competition commission
south africa

Media Statement
For immediate release
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COMMISSION SUSPENDS ADVISORY OPINION SERVICE
PENDING CONCOURT DECISION

The Commission has suspended its advisory opinion service pending the finalisation of the case against Hosken Consolidated Investments Limited (HCI).

This follows a Competition Appeal Court (CAC) judgment ruling against the regulator on the matter. In November last year, the CAC ruled against the Commission in the matter of Hosken Consolidated Investments Limited and Another v The Competition Commission, in a case centred-around an advisory opinion issued by the Commission to HCI.

The CAC 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. A final decision on the advisory opinion service will be made after the outcome of the Commission's application for leave to appeal (and appeal if leave is granted) to the Constitutional Court.

Advisory opinions form part of the Commission's advocacy functions to facilitate compliance with the Competition Act. They do not constitute Commission decisions and are not binding on the Commission and parties requesting such advice. These opinions cover various topics including whether or not a proposed transaction constitutes a merger and whether or not competition authorities must be notified of the proposed transaction.

Background

On 16 August 2017, at the request of Hosken Consolidated Investments Limited (HCI), the Commission issued an advisory opinion in which it advised the company to file a proposed transaction.

In terms of the transaction, HCI intended to increase its shareholding in Tsogo Sun Holdings Limited (Tsogo) to more than 50% and consolidate all its gaming interests (other than its sports and betting interests) under Tsogo, by transferring such gaming interests owned indirectly by one of its subsidiary companies, Niveus Investments Limited (Niveus) to Tsogo (the proposed 2017 transaction).

Although the Commission and Tribunal previously unconditionally approved HCI's acquisition of a majority shareholding in Tsogo in 2014, HCI was unable to attain the majority interest in Tsogo and only became the largest minority shareholder.

In the 2014 transaction HCI indicated that the two gaming businesses held under Tsogo and Niveus would not be integrated and as a result there would be no retrenchments. However, the proposed 2017 transaction envisaged a transfer of the gaming interests held under Niveus to Tsogo and this constitutes

a form of integration. It was therefore necessary for the Commission to assess whether or not the proposed 2017 transaction should be approved subject to any employment conditions.

HCI did not agree with the Commission's non-binding advisory opinion and approached the Tribunal for a declaratory order that it should not file its proposed transaction with the Commission. The Tribunal dismissed HCI and Tsogo's application and found, among others, that it did not have jurisdiction to hear the matter because there was no "live dispute" between the parties and that if HCI wished to challenge the Commission's views about whether or not the transaction must be filed with the Commission, HCI should have used the dispute resolution procedures set out in the Competition Act for resolving disputes relating to notifiability of mergers.

These procedures envisage that if a party wishes to contest whether a transaction is a merger falling within the Competition Act, it must first file that transaction with the Commission, and if the Commission formally makes a decision that the transaction is a merger, that party has a right to appeal to the Tribunal against the Commission's decision. In this case there was no formal decision by the Commission whether the 2017 proposed transaction constituted a merger, the Commission merely provided HCI, at its request, with a non-binding advisory opinion.

HCI and Tsogo then filed an appeal with the CAC against the Tribunal's decision. The CAC set aside the Tribunal decision and found, among others, that the Tribunal had jurisdiction to hear the matter and that there was a "live dispute" between the parties. In addition, the CAC found that the proposed 2017 transaction did not require notification to the competition authorities as it did not change the quality of control that HCI enjoyed in Tsogo because HCI as the largest minority shareholder in Tsogo was able, at two annual shareholder meetings, which took place in 2015 and 2016 respectively, to secure a majority of votes cast in those meetings.

The Commission subsequently applied for leave to appeal to the Constitutional Court against the CAC's decision. At the heart of the Commission's application is that non-binding advisory opinions should not be the subject of litigation and cannot be used to side-step investigative processes set out in the Competition Act. The Commission's application for leave to appeal seeks to safeguard the interests of employees who may possibly be retrenched as a result of the integration of the businesses of Niveus and Tsogo.

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Issued by:
Sipho Ngwema, Head of Communications
On behalf of: The Competition Commission of South Africa
Tel: 012 394 3493 / 078 048 1213 / 081 253 8889
Email: SiphoN@compcom.co.za

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