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CONSENT AGREEMENT RAMMED BY COMPETITION TRIBUNAL

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COMPETITION COMMISSION SUSPENDS ADVISORY OPINION SERVICE

The Competition Commission announced that it has taken a decision to suspend its advisory opinion service, pending the finalisation of a matter between the Commission and Hosken Consolidated Investments Limited. This pronouncement follows the recent decision by the Competition Appeal Court in *Hosken Consolidated Investments Limited v The Competition Commission* (154/CAC/Sept17).

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CONSENT AGREEMENT RAMMED BY COMPETITION TRIBUNAL

In this case, the Tribunal refused to make the consent agreement an order of the Tribunal.

The Tribunal concluded that the consent agreement was irrational by failing to disclose a nexus between the alleged harm (if any) and the suggested remedy.

The Competition Tribunal (Tribunal) has rejected a consent agreement between the Competition Commission (Commission) and four respondents (AECI Limited, Foskor Proprietary Limited, Omnia Fertilizer Limited and Sasol South Africa Proprietary Limited) (Respondents).

A consent agreement offers parties to an alleged anti-competitive practice the opportunity to settle the matter with the Commission by agreement. It is very unusual for the Tribunal to reject a consent agreement, since it prefers to defer to the Commission on the basis that the Commission has conducted an investigation and negotiated with the respondents. However, in this case, the Tribunal refused to make the consent agreement an order of the Tribunal.

The Respondents are partners in an ammonia terminal facility (RAMM facility), which enables them to store ammonia for export and import. The agreement between the partners provided for the negotiation of a price if one partner wished to purchase ammonia from another partner's stock at the facility. If a price could not be negotiated, then a formula was to apply. The Commission understood that this was a deadlock breaking mechanism, but had concerns that the clause had "pricing effects" although it did not identify what those were. However, the Commission did not indicate the provisions (if any) in the Competition Act, No 89 of 1998, as amended (Competition Act) the Respondents were alleged to have contravened. The consent agreement did not provide for a penalty or an admission of contravention of the Competition Act, but did provide for an alternative deadlock breaking mechanism.

The Tribunal noted a distinction between a respondent failing to admit liability for a contravention versus the failure to allege a prohibited practice – the latter results in the agreement lacking an essential jurisdictional fact. Here, the Commission failed to identify precisely what the contravention was and why it was a contravention, which failure prevented the Tribunal from being able to assess whether the terms of the settlement agreement appropriately remedied the harm.

The Tribunal made quite a damning reference to the Commission's nonchalant argument on this question, illustrating that the Commission did not give much consideration to what the theory of harm was. This implies that the Commission simply considered that there was some intuitive or prima facie harm, but instead of assessing whether the conduct was really problematic or not and why, it considered it sufficient to close the book on the question once the Respondents agreed to settle.

The Tribunal concluded that the consent agreement was irrational by failing to disclose a nexus between the alleged harm (if any) and the suggested remedy. Where there is no identifiable theory of harm, it is not possible to ascertain whether the consent agreement is a sufficient deterrent for future conduct. Alternatively, if the theory of harm is "entirely speculative", a consent agreement is both unnecessary and an over-deterrent.

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CONSENT AGREEMENT RAMMED BY COMPETITION TRIBUNAL

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This is one of the few times that the Tribunal has challenged the Commission on substantiating its theory of harm in the context of consent orders.

The Tribunal also raised a concern that the consent agreement specified would culminate in the full and final settlement of the dispute, thereby closing the proverbial door and barring any further potential enforcement by the competition authorities.

Consent agreements can allow respondents to expeditiously, and more often cost-effectively, settle matters. While there is no requirement to admit liability for the alleged contravention nor to pay an administrative penalty, the parties do have to identify what provision of the Competition Act is implicated and why the conduct is harmful.

This decision is a reminder that the Tribunal does not serve a "rubber stamping" function. This is one of the few times that the Tribunal has challenged the Commission on substantiating its theory of harm in the context of consent orders. This should help to guide the Commission on its approach to consent orders in the future, and will hopefully also guide the Commission in applying the same rigour when deciding to refer matters for prosecution.

Kirsty Dean-Mhlongo and Lara Granville

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COMPETITION COMMISSION SUSPENDS ADVISORY OPINION SERVICE

The Commission decided to suspend the service after HCI challenged the conclusion of an advisory opinion at the Competition Tribunal and then the CAC.

The Competition Commission (Commission) announced that it has taken a decision to suspend its advisory opinion service, pending the finalisation of a matter between the Commission and Hosken Consolidated Investments Limited (HCI). This pronouncement follows the recent decision by the Competition Appeal Court (CAC) in *Hosken Consolidated Investments Limited v The Competition Commission* (154/CAC/Sept17).

The Commission argued that advisory opinions should not be the subject of litigation.

The Commission, as part of its advocacy function, had provided a (non-binding) advisory opinion service, at the request of parties, to offer guidance on the interpretation of the Competition Act, No 89 of 1998 (Act), and the approach the Commission would likely take in respect of certain agreements, transactions or practices.

The Commission decided to suspend the service after HCI challenged the conclusion of an advisory opinion at the Competition Tribunal (Tribunal) and then the CAC. By way of background, HCI previously jointly controlled gaming entity, Tsogo Sun Holdings Limited with SABMiller plc. When SABMiller chose to exit, HCI notified the Commission on the basis that it would acquire sole control of Tsogo and it anticipated holding more than 50% of Tsogo. Such merger approval was granted.

HCI did increase its shareholdings to only 47.5%, but it proceeded to exercise sole control over Tsogo. HCI then decided it wished to consolidate and restructure its gaming interests, which would result in increasing its shareholding in Tsogo to more than 50 percent. Having already secured approval for sole control of Tsogo, it approached the Commission for an advisory opinion on whether it was required to notify the restructuring which would move it above a 50% shareholding, but would not alter the nature of its control over Tsogo.

The Commission issued an advisory opinion stating that the proposed transaction was notifiable. Disagreeing with this outcome, HCI then approached the Tribunal for an order declaring that the proposed transaction was not notifiable.

In opposing HCI's application, the Commission argued that advisory opinions should not be the subject of litigation. It considered HCI to be short-circuiting the investigative process by getting a finding that a matter was not notifiable without the Commission having had an opportunity to investigate the transaction. The Tribunal held that it

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COMPETITION COMMISSION SUSPENDS ADVISORY OPINION SERVICE

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Considering that the advisory opinion service now puts the Commission at risk by allowing parties to challenge such an opinion, the Commission announced it would suspend the service.

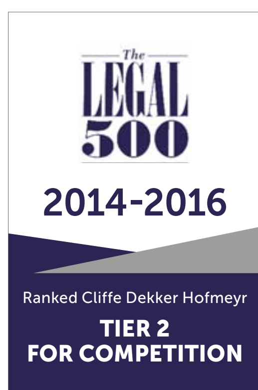
did not have jurisdiction to consider the matter because, as the advisory opinion was non-binding, there was no "live dispute" between the parties that required intervention.

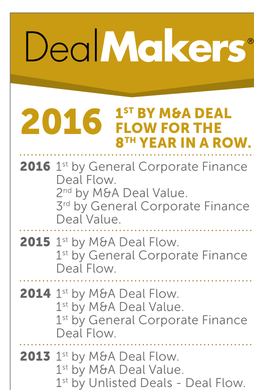
On appeal, the CAC held in favour of HCI and declared that the proposed transaction did not require approval by the competition authorities, as it did not change HCI's existing quality of control.

The Commission has applied for leave to appeal the CAC's decision to the Constitutional Court on the basis that the CAC's decision creates a precedent which can be used by parties to challenge a non-binding advisory opinion issued by the Commission if they do not agree with it.

Considering that the advisory opinion service now puts the Commission at risk by allowing parties to challenge such an opinion, the Commission announced it would suspend the service. The Commission has said that a final decision on the provision of advisory opinion services will be made after the Hosken case has been finalised.

Megan Quenet-Meintjes and Lara Granville





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