COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 78/LM/Aug05

The large merger between:

Mercanto Investments (Pty) Ltd

and

Johnnic Holdings Ltd

Reasons

Introduction

1. On 7 December 2005 the Competition Tribunal approved the merger between Mercanto Investments (Pty) Ltd and Johnnic Holdings Ltd subject to the condition that the merged entity shall, within 12 months of the date of the order, divest the following business:[1]

    1) the business of the Gallagher Estate Exhibition and Convention Centre as a going concern; and/or
    2) the entire shareholding of Johnnic Holdings in Gallagher Estate Holdings Ltd.

The transaction

2. This is a hostile takeover in which Mercanto Investments (Pty) Ltd ("Mercanto"), in terms of the Securities Regulation Panel, made a compulsory offer to acquire all the remaining shares in Johnnic Holdings Ltd ("Johnnic"). Mercanto already owns 35% of the share capital in Johnnic.

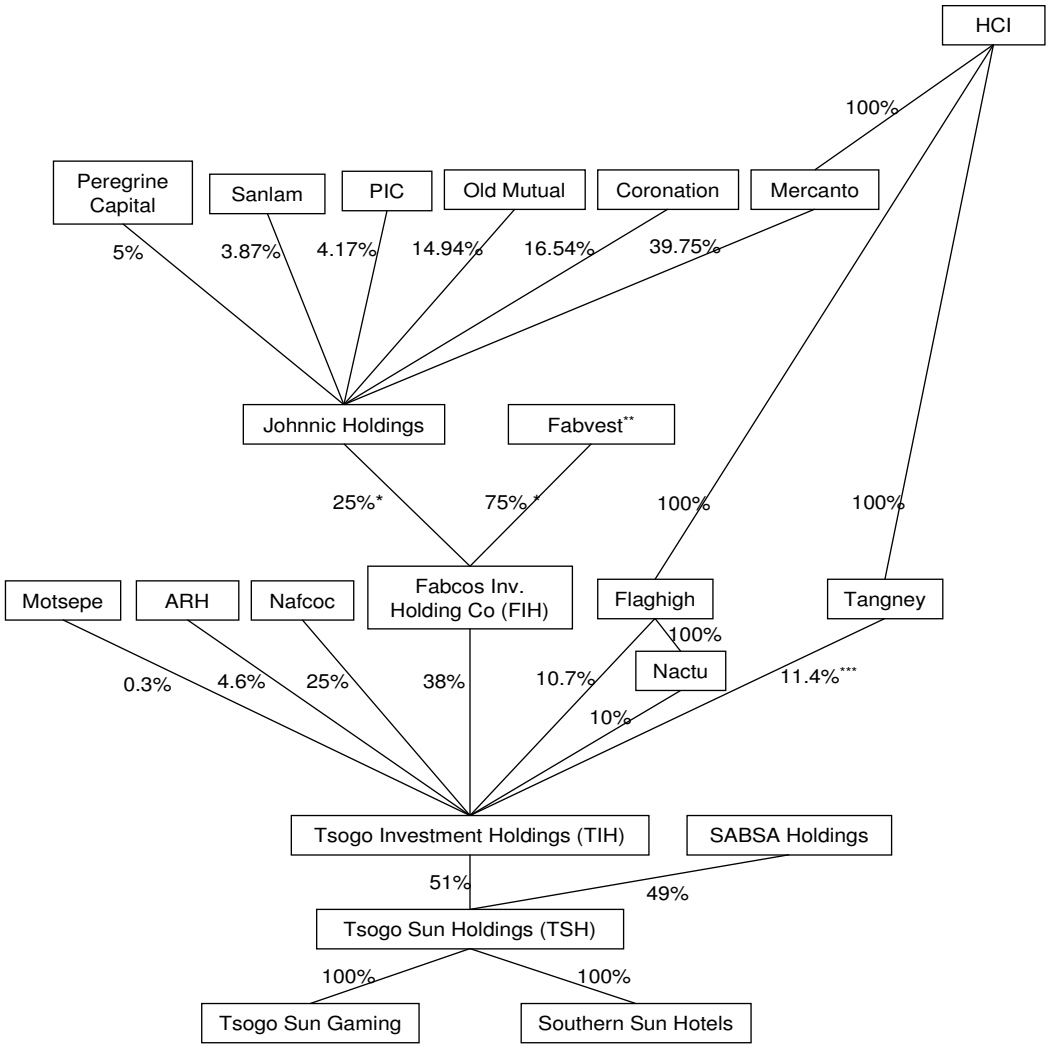
3. Mercanto is a wholly owned subsidiary of HCI, an investment holding

1 See order attached as Annexure A.

company listed on the JSE. The principal areas of investment of the HCI group involve media and broadcasting, information technology, gaming, financial services and transport.

4. Johnnic, the primary target firm is also an investment holding company listed on the JSE. Its principal areas of investment are currently concentrated in gaming and exhibitions.

5. The merging parties' pre-merger relationship is intertwined through a web of shareholdings in various subsidiaries as set out in the diagram below:[2]



* In the event that the suspensive conditions to the second tranche are fulfilled, both Johnnic Holdings and Fabvest will each hold a 50% interest in FIH.

** HCI has purchased 100% of the shares in Fabvest, subject *inter alia* to obtaining the approval of the relevant Gaming Boards, which approval has yet been obtained.

*** Tangney's shareholding in TIH is the subject of a dispute in the High Court of South Africa.

2 For an analysis of the diagram see Johnnic Holdings Ltd v Hosken Consolidated Investments Ltd and Competition Commission Tribunal Case No: 65/FN/Jul05, par 13 onwards.

Transaction background

6. HCI, through Mercanto, and Johnnic have been engaged in a battle for the control of Tsogo Investment Holding Company (Pty) Ltd ("TIH"), the controlling shareholder in Tsogo Sun Holdings (Pty) Ltd ("TSH") the largest gaming and hotel group in South Africa since the beginning of 2004.[3]

7. On 21 July 2005 Johnnic, in an effort to stop HCI from acquiring more shares, filed an application with the Tribunal for a declaratory order and an interdict, based on the allegation that HCI had implemented an actual or proposed merger with Johnnic without the approval of the competition authorities. The matter was heard on 22 September 2005 and on 21 October 2005 the Tribunal dismissed the application finding that Johnnic had failed to show that HCI had acquired control of Johnnic.[4]

8. On 3 August 2005 Mercanto filed a merger notice with the Commission after which, on 15 August 2005, Johnnic notified the Commission that it would file a separate merger notification in terms of Rule 28 of the Competition Commission Rules for the Conduct of Proceedings. The Commission referred its recommendation to us on 4 November 2005. On 11 November 2005 the Registrar set the matter down to be heard on 6 December 2005.

9. Johnnic informed the Tribunal that it would oppose the Commission's recommendation and subpoenaed the following witnesses to produce documents as well as appear before the Tribunal: [5]

    1) Jabu Mabuza, Managing Director: Tsogo Sun Holdings
    2) Steven Joffe, Chief Excutive Officer: Gold Reef Casino
    3) Lynn Chamier, Director for Africa (Pty) Ltd
    4) Carol Weaving Managing Director: Thebe Exhibitions and Events Group (Pty) Ltd
    5) Ron Stringfellow Chief Executive Officer: Tsogo Sun Group
    6) Ian Geoffrey Young: Ian Young Consulting.

3 See the Tribunal's summary of this battle as set out in par 10 to 29 of Tribunal Case No: 65/FN/Jul05.
4 See supra.
5 Since the Tribunal ruled that it would not hear evidence on either the exhibitions market, nor on the Gambling market, as set out in this decision, Jabu Mabuza, Ian Young, Lynn Chamier and Ron Stringfellow were released from further attending the hearing as witnesses.

10. On 5 December 2005 Johnnic also submitted a report by Genesis on the "*Impact on competition in the market for exhibition facilities*".

The Commission's recommendation

11. The Commission identified two relevant product markets in this transaction:

    1) The Gaming, Hotels & Leisure product market; and
    2) The Exhibition & Conference facilities product market.

12. It found that the transaction would not have any effect on HCI's market share in the Gaming, Hotel & Leisure industry ("the casino market") since the transaction would merely result in HCI increasing its shareholding in TIH and the Suncoast Casino & Entertainment World. TSH's market share in this market would remain unchanged after the transaction.

13. In the Exhibition & Conference facilities market it found that both HCI and Johnnic had interests in the Sandton Convention Centre ("SCC") in Johannesburg. Johnnic also owned the Gallagher Estate in Midrand. Within this broad market it identified two sub-markets, the market for consumer exhibitions, meetings and conferences with less than 1000 delegates and those with more than 1000 delegates. The Commission considered the geographic market as national.

14. It found that there were a large number of competitors in the smaller conference product market and that the transaction would not substantially lessen competition in that market. Its investigation in fact revealed that the lower the number of delegates, the higher the number of competitors competing in that particular market.

15. Within the larger sub-market the Commission considered all venues with a capacity of 1000 delegates or more because both SCC and Gallagher can accommodate events in excess of 1000 people. It found that even on a narrow geographic definition of the market, i.e within the Johannesburg area, there were alternative venues competing with SCC and Gallagher Estates.

16. In light of this the Commission found that the transaction would not substantially lessen or prevent in the relevant markets. It accordingly recommended that the transaction be approved without conditions.

The issues raised during the hearing

17. The hearing was set down for one day namely 6 December 2005. The Tribunal had previously indicated to the parties that should they require any further days for the hearing such request should be made in writing and in advance.[6] No such request was received from either party by the day of the hearing. Nor did any of the parties request a pre-hearing prior to the hearing in order to settle any outstanding discovery issues. Despite being aware of the hearing date since 11 November 2005, Johnnic only provided the Tribunal and HCI with a list of witnesses on 1 and 2 December 2005.[7] Apart from the representatives of the merging parties and the Commission, also present at the hearing was Mr Steven Joffe.

18. At the commencement of the hearing a number of preliminary matters were identified by the Chairperson. It was agreed that it was of critical importance to deal with the presence and status of the evidence of Mr Joffe (who was represented at the hearing in order to oppose a subpoena served on him at the last minute) and the status of the Genesis report that had been filed and served on 5 December 2005. Mr Joffe, the CEO of the Gold Reef City Casinos ("GRC") had been served with a subpoena on 1 December 2005 by Johnnic to testify at the hearing. Mr Rubens, on behalf of Mr Joffe, indicated that his client wished to oppose the subpoena and to request the Tribunal to withdraw it on procedural and substantive grounds.

19. The panel decided that the first issue that should be dealt with was to determine whether it was necessary for the Tribunal to hear evidence from Mr Joffe or not. In arriving at this decision the Tribunal would have to consider the relevance of Mr Joffe's evidence. GRC was not a party to this transaction. Mr Joffe was being summonsed as a witness by Johnnic to give evidence on inter alia the relationship between GRC and HCI.. A decision on this matter would also determine whether the Tribunal ought to hear evidence on the arrangement between GRC and HCI regarding the acquisition by GRC of SABSA's 49% in TSH. A finding was made that Mr Joffe was not required to give evidence on the GRC matter and that there was no need to hear any further evidence on the proposed transaction. The hearing continued with the panel undertaking to provide its reasons for that decision herein.

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6 See Tribunal letter dated 8 November 2005.

7 In order to accommodate Johnnic's last-minute list of witnesses, the Tribunal indicated during the course of the hearing that it had set aside the following day, 7 December 2005, as a further day in the event that more time was needed.

20. A second and critical matter that the Tribunal was asked to decide on was whether the Genesis report filed on behalf of Johnnic should be admitted in the proceedings due to it being served late. The Genesis report dealt with the competition aspects of the exhibition and conference facilities product market. Arguments were made by the parties and the hearing was adjourned in order for the panel to make its decision. After the adjournment and before the panel could communicate its decision, HCI tendered a condition to be attached to an approval of the merger which abbreviated the hearings to a substantial degree. HCI indicated to the Tribunal that it was willing to propose a divestiture of Gallagher Estates as a condition for the approval of this merger.

21. A further adjournment was sought and a draft proposal of divesture was tendered to the Commission and the Tribunal for consideration. The Commission had no objections to this proposal. Mr Unterhalter, however, argued that the Tribunal should nevertheless hear evidence on whether in fact such a condition could cure the competition concerns raised in the Genesis report. The Tribunal agreed to hear one further witness, Ms Carol Weaving on the basis that her evidence should be restricted to the proposed condition only.

Decision

22. Our decision to conditionally approve this transaction turns on two fundamental questions raised during the hearing:

    1) Whether it was necessary to hear evidence relating to the casino product market, for which Steven Joffe was called as witness; and

    2) Does the proposed divestiture of the Gallagher Estate exhibition Centre cure the competition concerns that Johnnic had raised in its Genesis report as supported by Carol Weaving's evidence?

23. We will firstly deal with the casino market and whether Joffe's evidence is required.

24. Mr Joffe had been served with a subpoena by Johnnic to testify in the proceedings. The only basis of opposition raised by Johnnic in its submissions to the Commission on 13 September 2005 in relation to the casino market was that this merger should be prohibited because it was

related to another transaction between HCI and Gold Reef City Casinos ("GRC"). This other transaction ("the proposed transaction") was referred to in paragraph 12 of the HCI circular issued to Johnnic shareholders of 1 August 2005 and captured under the heading of "*Special Arrangement*". No other concerns were raised by Johnnic in relation to the casino market.

25. *The special arrangement between HCI and GRC is set out in the HCI circular to Johnnic Shareholders, specifically the following paragraphs:*[8]

"If HCI, through Mercanto acquires shares in Johnnic in terms of the offer at a price higher than 975 cents per Johnnic share, then HCI has undertaken to pay GRC the difference between such higher price and the 975 cents per Johnnic share acquired from GRC pursuant to the GRC acquisition.

HCI has confirmed to GRC that it is agreeable to supporting GRC, should make an offer sounding in GRC shares and cash, for the entire issued share capital of TSH on terms to be agreed with SABSA, provided that:

- *HCI participates in GRC's negotiations with SABSA so that it is fully aware of the manner in which the offer price is agreed upon and other arrangements contemplated for the operation of the merged company;*

- *HCI accepts it may be necessary to restructure TSH's gearing, provided the level of gearing does not exceed a level that HCI and its advisors believe to be prudent;*

- *The consideration to be paid to TIH will be the same price per TSH share as that paid to SABSA, it being understood that the consideration will be discharged (in whole or part) by the delivery of GRC shares and the value attributed to the GRC shares shall not be higher than the price paid by any person investing in any issues of GRC shares from 30 June 2005;*

- *The agreement with SABSA to purchase its shares is signed in writing*

8 See page 59 and 66 of the record.

by not later than 31 December 2005.

HCI envisages participating in GRC after its contemplated acquisition of TSH. GRC and HCI anticipate concluding a voting pool agreement with the controlling shareholders of GRC."

26. Johnnic objected to the merger in a letter to the Commission on 13 September 2005, on the basis that it arises partly as a result of this special arrangement between HCI and GRC, which arrangement constitutes a restricted practice in terms of s4(1)(a), 4(1)(b)(ii) and (iii) of the Competition Act.[9]

27. The argument put forward by Johnnic seems to go along the following lines: HCI could only acquire GRC's 10% in Johnnic by providing GRC with the undertaking contained in the special arrangement above. This special arrangement is an arrangement between competitors, HCI and GRC, who are in a horizontal relationship. The arrangement would lead to a lessening of competition in the casino market because it would lead to a concentration in the market and is not justified by any pro-competitive gains, constitutes division of markets between HCI and GRC as contemplated s4(1)(ii) in that HCI has agreed not to compete with GRC in its acquisition of SABSA's shares and constitutes collusive tendering between competitors for the SABSA shares in TSH.

28. In support of its objection, Johnnic filed a report on 26 September 2005 with the Commission dealing with the competition implications of the arrangement between HCI and GRC.[10] In essence the report considers the arrangement from two perspectives, first, that the arrangement is a violation of s4(1)(a), s4(1)(b)(ii) and 4(1)(b)(iii). Second the report examines the competition consequences on the assumption that *GRC had already acquired the SABSA shares* in TSH and that HCI and GRC would be exercising joint control of TSH. Finally the report concludes that the arrangement could lead to the exchange of competitively sensitive information between HCI and GRC. The report does not deal with the competition effects, if any, of HCI's acquisition of Johnnic.

29. At the hearing Mr Unterhalter argued that the Tribunal should consider the arrangement between HCI and GRC as an agreement designed to ultimately result in the joint control of TSH by HCI and GRC. The arrangement had two legs, the first being the acquisition of Johnnic by HCI

9 Record on page 593.
10 Record on page 598.

and the second the acquisition by GRC of SABSA's 49% interest in TSH. Hence there was a merger within a merger and therefore, it was argued, the Tribunal must assess this acquisition of Johnnic by HCI as if it would *inevitably* result in the joint control by HCI and GRC of TSH.

30. Johnnic claimed that it had called Joffe as a witness because it needed to lead evidence on the special arrangement between HCI and GRC, the consequence of which would, seemingly, be to tie up approximately 50% of the gambling market in Gauteng and about 57% of the gambling market in KwaZulu Natal. Johnnic stated that it was in possession of a fax addressed to Joffe dated the 30th of June, in which HCI confirmed that *"In regards to the total merger of GRC and Tsogo, we confirm HCI will obviously not make a competing offer directly or indirectly for the SABSA shares".*[11] Joffe was thus required to explain this arrangement as well as the competitive effect that this transaction will have on the casino market specifically in light of GRC's acquisition of the Silver Star casino.

31. The Commission indicated that Johnnic had raised all the above issues during the merger investigation but that it was of the view that the type of information that Johnnic required from Joffe related to an investigation into a prohibited practice rather than a merger evaluation. Such complaints should be filed with the Commission under section 4 of the Act upon which the matter would be investigated by the Commission. The Commission was also of the view that the GRC/SABSA transaction would have to be filed with the Commission before it could be implemented. Moreover, SABSA had publicly stated that it does not intend to sell its 49% shares in TSH.[12]

32. HCI agreed with the Commission and added that Johnnic's submission that this is "*a merger within a merger*" is flawed because the mandatory offer is an independent transaction, the implementation of which has never been conditional upon or linked to the conclusion of the potential TSH transaction.[13] Moreover, Tsogo Sun Casino currently owns 5 casinos in South Africa, Suncoast Casino in Durban, Hemmingways in Eastern Cape, The Ridge in Mpumalanga, Monte Casino in Gauteng and Emnotweni in Mpumalanga.[14] Post the transaction this will not change because Johnnic does not have any interests in any other casinos except these through its indirect shareholding in TSH. Joffe's evidence is thus not relevant to this transaction.

11 See page 16 of the transcript.
12 See page 616, par 7.1 – 7.3 of the record.
13 See page p 615, par 6.2 of the record.
14 See diagram on page 183 of the record.

33. Mr Joffe opposed Johnnic's subpoena on the basis that it amounted to an abuse of process due to its timing and lack of detail and requested the Tribunal to withdraw it. It was argued on behalf of Mr Joffe that the issuing and serving of the subpoena on his client was a tyrannical process and that the evidence Mr Joffe was required to give was not relevant to the hearing. Mr Joffe was served with a subpoena at 16h00 on 1 December 2005, a mere two business days before the hearing. He was also required to produce documentation and to deliver this to Webber Wentzel Bowens, Johnnic's attorneys, just one business day after the service of the subpoena. This was despite the fact that Johnnic was aware from 11 November 2005 that the matter was to be heard on 6 December 2005. The subpoena was vague and there was insufficient detail for Mr Joffe to know what evidence he was required to give or what documentation he was required to produce. Furthermore, Mr Joffe had not had sight of any of the merger documents or filings and could not possibly have any knowledge of the nature of evidence or of the documentation he was required to produce.

34. Mr Rubens argued further that no matter what arguments were presented by Johnnic as to the relevance of Mr Joffe's evidence, the serving of the subpoena was so tyrannical a process that it could not be cured by any finding of relevance. Furthermore, it was argued, the subpoena was not issued in order to establish the truth of what was relevant in the merger inquiry but with the intention to procure confidential information not relevant to this transaction from a competitor in the gaming market.

35. In its argument Johnnic suggests that if the Tribunal approved this merger, it would be approving the proposed transaction, i.e. the GRC/SABSA acquisition. We do not agree with this view.

36. On a plain reading of the special arrangement in paragraph 12, it clearly indicates that HCI has undertaken to be agreeable to supporting GRC *should GRC make an offer to purchase SABSA's shares*. This undertaking is then conditional on a number of other conditions, including the signing of an agreement between SABSA and GRC before 31 December 2005. The second undertaking is found in the last paragraph of the special arrangement and in the fax to Joffe and relates to the possible joint control of TSH by GRC and HCI through the mechanism of a voting pool agreement.

37. It may be that HCI and GRC, from whom HCI acquired its 10% in Johnnic, have concluded an agreement expressing an intention to exercise joint

control over TSH at some time in the future. To the extent that HCI has expressed that intention, this is contained in the special arrangement in the circular and in the fax.

38. However, that intention can only come to fruition on the occurrence of two fundamental events. First, it requires SABSA, which is an independent third party, to agree to sell its 49% stake in TSH to GRC. Then, in the event that such agreement was concluded, that transaction would require the approval of a number of regulatory authorities, including the competition authorities. The acquisition by GRC of SABSA's 49% in TSH, if it were to happen, would, be a discrete notifiable transaction by GRC and SAB Miller.[15] The proposed transaction would be a transaction between two different parties namely GRC and SAB Miller (not Johnnic and HCI). Such approval would not be given without a consideration of the issues of control and competitive impact of that transaction at that time.

39. It is worthwhile to note that GRC did indeed approach SAB Miller. But it had already become public knowledge by 8 August 2005**,** almost four months before the hearing in this matter**,** that SAB Miller did not intend to sell its 49% stake in TSH and that discussions between GRC and SAB Miller had ceased.[16] Hence by the time this matter was set down for hearing, the parties were well aware that no agreement had been signed between GRC and SABSA, nor were there any indications that the status quo had changed.

40. In any event, we fail to see how an intention by competitors to acquire joint control of a business or part thereof could constitute a prohibited practice or some or other contravention of the Act. The Competition Act does not generally prohibit competitors from acquiring each other's businesses or forming joint ventures with each other. In fact the Act envisages that competitors would seek to do just that in a particular market. Hence it requires the competition authorities to fulfil its mandate of promoting competition in a particular market by assessing whether a transaction, especially one between competitors, is likely to prevent or result in a substantial lessening of competition.[17] That indeed is the purpose of merger control, a fundamental precept of competition regulation, which seeks to promote competition in a market by regulating market structure as opposed to the behaviour of competitors in that market. If on the basis of the Johnnic argument, every discussion between or intention expressed

15 Assuming that such an acquisition will meet the threshold for notification in terms of the Act.
16 See SENS announcement issued by GRC on 8 August 2005, page 620 of the record.
17 See s12 of the Act.

by competitors to purchase each other's businesses or form joint ventures constituted prohibited practices then the there would be no need for competition authorities to employ merger control as a means of promoting competition in a particular market.

41. However as indicated above the Competition Act does prohibit certain behaviour on the part of competitors. If, in Johnnic's view, the special arrangement itself somehow constitutes violations of section 4(1)(a), (1)(b)(ii) and (iii) then it would be more appropriate that such a complaint be lodged with the Commission and be investigated in the appropriate manner. It is not an appropriate enquiry to conduct in a merger hearing. In any event it may be that the whole issue is moot since SAB Miller has indicated that it does not intend to sell its shares.

42. One last aspect of Johnnic's contentions suggest that the 10% stake is conditional upon the attainment of joint control by GRC and HCI of TSH and that HCI will not be able to implement its 10% acquired from GRC if the GRC/SABSA agreement does not take place.

43. This merger has been approved on the conditions annexed hereto and on the basis of the submissions made by HCI to the Commission and during the hearing, that it has obtained all of GRC's shares in Johnnic unconditionally.[18] If HCI has not made full and proper disclosure to this Tribunal regarding any conditionality that may attach to the 10% and it later emerges that HCI is unable to implement the 10% shareholding due to a condition not disclosed to the Tribunal at the time, it runs the risk of having this merger set aside and attracting penalties as provided in the Act. Moreover, HCI's legal representative, in a letter dated 12 October 2005, acknowledges that the potential TSH transaction, should it go ahead, would be subject to various regulatory approvals, including that of the competition authorities.[19] In fact Copelyn, in an earlier letter to Joffe also acknowledged and mentioned that " …*regulatory hurdles to implement the proposed transaction*…" existed.[20] There seems to be no indication in the evidence before us that the parties intend not to comply with the Competition Act.

44. Hence, an approval by the Tribunal of this merger cannot be considered to be an approval of the GRC/SABSA transaction, which may or may not happen at some future date. In these proceedings the Tribunal is only

18 See submissions by HCI, page 615 of the record, and page 28 of the transcript that GRC acquisition by HCI unconditional.

19 Record page 619 par 7.5 and page 618 par 10.

20 Record on page 628.

concerned with the evaluation of the acquisition of Johnnic by HCI. The GRC/SABSA transaction would constitute a separate and divisible transaction, the competition effects of which must be assessed at the time it is notified to the authorities. We therefore do not consider evidence of the HCI and GRC special arrangement relevant to these proceedings. Nor do we consider evidence of the competition assessment of a possible GRC/SABSA transaction relevant to these proceedings.

45. We therefore determine that Joffe's evidence is not required in this proceeding.

46. Given our determination above, it is not necessary for us to decide whether the subpoena issued to Mr Joffe constituted a tyrannical process or not. However we do note with some consternation that a party to a merger would think it appropriate to serve a subpoena on a CEO of a major company at such short notice when it was fully aware of the date of the hearing and where the evidence sought related to a matter that was raised some months prior to the hearing.

47. We now turn to the second question, does the undertaking by HCI to dispose of Gallagher Estate address Johnnic's concerns raised in the Genesis report as supported by Carol Weaving's evidence.

48. According to the Genesis report its investigation revealed, contrary to that of the Commission, that the exhibitions market and the conference market are not one but separate product markets and that there is not a national market but a regional market for exhibitions.

49. It argues that there are effectively 5 major exhibition venues in Gauteng namely Gallagher, SCC, The Dome, Kyalami exhibition, and Johannesburg Exhibition Centre. None of these venues were considered suitable as indicated by various exhibitors during Genesis' survey. Entry into this market was limited since both SCC and Gallagher weren't making sufficient returns on their investments.

50. Finally Genesis found that price and service levels are negotiated for 97% of exhibitions. Since the merger combines two competitors in the exhibitions market that previously placed a competitive restraint on each other it is likely to substantially lessen or prevent competition in a regional market for exhibition facilities.

51. During the course of the hearing and prior to the Tribunal making its determination on the admissibility or otherwise of the Genesis report, HCI

undertook to divest of all of its interest in Gallagher Estate Exhibition Centre if the merger was approved. A draft condition to that effect was tendered to the Tribunal, which condition was substantially similar to the condition annexed hereto.

52. The Commission did not object to the condition as presented to the Tribunal. However Mr Unterhalter on behalf of Johnnic raised a very specific concern with the condition. Johnnic's position was that the divestiture should take place *prior* to the implementation of the merger.[21] In other words the implementation of the merger should be suspended until such time as the divestiture of Gallagher Estates has taken place. It was contemplated in the draft condition that the divestiture would take place within a period of 12 months of the date of acquisition of control by HCI of Johnnic as opposed to the 6 months time period usually given by the Competition Commission. If the merger would be implemented upon the date of the Tribunal's order then this would mean the HCI would effectively control both SCC and Gallagher Estates for a period of 12 months.

53. Mr Unterhalter argued the common control of SCC and Gallagher by the merging parties for a period of 12 months would give rise to competition concerns in the exhibition market. He urged the Tribunal to hear evidence in this regard from Ms Carol Weaving. The Tribunal agreed to hear the evidence of Ms Weaving provided that such evidence was restricted only to that aspect of the draft condition.

54. Carol Weaving is the managing director of Thebe Exhibitions and Events Group ("Thebe"). Thebe runs a combination of various exhibitions like Decorex and trade shows. In her evidence, she informed the Tribunal that her company has a portfolio of 17 exhibitions. In deciding to choose a venue exhibitors would consider the profile of the exhibition and match the profile with appropriate venue, service levels, accommodation, conference facilities and pricing. Bookings are usually done one year in advance and in Thebe's case some shows were already booked until 2010.

55. She testified further that while there were three large venues in the Johannesburg region,[22] the majority of these could only be held at Gallagher or SCC due to the specific requirements of the type of exhibition and capacity considerations.[23] Furthermore there were certain

21 Mr Unterhalter could not explain how HCI could divest of an asset it did not have control over.
22 Namely, the Coca-Cola Dome, SCC and Gallagher Estates.
23 See page 84 of the transcript

exhibitions that could be held in only one of these two venues.[24] Weaving testified that price was usually negotiated for each exhibition and deposits were made in advance to secure the venue. In relation to some annual exhibitions such as Decorex, negotiations could take place with a venue for a period exceeding one year.

56. Her central concern with the merger was that if SCC and Gallagher Estates were brought under common control, even if only for period of 6 to 12 months, this could drive prices up and service levels could deteriorate. Her further concern was that Africa Exhibitions, a competitor of Thebe's who has a five year contract with SCC, and who in her view receives preferential rates and dates from SCC, would also be given preferential rates and dates at Gallagher should the two venues come under common control even if for a period of 6-12 months. This would disadvantage Thebe and other competitors of Africa Exhibitions. Weaving was also concerned that HCI could drive all exhibition business towards SCC and convert Gallagher into a non-exhibition venue. She also expressed this concern in relation to the proposed divestiture indicating that a new owner could convert Gallagher into a non-exhibition venue and that this would leave the industry with only SCC.

57. Under cross-examination by Mr Labuschagne, on behalf of the Commission, Ms Weaving acknowledged that in fact Thebe had offices in Johannesburg and Cape Town and hosted exhibitions all over the country including KZN and Cape Town. Certain exhibitions were hosted only in major centres due to the market size that that city offered. She explained that it was not the venue but rather the presence of a market that determined whether a particular exhibition would be held in a particular city. Hence she hosted only Decorex in KZN because the market in KZN was too small for any other exhibitions. However, she insisted that size and venue were still critical and that is why she would not take Decorex to the Coca Cola Dome even though she managed the venue.

58. Weaving also confirmed that most of her exhibitions were scheduled at least a year in advance and that for exhibitions such as Decorex, bookings at Gallagher were made as far in advance as 2010. The shortest time in which she had made bookings was 6 months in advance and this was the exception rather than the rule. Ms Weaving was also of the view that most of the exhibitions at Gallagher for next year would have been booked and that deposits would have been paid.[25]

24 See page 96 and 105 of the transcript.
25 See pages 95-98 off transcript.

59. In response to a question put directly to Ms Weaving by Ms Carrim, she confirmed that the draft condition would address her concerns in the short term if the condition required the merged entity not to amend the terms and conditions of the bookings already confirmed. Her long-term concerns related to whether the new owner would be an experienced operator and that Gallagher would remain an exhibition venue.

60. In our view Ms Weaving's evidence regarding the geographic nature of the exhibition market tends to support the finding of the Commission that such a market is national rather than regional. However we do not find it necessary to make a determination on this issue since in our view the condition as annexed hereto, and in particular, clause 4 adequately addresses Ms Weaving's concerns regarding any possible amendments to the terms and conditions of bookings made in the next 12 months at Gallagher.

61. In terms of the condition the divestiture has to take place within a period of 12 months. While no specific data was provided by Johnnic, it seems that a fair amount of Gallagher would already have been committed at least a year in advance.[26] Clause 4 requires the merging parties to preserve and maintain the economic and competitive value of the business[27] and to refrain from carrying out any act that adversely impacts on the business[28] or to alter the economic value or commercial strategy of the divested business [29] during the period of 12 months or longer as may be approved by the Tribunal.

62. Furthermore the appointment of a trustee as contemplated in clause 5 will ensure that the divested business is run independently from that of SCC and maintained separately from the merging parties' commercial strategies for the duration of the period until it is divested. Ms Weaving's long-term concerns are adequately addressed by the provisions of clause 6, which state that: *"the purchaser is to maintain the divested business as a viable and active competitive force in competition with the merging parties."*[30]

63. Finally the ultimate approval of the appointment of the trustee and the sale by the Commission is an additional guarantee that the divestiture will take place in accordance with the terms of the conditions. Hence, there is no

26 Weaving above
27 Clause 4.1.1 of the condition
28 Clause 4.1.2 of the condition
29 Clause 4.1.3 of the condition
30 Clause 6.2 of the condirtion

need for the divestiture to occur *prior* to the implementation of the merger.

64. In our view the condition, requiring divestiture, also addresses the competition concerns raised by Genesis in its report. Divestiture of Gallagher Estates, which is a structural remedy, will remove any overlap between the merging parties in the exhibition and conference facilities market as defined by Genesis or the Commission.

65. This transaction does not raise any public interest concerns.

66. Accordingly the merger is approved on the condition attached hereto.

_____ 17 January 2006

Y Carrim **Date**

Concurring: D Lewis and M Holden