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CONTROL – 'SOMEWHERE IN THE FUTURE'

Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another (CCT296/17) 2019

The Constitutional Court of South Africa upheld an appeal and replaced the order of the Competition Appeal Court (“CAC”) in February this year, ordering that the proposed merger transaction between Hosken and Tsogo Sun (in 2017) did not constitute a notifiable merger in terms of the Competition Act.

Tsogo Sun was jointly controlled by HCI and SABMiller, however, in 2014 SABMiller disinvested itself from its shareholding in Tsogo Sun with the effect that HCI’s beneficial shareholding in Tsogo Sun would increase to 47.61%. As such, HCI became the largest shareholder in Tsogo Sun and the de facto controller of Tsogo Sun.

HCI approached the Commission and applied for merger approval for the acquisition of sole control of Tsogo Sun in 2014 (with 47.61%) and also notified the Commission of its intention to acquire more than 50% of the issued share capital of Tsogo Sun somewhere in the future. The Commission investigated and approved the merger unconditionally in 2014, noting that it was the intention of HCI, post-merger, to ultimately increase its shareholding in Tsogo Sun beyond 50%.

In 2017, when HCI sought to affect its proposed restructuring, whereby HCI would increase its shareholding in Tsogo Sun to more than 50%, the dispute arose. HCI therefore intended to acquire de jure control of Tsogo Sun. The Commission advised HCI that the transaction amounted to a notifiable merger.

Dissatisfied with the Commission’s opinion, HCI and Tsogo Sun approached the Competition Tribunal and eventually on to the CAC, who found and held that an acquiring company, having already obtained prior merger approval from the Commission to acquire sole control of an entity, need not to obtain merger approval before entering into a subsequent transaction with that entity. The 2017 transaction therefore did not constitute a notifiable merger as the competition authorities had previously approved the acquisition in 2014 and had clearly accepted the two phased transaction which would ultimately result in HCI acquiring de jure control of Tsogo Sun “*somewhere in the future*”.

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