

Court resists tactics to avoid takeover

THE Competition Appeal Court's decision in the appeal prosecuted by Johnnic Holdings Ltd against Mercanto Investments (Proprietary) Ltd and others finally dashed Johnnic's hopes of warding off what it regarded as an "unsolicited hostile takeover bid" by gaming rival Hosken Consolidated Investments Ltd.

Johnnic's first attempt to avoid a merger with Hosken was dealt a substantial blow when the Competition Commission, having completed its assessment of the separate merger notifications filed by each of Johnnic and Mercanto respectively, decided to recommend to the Competition Tribunal unconditional approval of the proposed merger.

This decision was taken notwithstanding the fact that the commission regarded the activities of Johnnic and Hosken as overlapping in respect of the "gaming, hotels and leisure" and the "exhibition and conference facilities" sectors.

In its submissions before the tribunal, Johnnic sought to erode the commission's recommendation in favour of the proposed merger by arguing for the existence of "very real competition concerns in the exhibition and conference sectors including the gaming sector".

Johnnic contended that Hosken had flouted competition legislation by increasing its stake in the consortium from 30% to 40% through the acquisition of Gold Reef Casino Resorts Ltd's interest in Johnnic.

This acquisition included an ar-



rangement between Hosken and Gold Reef under which the former undertook to support Gold Reef should it make an offer for the entire issued share capital of Tsogo Investment Holding Company (Proprietary) Ltd from Sabsa Holdings (Proprietary) Ltd.

In response to Johnnic's concerns, Hosken argued its acquisition of Gold Reef's shares in Johnnic was "an independent transaction" and not conditional upon the successful acquisition by Gold Reef of the entire issued share capital of Tsogo. As it turns out, Sabsa made a public pronouncement that "it had no intention to sell its shares in (Tsogo)". There were no further discussions between Sabsa and Gold Reef in this regard. This was confirmed by an affidavit from the CEO of Gold Reef.

Johnnic's additional concern, that it was not appropriate for both

Gallagher Estate and the Sandton Convention Centre to be under the control of the merged entity, was assuaged by Hosken's undertaking to divest of Gallagher Estate after the implementation of the merger.

The tribunal approved the merger subject to the abovementioned condition in relation to the disposal of Gallagher Estate.

This dealt a second blow to Johnnic's endeavour to defeat what it still regarded as a hostile merger.

Johnnic then launched appeal and review proceedings against the tribunal's decision to conditionally approve the merger with Hosken. In the competition law arena, however, the implementation of a transaction is not automatically stayed pending the finalisation of an appeal or a review. Rather, it is incumbent on the appellant or applicant in such circumstances to bring an application for appropriate interim relief pending the outcome of the appeal and/or review.

On December 9 last year, Johnnic brought an urgent application against Hosken and others for interdictory relief, restraining Hosken and others from implementing or further implementing the merger until such time as Johnnic's appeal against the tribunal's order and Johnnic's application for the review and setting aside of the tribunal's order had been finally determined.

The court held that Johnnic failed to establish any legitimate ground for appeal or review of the tribunal's

decision insofar as it dealt with the company's concerns raised in the context of the conference and exhibition market and the gaming market. The court found the tribunal's divestiture order and the interim regime put in place pending such divestiture, to be "carefully considered". The court described Johnnic's submissions on the Hosken and Gold Reef relationship as unsubstantiated by "any credible facts".

The court held that the Competition Act provided more appropriate means for Johnnic to pursue allegations of anticompetitive conduct between competitors, which the company had failed to invoke.

In conclusion, the court warned against the (ab)use of the competition law regime in SA as a tactic to thwart hostile takeovers.

Unless legitimate competition law concerns — substantiated by the necessary evidence — are brought to the attention of the competition authorities, such tactics are doomed to failure. As for the interdictory relief sought by Johnnic, the court held that such relief "must not be lightly granted". Parties seeking relief of this nature "must do so for genuine competition concerns and must make full disclosure to the court of all the material facts".

■ *Mark Garden is a director and Thando Damane is a candidate attorney in the competition law department at Edward Nathan Sonnenbergs.*