some time dimension, it was the materiality of the resolution that stood to be defeated by Harmony and Norilsk that counted in the CAC's determination of the acquisition of control. The judgement notes:

"... As a result of the early settlement offer and the irrevocable undertaking from Norilsk the first respondent will be able to effect a permanent and irreversible change to the structure of a competitor; at the very least it will be able to materially interest (sic) a key policy of appellant by ensuring that appellants long term strategy of entering into the IAMGold transaction could not be implemented."

[64] The question in this case is whether, if we assume for the applicants that the Country Bird group has obtained sufficient undertakings from other shareholders so as to enable it to defeat the special resolutions, this would amount to an acquisition of control. Put in the court's language, does the veto of the special resolutions amount to effecting a permanent and irreversible change to the structure of the applicant.

[65] Neither the content of the resolutions nor the history of how they came to be proposed, suggests this is the case. The resolutions do not change the structure of the applicant in the way the thwarted IAMGold resolution would have for Gold Fields. Granted the proposed special resolutions change the shareholding ratios, diluting some in favour of others, but the structure of the firm remains the same; nor does the passing of the resolutions lead to a new controller. Second, the history of the resolutions shows that they are not immutable. Since the unsuccessful attempt to pass them at the January meeting, the directors made some changes to the special resolutions and proposed them again in changed form. This suggests that from a content point of view there is nothing irreversible about them. No doubt even if defeated at the March meeting, the scheme could again be amended to make it more appealing to some of the objecting shareholders. The veto even if successful does not lead to a permanent and irreversible change which was feature that the CAC identified as determinative for it in *Gold Fields.*

[66] Further distinguishing this case from *Gold Fields* is that the Country Bird group has made no takeover offer contingent on the defeat of the special resolutions. There is no inevitability that if the resolutions are defeated the next stage is the inevitable control of the applicant by the Country Bird Group. Nor does the past history of Country Bird group's actions with respect to the applicant, constitute a sufficient evidential basis to place the present case on all fours with those in *Gold Fields.* If anything the Country Bird Group's past history has been ambiguous – it is unclear if it has ambitions to take control, to get a better offer

for someone to buy its shares by applying pressure on the board, or if it wants to do no more than make life difficult for a rival. In *Gold Fields*, the dissenting shareholder (Harmony) had put a formal takeover offer to shareholders – no such communication is present from the Country Bird Group.

[67] We thus find that even if the Country Bird group had obtained irrevocable undertakings from a sufficient number of shareholders to effect a veto of the special resolutions, such an action would not amount to the acquisition of control for the purposes of the Act.

[68] We must be careful not to allow companies facing hostility to board proposals to use the Competition Act's merger provisions to thwart shareholder voting activity. This would be an unwarranted interference in the governance of companies and the acquisition of control by way of an ability to veto a board's proposed resolution should not be lightly inferred.

Conclusion

[69] The application fails in three respects. The applicants have failed to demonstrate that the Country Bird group will be able to vote more than 25% of the shares at the general meeting, nor that it has shown a reasonable apprehension that they might, and finally, even if they could, this would not constitute the acquisition of control for the purpose of the Act.

Mr. Norman Manoim

DATE 07 JUNE 2016

Prof Fiona Tregenna concurring

DISSENTING OPINION

Mrs Mokuena's Reasons

[70] I have read the reasons of my colleagues in this matter. I regret I cannot agree with their conclusion. In my view the applicant should have been granted the

declaratory order and interdict against the first to the tenth respondents. I differ with my colleagues approach and conclusion on three issues:

(a) the first to the tenth respondents do not have the means to effect the veto;

(b) there is not reasonable apprehension that they might have the means at the time of the general meeting to effect the veto;

(c) vetoing the resolution does not constitute a form of acquisition of control.

[71] In these reasons I will not repeat facts already traversed by my colleagues. I will supplement the summary of facts (in the reasons) and bring into sharp focus those facts which are not addressed by my colleagues, which I consider important for my dissent.

[72] Sovereign issued a cautionary note on 5th March 2009 and 21 April 2009, to the effect that it was in negotiations and the price of the shares of the company could be affected. Subsequently Country Bird increased its shares in Sovereign to 13.4% on 14 May 2009.

[73] Sovereign and Afgri Operations Limited (Afgri) made a further announcement about negotiations that they were engaged in to effect a *"reverse"* listing of the food division of Afgri into Sovereign. The effect of the *"reverse"* listing would inject the much needed cash into Sovereign. Sovereign considered the transaction strategic and an answer to its financial problems.

[74] Country Bird purchased more shares in Sovereign making it the second largest shareholder with 22.76% on 1st June 2009. Prior to increasing its stake in Sovereign to 22.76%, Country Bird had already announced on 20 May 2009, its intention to make an offer to purchase all the shares of shareholders of Sovereign.

[75] The announced intention to make an offer to purchase shares of shareholders of Sovereign did not materialise. Instead, Country Bird informed Sovereign that, it will not support the special resolutions for the Afgri transaction. The Afgri transaction was abandoned.

[76] Sovereign endeavoured to raise R100 million through rights issue in respect of Sovereign's 17 million unissued shares. The rights issue also required a special

resolution of shareholders. Again Country Bird frustrated the rights issue by advising Sovereign that it will not support the necessary special resolution for the rights issue. Sovereign settled for the less attractive option, to raise funds through a *"claw-back offer"* which, Country Bird did not support. Country Bird failed to fund Sovereign.

[77] Subsequently, Country Bird sold its 22.76% Sovereign shares. Country Bird in its announcement in February 2010 said *"...when CBH identified Sovereign as a potential take-over target. Following unsuccessful negotiations between the parties, Sovereign proceeded with a rights issue which was not supported by CBH and talks were therefore terminated. Following this development the CBH board has decided that it was in the best interest of CBH to sell its investment in Sovereign and apply the cash flow to CBH's requirement."*[20] This sale followed shortly after Country Bird had scuppered the Sovereign Afgri deal and Sovereign's financial woes continued.

[78] Country Bird is Sovereign's competitor and became aware of its financial problems, and scuppered every endeavour Sovereign made to make its shares attractive in the market and bolster its finances. Country Bird's refusal to support the proposed special resolutions to revise the remuneration of Sovereign's incentive scheme of its executives and non-executive directors and the introduction of a BEE, is indicative of an emerging pattern to control the destiny of Sovereign.

[79] Interestingly five years later, Country Bird between July and October 2015, acquired shares in Sovereign again.[21] In October 2015 Sovereign announced its intention to buy back its shares, bring in a BEE and change the short and long term incentive scheme of its Executive Committee and the non-executive directors' fees policy.

[80] Country Bird voted against the special resolutions which were intended to effectuate the strategic transactions of Sovereign in the meeting of 14 January 2016. Due to Country Bird voting against these special resolutions, this gives rise to an obligation on Sovereign to fork out R70 million to repurchase Country

[20] See page 67 of the record. Country Bird said it was selling the shares to apply the money to its requirements.
[21] See the summary of the facts in the majority reasons at paragraph 15 to 23.

Bird's shares. This obligation put a further financial strain on Sovereign's already constrained financial position.

[81] Cognizant of its financial constraints, Sovereign opted to revise the resolutions passed on 14 January 2016. Sovereign proposed a revised transaction to its shareholders of the majority's reasons.[22] I agree with the majority that 10% shareholding on its own cannot veto special resolutions of shareholders. However, I do not discount the possibility that Country Bird could persuade other shareholders to vote with it. If it is to succeed, its 10% voting rights and the balance of 20% of other shareholders if successfully persuaded by Country Bird, would carry the vote which veto the special resolutions as proposed by the Board of Sovereign to the shareholders.

[82] Therefore, it is not farfetched of Sovereign to bring this application. Country Bird has approximately 10% shares in Sovereign. Sovereign's apprehension that Country Bird could veto the special resolutions with other shareholders is reasonable or directly by having increased its shares prior to 11 March 2016 should not be discounted. Sovereign requested Country Bird to categorically state that it does not have an agreement with other shareholders to veto the special resolutions, and, has not increased its shareholding in Sovereign, but declined to do so. The question that Country Bird did not answer during the hearing was, *"why was Country Bird not willing to put this matter to rest by simply unequivocally answering the question?"* Why was it willing to contest an application for an interdict and a declaratory order, incur legal costs when, that could have been avoided by an answer? I am therefore of the view that Sovereign's apprehension is not unfounded and unreasonable under the circumstances. Therefore granting an interdict to Sovereign was appropriate.

[83] I agree with my colleagues that it is trite that an applicant cannot make its case in a reply; however, I cannot uphold the respondent's submission that, that is the case in this instance. Sovereign did not make its case in the reply. Sovereign responded to Country Bird's answer, which was equivocal. If replying to an answer is considered making a case, wouldn't that defeat the need and purpose of a reply.

[22] See sub-paragraph 21.1 and 21.2.

[84] I am cognizant of the fact that Country Bird's bid to get the support to veto the special resolutions at the shareholders meeting on 14 January 2016 was not supported. I am however of the view that, that does not mean that this time Country Bird will not succeed. If it has nothing to hide, it could have just given Sovereign the necessary assurance. It is trite that if an undertaking is given, the courts usually do not grant an interdict.

[85] The concession made by Christopher Coombes referred to by my colleagues does not in any way suggest that everything is well in all material respects. This does not mean that control cannot be exercised by Country Bird and other shareholders through voting in line with S12(2)(g) of the Act. According to the law *"It is not necessary for the applicant to establish on a balance of probabilities that the injury will occur, he simply establish on a balance of probabilities that there are grounds for a reasonable apprehension that his rights will be detrimentally affected."*[23]

[86] I do not appreciate why this dispute had to come to the Tribunal, when it could have been resolved quickly. What Sovereign wished to know could have been answered with a simple no! Country Bird could have just indicated unequivocally that it does not have agreement(s) with other shareholders to veto the special resolutions, and has not acquired more shares before 11 March 2016. Of importance is that, an interdict is not granted in circumstances where the apprehended action has already occurred. If the horse has bolted, it cannot be stopped, thus our law provides for interdicts. What has come and gone cannot be interdicted. In this dispute before us, Country Bird has on more than one occasion endeavoured to thwart Sovereign's strategic decision, which goes to its ability to survive as a business. There is a history which should not be ignored and, it is not unreasonable or unjustified of Sovereign to have brought an application for an interdict to this Tribunal.

[87] The law is clear and simple with regard to, or not to grant an interdict. Interdicts are preventive in nature and function. *"When there is a threatened infringement of an applicant's clear right he need not wait for the actual infringement to occur,*

[23] Herbstein and Van Winsen in *The Civil Practice of the High Courts of South Africa*, Volume 1, 5th Edition, page 1466.

but may approach the court to restrain the threatened conduct."[24] The applicant does not have to show that the act occurred, but that there is apprehension of it occurring. We are dealing here with a determined shareholder which has approached institutional shareholders, and it is unclear who else Country Bird sent feelers to. Country Bird alone knows who else it approached. I am of the opinion that Sovereign's application for an interdict is not an abuse of the legal process as submitted by Country Bird.

[88] Taking into consideration the history outlined in these reasons, the applicable principles to grant an interdict, the public interest (BEE) and the purpose of the Act, I am persuaded and satisfied that the apprehension of Sovereign, was neither hypothetical nor imaginary but, was reasonable under the circumstances therefore, an interdict should be granted.

[89] With regard to the conclusion that vetoing the special resolution does not constitute a form of acquisition of control, and must be contextualised taking into account S12(2)(g) of the Act. Section 12(2)(g) provides that *"A person controls a firm if that person- has 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)".* Country Bird not once but thrice has conducted itself in a manner that has *materially influenced* the strategic direction or policy of Sovereign.

[90] Country Bird communicated its intention not to support the rescission of the special resolutions of 14 January 2016, and the passing of the revised resolution which permits Sovereign to buy back 5% of its own shares (instead of 10%), and the implementation of the BEE transaction.

[91] Sovereign submitted that, to grow its sales and get continued support from companies such as Bidvest, it is necessary to be BEE compliant. Perhaps it is appropriate at this stage to refer to the Preamble of the Act, which provides that the Act is intended to facilitate the eradication or removal of unjust historical restrictions, which prevented others from participating in the economy of South Africa. The strategic decision of Sovereign would address that aspect of our

[24] Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th Edition, Volume 1, page 1465.

history. Giving previously disadvantaged persons the opportunity to be part of Sovereign should be commended. Taking the necessary strategic steps to do so is good policy that complies with the provisions of s2(f) of the Act. This, Country Bird stymied, contrary to public interest considerations.

[92] I agree with the majority that *"Ordinarily the voting of shares is a lawful act and the Country Bird group's refusal to submit to the applicant's set or interrogatories cannot form the basis to infer an apprehension of unlawfulness."* However, the conduct of Country Bird cannot be ignored. The history to this dispute points to Country Bird having exercised control over Sovereign in the past, by forcing Sovereign to abort implementing its strategic decisions. Effectively Country Bird's conduct influenced the strategic direction of Sovereign in the past and, was planning to continue doing so on 29 March 2016, which gave rise to the application. For example, Sovereign abandoned the Afgri transaction, the rights issue and opting for the *claw-back offer,* and endeavouring to rescind its decision of 14 January 2016 and reduce the risk of having to pay R70 million, which would have aggravated its precarious cash position. **CAC in *Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd*** said that, s12 of the Act envisaged *'a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market structure, and in particular reduces the level of competition in the relevant market.'*

[93] The Official Journal of the European Union[25] provides that *"Control is defined by Article 3.2 of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence will be actually exercised. However, the possibility of exercising that influence must be effective. (18) Article 3.2 further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of facts and law involved. A control may occur on a legal basis or de facto basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertaking."* Control is not exercised only if a shareholder has 25% or more in a company. It can be exercised by a shareholder with less shares by other means, which is

[25] See page 95-97.

what Sovereign is concerned about. Country Bird did not give an undertaking to nor did it assure Sovereign that there are no *other means* which it can veto the special resolutions proposed for 29 March 2016.

[94] My philosophy of the application of the Act is that, the Act must be applied, interpreted and implemented mindful of the Constitution. I am mindful of the fact that the Constitution is the pillar which guides the application of all legislation in the Republic.[26] In particular s9(2) of the Constitution provides that *"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."* The Act is one of the many measures taken and its purpose in s2(f) is relevant in this application.

[95] Country Bird's conduct cannot be considered a normal application of the Companies Act, without balancing that against the purpose of the Act, in particular s2(f) i.e. to promote BEE.[27] Thwarting Sovereign's important strategic direction and business decision is tantamount to materially influencing its policy, consequently exercising control over it.

[96] In conclusion, vetoing the special resolutions of Sovereign in the manner Country Bird has done, (in the past) it is exercising control and if it does so at the shareholder's meeting, the declaratory order is appropriate and am satisfied that it should be granted together with the interdict sought.

07 June 2016

Ms Medi Mokuena dissenting

Tribunal Researchers:	Derrick Bowles assisted by Kameel Pancham
For the Applicant's	Adv FA Snyckers SC, Adv RM Pearse as instructed by Cliffe Dekker Hofmeyr Attorneys.

[26] The Constitution, Act 108 of 1996.
[27] The purpose of this Act is to promote and maintain competition in the Republic in order- to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

For the First to tenth Respondents:	Adv. MJ Engelbrecht as instructed by Bowman Gilfillan Attorneys.