4 DECEMBER 2018

COMPETITION ALERT

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BREAKING NEWS

INCREASE TO SOUTH AFRICAN MERGER FILING FEES

The merger filing fees have now increased from R100,000 to R165,000 for an intermediate merger and from R500,000 to R550,000 for a large merger.

A PROPOSAL IS NOT A MARRIAGE, NOR A MERGER

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BREAKING NEWS
INCREASE TO SOUTH AFRICAN MERGER FILING FEES

On 4 December 2018, the Minister of Economic Development, Ebrahim Patel, published the amendment to Rule 10(5) of the Rules for the conduct of proceedings in the Competition Commission.

In terms of the amendment, the merger filing fees have now increased from R100,000 to **R165,000** for an intermediate merger and from R500,000 to **R550,000** for a large merger. These new filing fees shall be effective from 1 January 2019.

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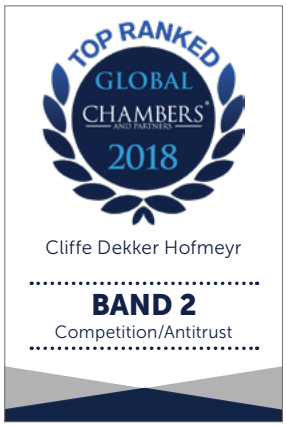

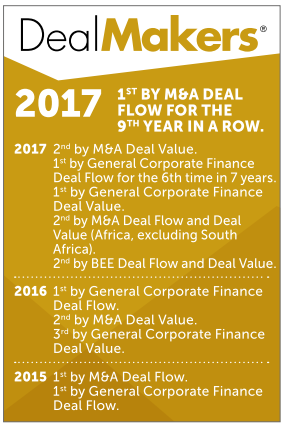

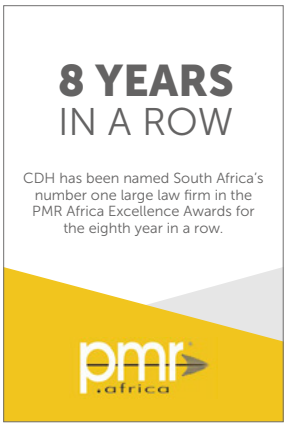

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The CAC agreed that the legal question of whether Aton was entitled to vote so-called 'affected shares' in M&R (being shares acquired by Aton after it held a firm intention to acquire control of M&R) was a live question.

Once a shareholder has announced a firm intention to acquire control of a target firm, can it still exercise its existing voting rights, or could this put the shareholder at risk of the prior implementation of a merger?

This was the question the Competition Appeal Court (CAC) grappled with in *Murray & Roberts Holdings Limited (M&R), Aton Holdings GmbH and Aton Austria Holdings Gmbh (Aton).*

The story begins when Aton notified M&R of its intention to make a voluntary offer to M&R's shareholders to acquire all of M&R's shares not already owned by it. Prior to making the offer, Aton already controlled some 29.99% of the M&R votes. Post the offer, Aton acquired further M&R shares, which ultimately increased its voting rights to some 39.6%.

M&R later announced a proposed transaction between itself and Aveng Limited (Aveng), which triggered the dispute with Aton. A date was set for a general meeting where the resolution regarding M&R's proposed transaction with Aveng would be voted on.

Prior to the M&R general meeting, Aton notified the Competition Commission (Commission) of its proposed merger with M&R pursuant to its voluntary offer. A day later the Takeover Regulation Panel required Aton to withdraw its voluntary offer and to make a mandatory offer.

In anticipation of the M&R general meeting, M&R sought an urgent interdict from the Competition Tribunal (Tribunal) to restrain Aton from voting any shares in M&R in excess of the shares it held prior to its offer to acquire the entire issued share capital of Aton (ie it sought Aton's voting rights to be capped at some 29.99%). The Tribunal granted only a very limited interdict restraining Aton from voting in excess of 50% less 1 vote in respect of the Aveng transaction resolution. M&R appealed the Tribunal order, which led to the CAC decision under discussion.

Ultimately at the M&R general meeting, Aton was outvoted in respect of the proposed Aveng transaction. Notwithstanding, the dispute between the parties was not over. The CAC agreed that the legal question of whether Aton was entitled to vote so-called 'affected shares' in M&R (being shares acquired by Aton after it held a firm intention to acquire control of M&R) was a live question. This was because clarity was required in respect of what shares Aton may vote at further M&R shareholders meetings, prior to the Commission's decision in respect of Aton's request for merger approval for control in respect of M&R.

Clarity was required in respect of what shares Aton may vote at further shareholders meetings, prior to the Commission's decision in respect of Aton's proposed merger notification.

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CONTINUED

According to the CAC, a party is not prohibited from acquiring and voting shares in a target company up until the point that those shares vest the acquirer with control of the target company.

M&R argued that once a company has expressed a firm intention to make an offer to acquire 100% of the shareholding of another, it cannot vote shares acquired post such announcement, especially when the firm having made an offer had notified a merger in terms of the Competition Act.

The CAC ultimately dismissed M&R's appeal, highlighting the following legal principles:

- M&R tried to rely on a previous CAC decision *Goldfields Limited v Harmony Gold Mining Company Limited [2005] 1 CPLR 774 (CAC)*, the detail of which is not necessary to delve into, save to note the CAC's unequivocal confirmation that the Goldfields decision is not authority for the proposition that the voting of shares is prohibited in terms of the Competition Act, where the shares so voted cannot give control to the voting shareholder over the target company. Whilst the Competition Act prohibits the implementation of a merger until it has been approved, it does not prohibit a merger from taking place until it is approved. A person may thus acquire control, and provided there is no exercise of that control, there can be no prior implementation of a merger.
- Put simply, according to the CAC, a party is not prohibited from acquiring and voting shares in a target company up until the point that those shares vest the acquirer with control of the target company as defined by the Competition Act, and even then it is only the implementation of that control prior to merger approval that is prohibited.
- The Competition Act does not envisage that an interdict can be sought where there is no evidence that control, on any of the bases set out in section 12 of the Competition Act, has taken place. In 'luminous justification' of this conclusion, at the M&R general meeting held to vote on the Aveng transaction, Aton did not possess the voting power sufficient to vote down the Aveng transaction. Had Aton, as was the case in Goldfields, been shown on a factual basis to be able to materially influence the policy of M&R in a manner that would amount to control for purposes of the Competition Act, the result would have been entirely different.

Click here to read GCR's South African chapter on Antimonopoly & Unilateral Conduct, authored by **Competition Directors Lara Granville & Albert Aukema and Senior Associate, Naasha Loopoo.**

GCR INSIGHT CONTRIBUTOR

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CONTINUED

The CAC has elucidated that, in circumstances where the voting of shares cannot give the voting shareholder control over the target company in terms of the Competition Act then the merger is merely "taking place" as opposed to being "implemented".

- The CAC further cautioned that the Competition Act should not be interpreted so broadly as to have unintended consequences. Hostile takeovers may add a healthy dose of competition to the economy, and so sterilising shares after the announcement of a firm intention to acquire control would appear to be contrary to the objectives of the Competition Act.
- M&R also argued in favour of policy considerations to create a 'bright line' whereby notification of an intention to merge would routinely freeze the voting rights of a shareholder in respect of shares after the disclosure of the intention. The aim ostensibly being to ensure that there is no potential for the inadvertent implementation of a merger or the exploitation of an uncertain factual position given that it is, at times, notoriously difficult to determine the precise level of shareholding which may trigger *de facto* control. The CAC was not convinced, rejecting the argument on the basis that the relevant provision of the Competition Act wherein such an occasion may arise is s12(2)(g) which requires proof that a firm can materially influence the policy of a firm in a manner comparable to a person in ordinary commercial practice exercising control, which is by its nature a fact intensive inquiry and can therefore never give rise to 'bright lines'. Essentially, in the CAC's view, the s12(2)(g) provision can never be formulated as a 'one stop' test as each case must be determined on its own unique facts, to test whether an acquiring firm indeed has the power to influence the commercial policy of the target firm.

In conclusion, the CAC has elucidated that, in circumstances where the voting of shares cannot give the voting shareholder control over the target company in terms of the Competition Act then the merger is merely "taking place" as opposed to being "implemented", and despite a proposal for a merger having been announced, there can be no scope for a prior implementation transgression.

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