COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No. 64/AM/Nov01

In re: Request for Consideration of Intermediate Merger between

Mr Dumisani Victor Ngcaweni and Others **Applicant**

And

Kwazulu Transport (Pty) Limited (in provisional liquidation) **Respondent**

Basfour 2488 (Pty) Limited **Respondent**

Decision of the Competition Tribunal

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1. The Competition Commission approved without conditions the merger between Kwazulu Transport (Pty) Limited (in provisional liquidation) ("KZT") and Basfour 2488 (Pty) Limited ("Basfour") on 09 November 2001. The merger has since been implemented.

2. On 28 November 2001 we received an application to consider the Commission's approval of the merger from Mr Dumisani Victor Ngcaweni, an employee of KZT, and a body calling itself the Natal United Co-operation[1]. Mr Ngcaweni professes to represent KZT employees who are opposed to the merger. Attached to the application were 250 signatures from persons claiming to be employees of KZT and a memorandum entitled "REASONS FOR PARTICIPATING IN THE ISSUE OF THE MERGER". The memorandum contained a number of grounds relied upon by the applicants in support of the application.

3. The merging parties responded to this application by challenging the *locus standi* of the applicants to bring these proceedings. At a pre-hearing conference held on

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1 Mr Kuboni, who appeared for the applicants, conceded that Natal United Co-operation had no *locus standi* to bring these proceedings. Natal United Co-operation is therefore not party to these proceedings and will receive no further mention in this decision. 'Applicants' refers to Mr Ngcaweni and the 250 signatories to the memorandum entitled "REASONS FOR PARTICIPATING IN THE ISSUE OF THE MERGER".

19 December 2001 it was decided that since the *locus standi* point, if good, would spell the end of the proceedings, it be resolved first. The hearing was set down for 20 January 2002.

4. The respondents argue that only section 16(1)(b) of the Act bestows upon persons the right to request the Tribunal to consider a decision by the Commission to approve an intermediate merger. This section, they argue, precludes the applicants from bringing these proceedings before the Tribunal.

5. Section 16(1)(b) provides:

> *"(1) If the Competition Commission approves –*
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> …
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> > *(b) an intermediate merger or approves such merger subject to any conditions, a person who, in terms of section 13A(2), is required to be given notice of the merger, by written notice in the prescribed form, may request the Competition Tribunal to consider the approval or conditional approval , provided the person had been a participant in the proceedings of the Competition Commission.*"

6. Section 13A(2) provides that the primary acquiring firm and the primary target firm must each provide a copy of the Merger Notice to:

> *"(a) any registered trade union that represents a substantial number of its employees; or*
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> *(b) the employees concerned or representatives of the employees concerned, if there are no such registered trade unions."*

7. It is argued that the wording of section 13A(2) is clear; it requires that parties to a merger serve the merger notice either on the registered trade union that represents a substantial number of the employees or, where there is no such trade union, on the employees concerned or their representatives; but not both. Service on the employees of a merging party is necessary only where there is no registered trade union that represents a 'substantial' number of the merging parties' employees. In addition, the person upon whom the merger notice is required to be served, must have participated in the proceedings before the Competition Commission in order for them to acquire *locus standi* to bring an application in terms of section 16(1)(b).

8. Uncontradicted evidence is that the Trade and Allied Workers Union (TAWU)

and the South African Trade and Allied Workers Union (SATAWU) are the registered trade unions at KZT and, together represent just over 77% of the employees of KZT.[2] The respondents argue that 77% of all employees of KZT is a 'substantial' number. Accordingly, in terms of section 13A(2), the only persons upon whom the merger notice had to be served are TAWU and SATAWU.[3] It is argued that no service was required on Mr Ngcaweni and the KZT employees he purports to represent (the applicants). The applicants are not persons on whom the notice in terms of section 13A(2) is required to be served and accordingly are not entitled to apply for a consideration of the Commission's decision as contemplated in section 16(1)(b).

9. The applicants, on the other hand, argue that the respondents' construction of section 13A(2) is unduly restrictive. They argue that the section 13A(2) requires that notice be served on three categories of people, namely; trade unions; employees concerned and representatives of the employees concerned. For the purposes of section 16(1)(b), they argue, it is not relevant whether the persons referred to were served the notice or not, what is relevant is whether they were required to be served and whether they participated in the Commission proceedings.[4] Where a person was required to be served in terms of section 13A(2) and they participated in the Commission proceedings, they are entitled to bring an application for a consideration of the merger. The applicants, being employees of one of the merging firms and having participated in the Commission proceedings, are therefore entitled to bring these proceedings in terms of section 16(1)(b).

10. What the applicants appear to be arguing is that if one adopts a formalistic view to section 16(1)(b), the employees' right to make representation on a merger may be unduly curtailed where the trade union decides not to participate in these proceedings. The purpose of the section, which is to give a voice to the employees of merging firms, would be defeated by such a formalistic approach. As appears below, the respondents argue that the employees are not denied a voice, but the section gives priority to the bargaining unit.

11. It is also argued that the respondents' interpretation of section 16(1)(b) would result in glaring absurdities. It is argued by the applicant that the legislature could not have intended to give a person such as the applicant *locus standi* to participate in Commission proceedings but take this away where the Commissions' decision is referred to the Tribunal.

12. The applicants further argued that since section 1(2) of the Act enjoins the

2 TAWU alone represents 69,53% of all KZT employees, including management.

3 It is common cause that valid service was effected on both TAWU and SATAWU.

4 It is common cause that the applicants made written submissions on the merger to the Commission, but see our comments on paragraph 19 below.

Tribunal to interpret the provisions of the Act in a manner consistent with the Constitution, we must reject the respondents' interpretation of section 16(1)(b) because it disregards section 34 of the Constitution. Section 34 of the Constitution states that everyone is entitled to have any dispute "that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal."

13. The applicants also argued that the interpretation advanced by the respondents may lead to a violation of the applicants' constitutional right to freedom of association. It was argued that if the applicants do not agree with the decision or conduct of the trade union in this case, they have a right to come together and take a different course. The interpretation advanced by the respondents negates this right by insisting that the employees are bound by the decision or conduct of the unions and is contrary to section 1(2) of the Act.

14. In response to the applicants' argument under section 34 of the Constitution, the respondents argued that the procedure for an application to consider the decision of the Commission in intermediate merger proceedings is an administrative, and not a judicial process, and is therefore not subject to section 34 of the Constitution.

FINDING

15. We find that the applicants lack *locus standi* to bring these proceedings. The reasons for this finding appear below.

REASONS FOR FINDING

16. In terms of section 16(1)(b) a person has *locus standi* to apply for a consideration of the Commission's decision in an intermediate merger where they meet two requirements; first they must be required to be served notice of the merger in terms of section 13A(2) and, second, they had been a participant in the proceedings before the Commission. What we have to decide therefore is whether the applicants meet both these requirements.

17. We agree with the applicants that it is not a requirement of section 16(1)(b) that the person listed in section 13A(2) is actually served the merger notice. The requirement is that the person is required to be served the merger notice in terms of section 13A(2). However, we disagree with their conclusion that this means therefore that all the persons listed in section 13A(2) are entitled to apply for the consideration of the merger.

18. This interpretation disregards the clear and unambiguous wording of subsection 13A(2). The 'golden rule' of statutory interpretation is that the words of a statute must be given their plain meaning unless the words used are ambiguous, vague, misleading or would result in an absurdity, in which case the court may deviate from that meaning to avoid such absurdity.[5] In our view, the wording of section 16(1)(b) is very clear and the plain meaning of the words used therein results in no absurdity. The use of the word "or" at the end of subsection 13A(2)(a) and the proviso to subsection 13A(2)(b)[6] clearly indicates that the persons listed in 13A(2)(b) (i.e. employees or their representatives) are only required to be served a notice where there are no trade unions referred to in 13A(2)(a). A party to a merger is therefore not required to serve the merger notice on all the persons listed in subsection 13A(2) but to one of them only. As noted above, it is common cause that TAWU and SATAWU are the registered trade unions representing the employees of KZT. It was not disputed by the complainants that these unions represent a 'substantial' number of KZT employees as contemplated in section 13A(2)(a). In the circumstances, only TAWU and SATAWU were required to be served the merger notice in this case and they alone are entitled to bring these proceedings. The fact that they elected not to do so does not make the applicants' case any stronger.

19. The applicants' contention that they enjoyed *locus standi* in the Commission's proceedings is not correct. Only persons contemplated in section 13A(2) of the Act, which as we have pointed out the applicants are not, enjoy such a right. The applicants' participation in the Commission's proceedings amounted to no more than the making of representations about the merger, which any concerned member of the public is entitled to make.[7] Making a submission did not confer *locus standi* upon them nor does it make any difference that in making their submissions they completed form CC 5(1). When section 16(1)(b) refers to participation in the Commission's proceedings it means participation by persons required to be notified in terms of 13A(2). In this sense the applicants, despite making submissions, were not participants in the Commission's proceedings in the manner contemplated in section 16. The applicants' involvement in the Commission's proceedings can not confer upon them a *locus standi* which the Act does not give them anymore than it would to any other person who makes representations to the Commission, as is frequently the case, such as a customer or competitor of the merging parties.

20. We turn now to the applicants' argument that their constitutional rights may be violated by the interpretation adopted above. The applicants are correct that we

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5 See Venter v R 1907 TS 910 at 914; Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa v Competition Commission 2000 (2) SA 797 (SCA) at paragraphs 16-20.

6 The proviso is that the persons listed in subsection 13A(2)(b) are required to be served where there is no registered trade union representing a substantial number of the employees of the merging firms.

7 See section 13B(3) of the Act.

are bound by section 1(2) of the Act to interpret the Act in a manner consistent with the Constitution. We do not consider that the interpretation of section 16(1)(b) adopted herein is inconsistent with any provision of the Constitution. Section 16(1)(b) gives priority to represent employees' views to the registered trade union, which is the recognised collective bargaining unit[8]. The right is given to individual employees or their representatives in default, where there is no registered trade union. The fact that a trade union may not participate in a merger proceeding does not mean that it was passive in enforcing its members' rights. It is equally possible that the trade union considered that the merger was nevertheless in its members' best interests or that opposition would be futile. The legislative policy of preferring the collective bargaining unit to the individual seems to us a sound one as if every employee was given these rights, merger adjudication would be rendered impractical.

21. The applicants seek to use section 34 of the Constitution to invoke a right which the clear language of the Competition Act does not afford them. Whilst the application of section 34 is still in its infancy, what case law there is, relates to the constitutionality of impediments to enforcing ones rights, for example, prescription periods and onerous costs provisions, etc.[9] It has not to our knowledge been used to create a substantive right, which a statute or the common law did not already afford.

22. Accordingly the applicants' argument on constitutional grounds fails. For this reason, it is unnecessary for us to go further and determine whether the nature of our proceedings is one of the nature contemplated in section 34.

ORDER

23. We make the following order:

1. the application to consider the decision of the Competition

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8 The following dictum by Centlivres JA in *Amalgamated Engineering Union v Minister of Labour and Another* 1949 (4) SA 908 (A), although made in the context of the Industrial Conciliation Act, is pertinent: "The whole idea underlying the trade union system … is that the trade union concerned should act as the spokesperson for its members whenever a dispute arises between employers and employees. The act encourages collective bargaining… To insist that whenever a dispute arises between employers and employees, an individual employer or employee should set the statutory machinery in motion for the purpose of settling the dispute, would tend to defeat the object which the legislature had in mind, viz. to facilitate the settlement of disputes, for it is obvious that what the legislature had in mind was that employees should use the services of the trade union of which they are members and that employers should use the services of the employers' organisations to which they belong." See also *Steel And Engineering Industries Federation And Others v National Union of Metalworkers Of South Africa* (1) 1993 (4) SA 190 (T)

9 See Chaskalson et al, *Constitutional Law of South Africa*, (Juta) 1999, pages 25-23 to 25-24.

Commission to approve the intermediate merger between Kwazulu Transport (Pty) Limited (in provisional liquidation) and Basfour 2488 (Pty) Limited is dismissed; and

2. **there is no order as to costs.**

_____ 13 February 2002

NM Manoim Date

Concurring: U Bhoola; DH Lewis