COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020578

In the matter between:

Hosken Consolidated Investments Limited	**First Applicant**
Atterbell Investments Proprietary Limited t/a Gallagher Convention Centre	**Second Applicant**
and	
The Competition Commission	**Respondent**

In re the intermediate merger between:

Hosken Consolidated Investments Limited	**Primary Acquiring Firm**
and	
Atterbell Investments Proprietary Limited t/a Gallagher Convention Centre	**Primary Target Firm**

Panel	: Yasmin Carrim (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Anton A Roskam (Tribunal Member)
Heard on	: 20, 24 and 25 March 2015
Order Issued on	: 27 March 2015
Reasons Issued on	: 7 May 2015

Non-Confidential Reasons

Conditional approval

[1] On 20 January 2015, the merging parties, namely, Hosken Consolidated Investments Limited ("HCI") and Atterbell Investments Proprietary Limited ("Atterbell") t/a Gallagher Convention Centre ("GCC") filed an application in terms of section 16(1)(a) of the Competition Act No. 89 of 1998 requesting the Competition Tribunal ("Tribunal") to reconsider their intermediate merger that was prohibited by the Competition Commission ("Commission") on 22 December 2014.

[2] The Commission prohibited the merger on the ground that it would result in a substantial prevention or lessening of competition in the market for the provision of exhibition venues and exhibition facilities. The merging parties, however, held the view that the merger would not result in any competition concerns and further that the merger can be justified on the public interest, given the positive effects it would have on employment.

[3] At the hearing of the matter on 20 March 2015 both the merging parties and the Commission indicated that they were willing to engage in discussions in an effort to arrive at an agreed set of conditions. The Tribunal stood the matter down and afforded them an opportunity to do so. We ultimately issued an order approving the merger on 27 March 2015 subject to the conditions attached hereto. Our reasons for conditionally approving the proposed transaction follow below.

Background

[4] In 2005 Mercanto Investments Proprietary Limited ("Mercanto") made an offer to acquire all the remaining shares in Johnnic Holdings Limited in a hostile takeover. Mercanto was at that time wholly-owned by HCI and already owned 35% of the share capital in Johnnic. Johnnic intervened at the Tribunal[1] and raised a number of competition concerns, central to these was the overlap between large exhibition and conference centers namely Sandton Convention Centre ("SCC") owned by Tsogo Sun in which HCI is a shareholder and Gallagher Estate owned by Johnnic at that time.

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[1] Tribunal case number: 78/LM/Aug05.

[5] During the course of that Tribunal hearing, HCI tendered a condition on the basis thatwhile they did not agree with the substantial lessening of competition raised by Johnnic, they were willing to offer a divestiture of the business of Gallagher Estate and the entire shareholding of Johnnic in Gallagher Holdings. The condition was accepted by the Tribunal and the merger was approved conditionally.

[6] Subsequent to the Tribunal's decision, HCI, in order to comply with its own divestiture obligations, submitted to the Commission that it sought to divest the "GCC Business" but sought to maintain ownership of the immovable property on which the GCC business was situated. The Commission rejected the proposed divestiture on the basis that it was not in compliance, from a competition law analysis, with the Tribunal's order. In its reasons the Commission explained that the fact that HCI by virtue of its control of the immovable property, which was a critical input in the business of the GCC, had the ability to adversely affect GCC's competitiveness in the market of exhibition and conference centers, by for example raising the rental and/or other charges pertaining to that input.

[7] HCI challenged the Commission's decision and took the Commission on review to the Competition Appeal Court ("CAC").[2]

[8] The CAC over-turned the Commission's interpretation and allowed for the separation of property and business. HCI was therefore allowed to retain the property on which the GCC business was situated but had to divest the GCC Business. HCI subsequently sold the GCC Business to Atterbell. HCI now seeks to buy back the GCC Business from Atterbell.

Parties to transaction

Primary acquiring firm

[9] HCI is a public company listed on the JSE. HCI is not controlled by any single firm but its largest shareholders are the Southern African Clothing and Textile Workers' Union and associated entities ("SACTWU") – 32.2% shareholding and Mr M.J.A Golding – 6.78% shareholding.

[2] Johnnic Holdings Limited, Mercanto Investment (Pty) Ltd and the Competition Tribunal, The Competition Commission and Rupert Smith, N.O Case no: 69/CAC/Mar07

[10]HCI controls a number of subsidiaries, however, of relevance for purposes of this transaction is that HCI controls TIHC Investments Proprietary Limited ("TIHC Investments") and Johnnic Holdings Limited ("Johnnic"). TIHC Investments controls Tsogo Investment Holding Company Proprietary Limited ("TIHC"). TIHC in turn controls Tsogo Sun Holdings Limited ("Tsogo Sun").

[11]Johnnic controls Johnnic Properties Limited ("Johnnic Properties"), which in turn controls Gallagher Estate Holdings Limited ("Gallagher Holdings"). Gallagher Holdings controls Gallagher Convention Centre Limited ("GCC Limited").

[12] HCI is involved in, amongst others, the hotel and leisure, interactive gaming (including in the non-casino gaming industry), media and broadcasting, transport, mining, clothing, and property sectors. Tsogo Sun is involved in the hotel, gaming and entertainment industries and has operations throughout Africa, the Middle East and the Seychelles.[3] Tsogo Sun also operates 20 conferencing and exhibition facilities at its hotels situated within the Sandton, Fourways, Rosebank, Auckland Park and Johannesburg areas. Of central relevance to this transaction is that Tsogo Sun wholly controls the SCC business which also offers conferencing and exhibition facilities in Johannesburg. Further, through Johnnic Properties, HCI owns the property on which the GCC Business is situated.

Primary target firm

[13]The primary target firm, Atterbell which trades as Gallagher Convention Centre ("GCC") is controlled by the Gallagher Charitable Trust "the Trust". The Trust controls the GCC Business. The Trust was established for charitable purposes and has as its object the procurement and utilisation of donations and accruals for payment, or on behalf of the beneficiaries of the Trust. The GCC Business is a conference and exhibitions venue situated in Midrand, Johannesburg. Both Atterbell and the Trust do not control any other firm.

Proposed transaction and rationale

Description of the transaction

[3] These operations are undertaken through Tsogo Sun Hotels Gaming and Entertainment (Pty) Ltd ("Tsogo Sun Hotels") and Southern Sun Hotels (Pty) Ltd ("Southern Sun").

[14]The proposed transaction involves HCI purchasing the entire share capital of Atterbell. Pursuant to the implementation of this transaction, HCI will own 100% of the issued share capital of Atterbell and will therefore control Atterbell. As a result of this acquisition, HCI will also own and control the GCC Business.

Rationale

[15]The Trust had decided to exit the convention and exhibition center and to focus on its charitable objectives. [redacted]

[16]HCI submits that the purchase of Atterbell and subsequently the Gallagher Leases would result in HCI being able to continue the operation of GCC while also affording it the flexibility to efficiently develop various pieces of land to better reflect current tenant and market demands in the area.

Relevant Markets and Impact on Competition

Product market

[17]The Commission identified two relevant markets for this transaction, namely, (i) the market for the provision of conference venues and facilities for big conferences of

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[4] This was the eventuality the Commission had anticipated during its assessment of HCI's proposed divestiture of the GCC Business in the Johnnic transaction

[5]According to the merging parties, various cost-cutting measures have already been implemented at the GCC Business in order to make it the most profitable it can be and therefore additional cost cutting measures to neutralise the effect of increased rental obligations are not possible.

more than 500 delegates and (ii) the market for the provision of exhibition venues and facilities. As indicated above, the market for the provision of exhibition venues and facilities was identified by the Commission as likely to raise competition concerns post-merger.

Geographic market

[18]In relation to the market for the provision of conference venues and facilities for big conferences of 500 delegates or more, the Commission concluded that the relevant geographic market is national based on submissions it received from interviews with various exhibition customers.

[19]In relation to the market for the provision of exhibition venues and facilities, the Commission found it difficult to delineate the exact scope of the relevant geographic market as exhibition shows are designed around the location of its target market, i.e. the characteristics of the market is such that the market is taken to the customer. However, as this was the market that the Commission identified as likely to raise concerns, it analysed the competitive effects of the transaction in the Johannesburg area due to the fact that there are only a few players operating in this area.

Market shares

[20]In respect of the national market for the provision of conference venues and facilities for big conferences of more than 500 delegates, the Commission found that the merging parties will have a market share of 27.6% post-merger. The Commission however found that the merging parties will still face competition from at least nine competitors, including inter *alia* Birchwood Hotel, Emperors Palace, Nasrec Expo, St. Georges Hotel, Sun City, and Tshwane Events Centre in Gauteng and a number of other venues in Durban and Cape Town.

[21]In respect of the market for the provision of exhibition venues and exhibition facilities, the Commission found that the merging parties will have a market share of 50.1% post-merger. The Commission's investigation revealed that this market is highly concentrated pre-merger and that there will only be three players in the market, i.e. the merged entity, the Coca Cola Dome and Nasrec Expo Centre. The Commission also found that SCC and GCC are closest competitors and that they have similar

product and service offerings in that they both host conferences and exhibitions at similar prices. The Commission was further informed by five exhibition organisers that there are no reasonable alternative venues apart from SCC and GCC. In addition, the Commission's investigation further revealed that the barriers to entry into this market are high and customer's countervailing power is extremely limited. The Commission therefore concluded that this merger will not only remove an effective competitor from the market but that it is also likely to raise concerns around unilateral effects post-merger thereby allowing the merged entity to exert market power by raising prices to the detriment of exhibition organisers. The Commission prohibited the merger on this basis.

Consideration application

[22]In their original request for consideration the merging parties submitted that whilst they agreed with the Commission that their activities overlap in the market for the provision of exhibition venues and exhibition facilities, they disagreed with the geographic market arrived at by the Commission, i.e. the Johannesburg area. According to the merging parties, the correct competitive assessment of the geographic market should have encompassed a broader consideration of firms and potential competitors on at least a regional basis.

[23]Subsequently and prior to the hearing, the merging parties filed an amended request for consideration on 10 March 2015. In the amended application, the parties submitted that they still did not agree with the Commission's assessment and conclusion on the geographic market, but were not going to take issue with the analysis, because in their view the counterfactual position relied upon by the Commission was the incorrect one. In other words they argued that the Commission had assessed the proposed merger against the pre-merger situation whereas in their view the appropriate counterfactual was that leases expire in [redacted] and this would render the GCC Business unmarketable as was assessed by the Trust.

[24]The Commission rejected the merging parties counterfactual on the basis that the Trust had arrived at a unilateral decision that the GCC Business is unlikely to be financially viable to any other purchaser at the outset and without thoroughly testing the market. The Commission furthermore noted that the projections that were

submitted by the Trust, were not audited and therefore there was a strong possibility that the financial analysis was uncorroborated.

[25]On the first day of the hearing the merging parties indicated to the Tribunal that they had elected not to contest the Commission's analysis of the relevant markets and were willing to negotiate with the Commission to arrive at an agreed set of conditions.[6] The matter was stood down by agreement between the parties in order to provide them with an opportunity to reach agreement on conditions that would adequately address the concerns raised by the Commission. No evidence was led or heard in the matter.

[26]Following these discussions, the Commission and merging parties agreed on a set of conditions and requested that the transaction be approved subject to those conditions.

[27]On the basis of the stance adopted by the merging parties, we assume that the Commission's analysis stands uncontested namely that the proposed transaction was likely to result in the lessening or prevention of competition in the market for the provision of exhibition venues and exhibition facilities and assessed whether the proposed conditions adequately addressed the Commission's concerns.

[28]In summary, the conditions provide firstly that the businesses of SCC and GCC are kept separate and will not be integrated; including putting in place measures to ensure that competitively sensitive information does not flow between the two businesses. This condition addresses the concern that the transaction results in a removal of an effective competitor, i.e. the GCC Business. Secondly, the conditions provide that the Atterbell/GCC Business will not increase prices to its exhibition customers by more than CPI per annum for a period of at least four years. This condition addresses the concern relating to the possibility of unilateral price increases post-merger. The condition further requires HCI to ensure the continuance of the GCC Business for a period of four years so as to ensure that exhibition customers would still have a reasonable alternative.

[29]In conclusion, we find that the proposed conditions adequately address the competition concerns raised by the Commission.

[6] See Transcript 24 March 2015

Public interest

[30]The merging parties submitted that if this transaction is prohibited, this will have a negative impact on employment as a prohibition will result in [redacted] employees and approximately [redacted] part-time employees losing their jobs. The merging parties also submitted that HCI has a strategic and public interest objective in maintaining employment in South Africa, having regard to the fact that its major shareholder is the trade union, SACTWU.

[31]The parties also submitted that although they currently want to retain the GCC business, it is possible that the business may not continue operation in perpetuity or at least not in its current form, should the transaction be approved. According to the parties, this is because they have plans to develop Gallagher Estate/the land it owns adjacent thereto as and when development opportunities arise, depending on the economic feasibility thereof. In light of this, a condition dealing with employment has also been agreed to by the Commission and parties. This condition requires HCI to maintain employment levels of the GCC Business and in the event of the business closing down, HCI is required to preserve employment of all permanent employees/provide such employees with training or finding alternative employment.

Conclusion

[26] In light of the above, we conclude that the proposed conditions adequately addresses the competition concerns raised by the Commission as well as any employment concerns which may have resulted from a prohibition of the transaction. Accordingly, we approve the proposed transaction subject to the conditions annexed hereto marked as "A".

Ms. Yasmin Carrim

07 May 2015
DATE

Ms. Medi Mokuena and Mr. Anton A Roskam concurring

Tribunal Researcher:	Ipeleng Selaledi and Aneesa Ravat
For the merging parties:	Lizel Blignaut and Darren Smith of ENSAfrica
For the Commission:	Nelly Sakata, Seema Nunkoo and Layne Quilliam