IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 69/AM/Jul07

In the matter between:

AC Whitcher (Propriety Limited	Applicant
and	
The Competition Commission of South Africa	First Respondent
MTO Forestry (Proprietary) Limited	Second Respondent
Boskor Saagmeule (Proprietary) Limited	Third Respondent
Boskor Ripplant (Proprietary) Limited	Fourth Respondent

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and M Mokoena (Tribunal Member)

Heard on : 28 August 2008

Reasons issued on : 10 December 2008

REASONS FOR DECISION

Introduction

1. In this application, the applicant A C Whitcher (Proprietary) Limited ("AC Whitcher") seeks to review a decision of the Competition Commission of South Africa ("the Commission") to approve an intermediate merger between MTO Forestry(Proprietary) Ltd, Boskor Saagmeule (Proppreitary) Limited and Boskor Ripplant (Proprietary) Limited ("together referred to as Boskor").

2. The application is the first of its kind at the Tribunal and was brought in terms of section 27(1) (c) of the Competition Act which states that the Competition Tribunal may hear appeals from or review any decision of, the Competition Commission that may in terms of this Act be referred to it.

3. The applicant relied on a recent decision of the Competition Appeal Court, *TWK Agriculture Ltd v The Competition Commission ("TWK matter")*[1] in which the court held, having regard to the provisions of s27(1)(c), that parties wishing to review decisions of the Competition Commission should approach the Competition Tribunal before approaching the CAC.

4. At the time of the hearing of this matter the merging parties; second and third respondents, were concerned that a pending decision in *Johnnic Holdings Limited v Commission ("Johnnic matter")*[2] may have a bearing on the issue of jurisdiction and asked the Tribunal to await that Court's decision before accepting that it had the requisite jurisdiction. Since then the CAC has decided that the Tribunal enjoyed review jurisdiction in that matter on the basis that it raised only constitutional issues and not pure competition issues.[3] While the CAC did not elaborate further on what would constitute pure constitutional reviews or pure competition reviews, it nevertheless confirmed that this Tribunal, under s27 (1), enjoys jurisdiction to review decisions of the Commission in matters of the kind such as the current application before us.[4]

Background

5. The decision by the Commission involved an intermediate merger between MTO and Boskor. The primary acquiring firm MTO is an integrated forest company which operates forests and saw mills in the Eastern and Western or Southern Cape regions of the country. Cape Timber Resource (Pty) Ltd owns 75% of MTO, the balance of the shares being owned by South African Forestry Company Ltd ("SAFCOL"). The primary target firms are Boskor

[1] 67/CAC/Jan07

[2] 69/CAC/Mar07

[3] The Court distinguished the *Johnnic matter* from *the TWK matter* in para 35.2 where it states that the Johnnic review was brought on constitutional grounds and the *TWK matter* concerned pure competition issues

[4] In TWK matter the applicants similarly sought the review of the Commission's decision relating to an intermediate merger

which operates saw mills in the Tsitsikamma region in the Eastern Cape. MTO sought to fully acquire the business and assets of Boskor sawmills located in this region. Until the merger, Boskor was MTO's largest customer. Since MTO also operates saw mills, the merger transaction for the purposes of competition analysis, had both horizontal and vertical dimensions.

6. The merger was notified to the Commission on or about 12 December 2006. The Commission unconditionally approved the merger on 14 March 2007 and released a summary of its findings. The Commission's record of its investigation, which it had provided to this Tribunal for purposes of this application, consisted of some over 1000 pages.

7. The applicant operates a saw mill in Tsitsikamma and is a competitor of the merging parties as well as a customer of MTO, the acquiring firm. The applicant was opposed to the merger and conveyed its objections to the Commission during the period of investigation. It had held several meetings with the Commission and had also provided the Commission with a report prepared by an industry expert Mr David Crickmay. What became clear through these proceedings was that the applicant had been a rival bidder to acquire the assets of the third and fourth respondents, the target firms in the merger transaction.[5]

8. When the merger approval was announced, the applicant wrote to the merging parties in which it stated that it was considering seeking a review of the Commission's decision on an urgent basis.[6] However the review application was only filed on 5 July 2007. In its notice of motion one of the prayers sought by the applicant was that it be granted access to the Commission's record which it had not yet had sight of at the time of the application. The Commission granted the applicant access to the record on 25 September 2007. The applicant then filed a supplementary affidavit with this Tribunal on 23 November 2007. Annexed to the supplementary affidavit was a second report by Mr Crickmay prepared for the purposes of review, and which therefore was never available to the Commission when the impugned decision was taken. The matter was heard on 28 August 2008. The applicant did not seek the Tribunal's leave to file the supplementary affidavit or Mr Crickmay's report.

Summary of parties' submissions

[5] See pg. 4 of the second, third and fourth respondents' heads of argument

[6] See annexure DR8 of the merging parties' answering affidavit

9. In this application, the applicant relies on the principles of the common law right to fair administrative justice, alternatively on the provisions of the Promotion of Administrative Justice Act 2000 ("PAJA"), further alternatively on section 33 of the Constitution of the Republic of South Africa.

10. On the merits the applicant seeks to review the Commission's decision on a number of grounds alleging that the Commission in conducting its investigation and making the decision to approve the merger without conditions, was materially influenced by an error of law, failed to take relevant considerations into account, acted arbitrarily, acted in a manner which was not rationally connected to the information before it and/or in exercising its power to approve the transaction, acted so unreasonably that no reasonable person could have so acted.

11. The merging parties objected to the applicant's pleadings on the basis that they were too broad and vague and that the applicant was required to provide an explanation for the delay in bringing this application. In its reply and at the hearing, the applicant asked the Tribunal to consider three aspects of the Commission's decision in order to assess whether there has been a reviewable irregularity namely; the Commission's finding of the relevant geographic market for sawn timber, the Commission's finding that the merging parties would have no ability and no incentive to engage in foreclosure strategy and the Commission's finding that the applicant's reduced supply was not merger specific but as a result of the fire that had destroyed a significant portion of the log supply.

12. The applicant argued further that the Tribunal should have regard to the grounds listed in PAJA, but that unlike the High Court, this Tribunal should, by virtue of its expertise and statutory role be more willing to intervene in the decisions of the Commission.

13. The respondents raised a number of preliminary points. The primary point relied upon by them was that the applicant had delayed unreasonably in bringing the review application and the Tribunal ought to dismiss the application on this basis. We deal with the issue of unreasonable delay later in these reasons.

14. The second point revolved around the application of PAJA in respect to issues of standing, exclusion and procedure. The existence of a statutory remedy has often been regarded by our courts as replacing or ousting the usual common law remedies of judicial review which

are now provided for in PAJA.[7] This issue however was not taken any further in argument. We accept for purposes of deciding this matter that the grounds of review in section 6 of PAJA apply here. Nor was the issue of the applicant's standing taken any further.

15. It is significant to note that the applicant does not enjoy the right of appeal from merger decisions of the Commission under the Competition Act, a right enjoyed only by merging parties. The underlying rationale for this probably lies in the nature of merger regulation and does raise the question whether a decision of the Commission, which may at best have some economic, but not legal, effect on a market or a competitor in that market, falls within the type of administrative decisions contemplated in PAJA. However this matter remains to be decided on another day.

16. Section 7(1) of PAJA provides that review proceedings may be instituted only after the applicant has exhausted domestic or internal remedies. We deal with this issue in more detail later.

Grounds of review

17. As a first ground of review the applicant alleged that the Commission had committed an error of law in misconception of the relevant economic standard applicable to the analysis of vertical mergers and to the question of vertical foreclosure. As a second ground of review the applicant alleged that the Commission in concluding that there were no foreclosure concerns had arrived at a decision which was unreasonable. Specifically it alleged that the Commission's basis for arriving at the definition of the relevant geographic market was irrational in that it had taken into account irrelevant factors and ignored relevant factors. Its assumption regarding the 100 000 cbm of logs in relation to the calculation of market shares was also irrational. We deal with this latter ground first.

Reasonableness test

[7] See in this regard the discussion in Cora Hoexter et al, *Administrative Law Vol II*, I Currie (ed) Juta 2002 at 300-302

18. Since the introduction of the right to fair administrative justice in section 33 of the Constitution,[8] the grounds of review that were previously applied by the High Courts have been extended to include reasonableness as a separate ground of review. Prior to that at common law reasonableness was always an element of irrationality. PAJA was promulgated to give legislative effect to the right contained in section 33.[9] The applicant argued that because the notion of reasonableness was introduced as a separate ground of review, the distinction between review and appeal has been blurred and this required the Tribunal to consider the substantive aspects of the Commission's decision so as to decide on its reasonableness.

19. The reasonableness yardstick has always been the most controversial ground of review in South African administrative law.[10] Hoexter suggests that reasonable administrative action implies a decision that is 'structured' in a rational fashion, must broadly be supported by the evidence and information before the administrator and the reasons given for it, must be objectively capable of furthering the purpose for which the power was given and must be proportional.[11] Reasonableness has also been equated with "justifiability". [12]

20. Many commentators and courts alike have argued for a cautious approach to the degree of reasonableness required so as to avoid the conflation between the "judicial review of administrative action and the judicial exercise of administrative decisions".[13] This is because there is a substantive distinction between a review and an appeal of administrative decisions. An appeal involves a reconsideration of the matter as a whole and represents a second opportunity for parties directly affected by the outcome being challenged. In a review the enquiry is focused on the manner in which or the process in which a lower court or a functionary arrived at the decision.

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[8] Constitution of the Republic of South Africa, 1996. Section 33 (1) states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair

[9] See s33(3) of the Constitution

[10] See the discussion in Hoexter, *The New Constitutional & Administrative Law* at 177 – 178 and Baxter, *Administrative Law* at 480 -487

[11] Hoexter 181-183

[12] Hoexter 179

[13] Hoexter 183. See also *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 LAC

21. In *Rustenberg Platinum Mines Ltd v CCMA & Others*[14], the court stated the following:

> "…The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning was correct…In a review the question is whether the decision maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision maker came to the challenged conclusion…"

22. Put another way, in review proceedings, the relevant question is not whether the decision-maker made the *correct* decision but whether it made a *reasonable* decision..

23. The significance of this test and the distinction between the two cannot be more emphasized: -

> "The right of appeal may be thought of as a second-chance: an opportunity to have one's case heard a second time by a new decision-maker with the possibility of a different decision being reached…Review by contrast is not concerned with whether the decision was right or wrong but whether the way the decision was reached is acceptable….The focus of review is not the decision itself but on the process of arriving at it." [15]

24. Our courts have consistently shown a high degree of respect for and have seldom set aside administrative decisions which are made in accordance with policies, guidelines or legislation which seeks to balance a number of competing objectives or interests and where there is a clear allocation of powers to an administrative body. Courts are unwilling to set aside such decisions, not because of the degree of complexity of the decision, but because they seek to uphold the separation of powers between the different arms of government and to give finality to administrative decisions of functionaries who are expressly granted the discretion to make complex decisions. Nor have our courts ever relied on their *own* expertise as a basis for justifying a lesser degree of respect towards decisions of functionaries.

[14] [2006] JOL 18359 (SCA) at para 30-31

[15] Hoexter 64

25. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*[16], O' Regan J emphasized that it is essential for a court to show the appropriate level of respect for decisions for administrative agencies entrusted with discretion by the legislature and not to usurp the function of the administrative agency:-

> "… A decision which requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts."[17]

26. In that matter the Court held that the reasonableness of a decision will depend on the circumstances of each case. Factors relevant to deciding whether the decision is reasonable or not " will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for it, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected".[18] This is clearly not a *numerus clausus* of factors to be taken into account.

27. The Competition Act expressly grants the Competition Commission the discretion to investigate and decide intermediate mergers.[19] The evaluation of intermediate mergers requires the Commission to determine whether a transaction will lead to lessening or prevention of competition. Section 12(A) (2) provides guidance to the Commission as to the relevant factors it should take into account when making this determination. The Commission is required to consider factors relevant to competition including the characteristics of the product itself, the market, the level of import competition in that market, the ease of entry in that market, the history of the collusion or co-ordination between firms in that market, whether there has been a history of failures, the extent of vertical integration, whether absent the merger a firm will fail, whether the merger will result in the removal of an effective competitor and whether there are any efficiency or pro-competitive grounds for approving the transaction.

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[16] 2004 (4) SA 490 (CC)

[17] *ibid* at para 48.

[18] Ibid at para 45.

[19] Section 14 Competition Act, 1998

28. This is clearly not an exhaustive list of factors but any additional factors taken into account by the Commission must be relevant to competition. These factors are typical of those that an agency engaged in merger analysis would have regard to and in accordance with international best practices.[20]

29. The Act does not prescribe what relative weighting the Commission should allocate to these factors, nor does it require the Commission to consider all of these in one particular transaction. It requires the Commission to consider a conspectus of factors in the context of the market dynamics prevailing at the time and in the circumstances of a particular transaction. In addition section 12A (3) provides that the Commission may also have regard to a limited number of public interest grounds when making its final determination. These are not considered to be traditional competition criteria but permit the Commission to approve a merger on public interest grounds even if such a transaction could have adverse effects on competition or to prohibit a merger which may not be anti-competitive.

30. Hence it does not follow that a merger resulting in a large post-merger market share or dominance of the merged entity will inevitably be prohibited or a merger that results in a low accretion of market share will be approved. Nor does the evaluation consist of a mere calculation of pre-merger and post-merger market shares. It involves a complex analysis and weighing up of factors not limited to those listed in 12A(2) but relevant to competition in that market. The more complex the transaction or the markets involved, the more complex the analysis. The analysis also involves a consideration of complex economic theories seeking to explain the impact of the merger on the incentives of the merging firms, its competitors and customers. Moreover, the lessening of competition must be substantial and not insignificant.

31. Central to this enquiry is the definition of the relevant market. Because competition effects can only be measured with reference to defined product and geographic markets, it is in this area that we find the greatest contestation between the agencies on the one hand and merging parties on the other hand. Parties making submissions to the Commission always seek to define the relevant market as widely as possible so as to demonstrate that their transaction will have no or minimal impact on competition in the relevant market. Objectors or competitors of the merging parties may seek to define the relevant market as narrowly as

[20] See Hovenkamp, *Fundamentals of antitrust law*, Chapter 9, ICN Merger Guidelines, US Merger Guidelines, EC Merger Guidelines, and, Kovacic, *Antitrust Law and Economics in a Nutshell*, 5th ed, Chapter IX

possible so as to justify their concerns. The more differentiated the product the harder it is to define the outer boundaries of the relevant market.

32. The Commission is required to investigate these claims and does that through a variety of information gathering methods. [21] In its investigation the Commission may from time to time utilise complex economic theories and models as analytical tools in order to better understand the behaviour and incentives of enterprises in a relevant market.

33. A peculiar aspect of merger regulation is that it is predictive in nature. It requires competition agencies to look back in history and predict, on the basis of the evidence before them, not on mere speculation, whether the merger is likely to have anti-competitive consequences. This predictive element of merger regulation has often given rise to concerns that there may be too much room for agencies to commit errors in which they may prohibit mergers that are unlikely to lead to anti-competitive findings, referred to as type I errors, and approve mergers that are likely to adversely impact on competition referred to as type II errors. However it is accepted, given the predictive nature of merger regulation and weighing up of a myriad of factors, and where information flow is often asymmetric, that agencies may at times arrive at an incorrect decision. In South Africa, this concern is somewhat mitigated by the fact that the Commission does not arrive at its merger decisions without soliciting the views of a range of industry players and examining a wide array of documents and econometric evidence.

34. The Commission's usual practice, is to allocate a transaction to a lead investigator, obtain information from merging parties, solicit the views of customers and competitors of the merging parties, receive information from a variety of industry sources, receive or solicit views from industry experts, obtain and review internal strategic documents of the merging parties, submit the information received to its own economists for analysis and at times conduct in loco inspections at the merging parties operations. In more complex transactions it may also procure the assistance of industry and economic experts alike. In this process the Commission engages directly with a range of people and evaluates reams of data put before it in order to make findings of fact and law. It arrives at a decision by having regard to a myriad of factors and weighing up competing objectives of the Act.[22]

[21] See in general decisions of the Tribunal dealing with factors taken into account when defining relevant markets, more specifically JD & Ellerines 78/LM/Jul00

[22] See the objects of the Act in the preamble and section 2 dealing with the purpose of the Act

35. The manner in which the Commission arrives at conclusions about each of the relevant criteria is informed by the jurisprudence of experienced and established competition agencies in the United States and Europe, international best practices developed by the lawyers and economists alike.

36. It is the Commission, as the investigator, who gathers information, conducts interviews, conducts visits to the operations of merging parties and competitors alike, peruses internal strategic documents, gathers econometric evidence and through this process develops insights into the issues and the people pertaining to the transaction.

37. Given the complex nature of the decision and the fact that the Commission exercises its discretion through direct engagement with issues of fact, law and economics, this Tribunal would be inclined to show a high degree of respect for the decisions of the Commission and would only be inclined set aside decisions of the Commission in circumstances of a grave or palpable error. Such an approach would be in accordance with the guidelines developed by our courts and similar to that adopted in jurisdictions such as the European Union ("EU") where the Court of First Instance ("CFI") has granted the European Commission ("EC") a margin of appreciation and would not set aside a decision unless there was some grave or manifest error or procedural illegality.[23] Such an approach would not be dissimilar to that adopted by the Competition Appeal Tribunal in *Co-operative Group (CWS) Ltd v Office of Fair Trading* in which it was held that while the OFT must exercise its powers reasonably and proportionately, it enjoys a broad margin of assessment. That court went on further to state that the fact that the OFT "could have adopted a different decision does not in itself show that the alternative it did adopt was unreasonable".[24]

38. The Commission's investigation of this particular transaction involved a high level of engagement and interaction. The Commission's report shows that it had taken a number of factors into account, had solicited the views of customers and competitors alike, had gathered econometric evidence, had reviewed internal strategic documents of the merging parties, and had repeatedly engaged with all relevant stakeholders, including industry experts such as Mr Crickmay. All of the information and data gathered was subjected to

[23] See Nicholas Levy, **"***Evidentiary Issues In EU Merger Control***"** article presented at the Fordham 35th Annual Conference on International Antitrust Law and Policy, September 2008. See also *Tetra Laval BV v Commission* of the European Communities Case T-5/02 (ECR 2002 ii-04381), and *MyTravel v Commission Case* T-212/03

[24] Competition Appeal Tribunal case no 1081/4//1/07 para 180- 182

legal and economic analysis. In its report it dealt at length with the concerns raised by a number of sawmillers, including the applicant. The Commission did not merely gather this information from the comfort of its offices but held meetings with several players in the timber and sawmill industry[25] and conducted in loco inspections of the merging parties operations.

The Commission's Competition Analysis of the merger

39. The Commission's definition of the relevant market demonstrates that it did not simply adopt the merging parties' definition but instead formed its own view. [26] In defining the product market and the relative market shares, it considered submissions made to it by various parties, including the applicant, and considered various other upstream and downstream markets before deciding the relevant market as that of sawn timber.[27] In its report it also dealt with the differences in the figures supplied by the various parties, including the applicant's own expert.[28]

40. In its computation of the relevant market shares, the Commission, had excluded 100 000 cbms logs from the open market, a shortage caused by the fire in the Tsistikamma region. This decision of the Commission had drawn intense criticism from the applicant. The record reveals that a fire had in fact taken place at MTO's forests and that the Commission had repeatedly engaged with the merging parties before accepting the figure itself. The Commission's exclusion of the quantity was based on the fact that it took into account both demand and supply side factors in its analysis. This approach is not inconsistent with established principles of market definition where factors impacting upon the supply of input goods or services on the open market are taken into account. [29] Thus goods that have historically been supplied for own use rather than for the open market may be excluded or excess latent capacity to produce more goods could be included. In markets which are vulnerable to extreme weather conditions factors such as fire, flood or drought would be highly relevant to take into account.

[25] See record 648-657

[26] See record 1278- 1286

[27] See record 1177-1178, 1290

[28] See record 1289 -1291

[29] See supra fn20 Hovenkamp Chapter 9, Kovacic Chapter 9 and Whish "Competition Law" 5th ed Chapter 20 and 21

41. In the case of the forestry sector and the market for logs, shortages due to fires can have a significant impact on the total volume and quality of logs for a sustained, rather than a temporary period of time since forests take an average of 20-25 years to mature. The Commission took reasonable steps to verify the fact of the fire and its likely impact on supply in the region by visiting the merging parties' operations, engaging with its operational employees and meeting with competitors and customers alike. The Commission's decision to exclude the 100 000 cbms shortage and its assessment of the impact of the fire on the supply of is therefore not in the circumstances of this case unreasonable.

42. In defining the geographic market, the Commission had regard to factors such as transport costs, prices, supply and demand balances in different regions, sales and production data between regions. Transportation of large and heavy goods such as felled trees is usually considered to act as a limiting factor on the geographic extent of the market because of the high costs associated with it and the need for adequate rail and road infrastructure. Given the shortage caused by the fire in the Tsistikamma region, the ease or difficulty of imports into that region was highly relevant to an assessment of the availability of supply in that region and not unreasonable.

43. The Commission had dedicated approximately 13 pages of its analysis to the issue of vertical input foreclosure. In its investigation the Commission had solicited extensive submissions from large and small firms alike in a fair amount of detail and had dealt with these concerns in its report in quite some depth. However it had dealt with these at the general level of "input foreclosure" rather than with specific types of foreclosure such as refusal to supply, raising rivals' costs or quality degradation. The applicant argued that the fact that the Commission's report made no mention of its concern around log mix (quality degradation) demonstrated that it had not given due regard to the applicant's foreclosure concerns.

44. In our view the Commission's analysis demonstrates that it had no need to deal with each and every possible type of input foreclosure in its report precisely because it had *discounted* these on the basis that the concerns were not merger specific. Given the factual matrix of the case, this is not an unreasonable conclusion to arrive at. MTO was already present in the upstream and downstream markets prior to the merger and the fire had caused severe shortages of logs available to sawmillers on the open market, as opposed to those under contract from MTO. In the applicant's case, the shortages on the open market as a result of

the fire were likely to have a significant impact on its business because a large part of its supply of logs was obtained on the open market.[30] The Commission's approach of comparing MTO's ability to foreclose prior to the merger to that of the merged entity's ability to do so post merger is also in accordance with established merger analysis. As stated above merger analysis has a predictive element to it but that prediction must be based on the evidence before the Commission and not on mere speculation. Moreover the Commission is required to assess a particular transaction's likely impact on competition. In that sense the harm to competition must be merger specific. There is nothing to suggest that the Commission engaged in any form of speculation or that it was biased or arrived at its conclusions without regard to established approaches to merger analysis.[31]

45. In our view the Commission has come to its conclusions in a reasoned manner and took all reasonable steps to test the theories of harm proposed by the applicant and the other objectors against the factual evidence put before it and gathered by it in the course of the investigation. The Commission may have come to a *wrong* conclusion about the extent of concentration in the relevant markets or that foreclosure was not merger specific. However the correctness of the Commission's conclusions would more appropriately be the subject of an appeal and not of this enquiry.

Error of law as a ground for review

46. Mr Unterhalter appearing on behalf of the applicant argued that the Commission by assuming that vertical mergers are efficiency enhancing committed an error of law. He relied on the decision of the CAC in the appeal of *Mondi-Kohler Ltd and Kohler Cores & Tubes*[32] to support the contention that the "relevant economic standard" in South African merger analysis is not the theoretical model developed by the Chicago School, and that the

[30] The applicant obtained 28 500 (twenty eight thousand five hundred) cubic meters logs under contract from MTO. See clause 2.1 of the contract, pg. 156 of the record. In the open market it obtained supplies of approximately 45 000 (forty five thousand) cubic meters logs. See pg 27 of the transcript

[31] This much was conceded by the applicant's counsel in argument

[32] 20/CAC/Jun02

Commission committed an error of law by concluding that the merger would not lead to a substantial lessening of competition on the basis of this efficiency enhancing assumption.

47. This argument is completely without merit. As discussed above, economic concepts and economic theories play a critical role in competition regulation in that they seek to explain the behaviour of firms and markets. To suggest that a particular theory, whether current or historical, is to be treated as the "relevant standard" is to conflate that particular economic theory with the relevant *legal* standard. The legal standard according to which mergers are to be evaluated under our Act is whether a transaction is likely to lead to a substantial lessening or prevention of competition in a particular market by having regard to a number of factors, the extent of vertical integration being only one of these.[33]

48. In this legal enquiry, many economic theories could be advanced as to why a particular transaction may or may not lead to a lessening of competition. The Commission in considering these theories is required to test these against the details of the particular transaction and the evidence it has gathered. Indeed this is precisely what had taken place in this case. It is clear from the Commission's report that it did not leap to its conclusion merely by a consideration of the vertical concerns or an assumption of efficiency. Instead it considered the economic theories put forward by *both* the merging parties and the intervenors alike, tested these against the facts of this case and concluded that either of those scenarios were [theoretically] plausible but were not merger specific.[34]

49. The Commission's investigation did not stop there but went on to investigate a range of other relevant factors listed in section 12A including barriers to entry, countervailing power, efficiencies and concerns about collusion, all of it in accordance with the approach to merger regulation confirmed by both this Tribunal and the CAC in the *Mondi* case.[35] It is noteworthy to point out here that the *Mondi* case involved an appeal brought by the merging parties against a prohibition of the Tribunal. The Court in that case did not elevate any specific economic theory to the relevant legal standard to be applied by the agencies nor did it establish a "relevant economic standard" by which vertical mergers should be investigated. Indeed the Court confirmed the role that economic theory can play, as an analytical tool in

[33] In other jurisdictions, dominance or particular market share may be the legal standard to evaluate a particular transaction

[34] Record 1303

[35] Para 23. See also JD Ellerines case supra fn 22

merger analysis, but cautioned the appellant in that case against relying too heavily on economic theories which have been developed under limited assumptions or in a different legal and economic context.[36]

Unreasonable delay

50. The respondents argued that the applicant delayed unreasonably in launching this application and questioned the applicability of PAJA in this application. Mr Unterhalter conceded that there may be some uncertainty about whether or not PAJA applied. He argued that while the applicant relied upon section 27(1) (c) as the statutory threshold for launching its application it nevertheless relied on the provisions of section 7(1) of PAJA. Because the applicant was relying on PAJA it was entitled to bring such application within 180 days of the Commission's decision, as provided in section 7(1) of PAJA and accordingly was not out of time. He nevertheless referred the Tribunal to the explanation provided by the applicant in its reply for the delay.

51. Section 7(1) of PAJA provides that review proceedings must be instituted without unreasonable delay and not later than 180 days after domestic or internal remedies have been exhausted.

52. While the Tribunal rules prescribe the time limits within which a request for reconsideration of a small or intermediate merger should be filed with it,[37] the rule*s* do not prescribe any time periods within which a review application should be brought before it. Tribunal rule 55 provides that where there is procedural uncertainty, the Tribunal may have regard to the Uniform Rules of the High Court. Review proceedings are governed by rule 53 of the High Court which also does not prescribe time limits within which review proceedings ought to be launched. Where there are no time frames specified it is well established that a review application must be brought within a reasonable time. [38]

53. In our view the applicant, if it seeks to rely upon section 27(1) (c) and the CAC decision in the *TWK matter* to approach this Tribunal, must necessarily rely on the rules of procedure of

[36] At para 44-46

[37] See section 16(1) and rule 32 (1) which provides that a request for reconsideration should be filed within 10 business days of the Commission's decision in a small or intermediate merger.

[38] See Harms "*Civil Procedure in the Supreme Court*" at B53.21 and the cases cited there under

this forum. Hence it cannot rely on the outside limit of 180 days provided for in PAJA. Since the Tribunal rules do not prescribe the time frames for bringing the review application, the applicant was entitled to rely on rule 53 of the Uniform rules and was required to bring this application within a reasonable time.

54. Put another way, had the Tribunal rules prescribed the time frames for a review application, the applicant would have had to comply with those, failing which it would have had to ask the Tribunal to condone its non-compliance. Since the Tribunal rules do not prescribe time frames, the matter must necessarily be dealt with under Tribunal rule 55 and by incorporation rule 53 of the Uniform Rules of Court which provides that an application for review must be brought "within a reasonable time".

55. Even if we are wrong on this point, the provisions of section 7(1) of PAJA provide that review proceedings should be launched "without unreasonable delay and in any event not later than 180 days after the date on which the applicant became aware of the action and the reasons for it". The use of the word "and" in the section does not give an applicant a choice between "without unreasonable delay" and "180 days". Notwithstanding the fact that the section places an outer time limit of 180 days in which an application should be launched the injunction in PAJA is to launch proceedings without unreasonable delay within that very same time limit. The notion of "unreasonable delay" is not defined in PAJA. Accordingly we are entitled to turn to the common law to give meaning to this provision.

56. Our courts have held that what is reasonable depends on the circumstances of each case. Where it is alleged that the applicant has failed to institute proceedings within a reasonable period of time the court has to decide whether the proceedings were in fact instituted after the passing of a reasonable period and if so whether the unreasonable delay ought to be condoned. The former enquiry is a question of fact. In regard to the latter the court exercises a judicial *discretion* with regard to all the relevant circumstances.[39]

57. In *Associated Institutions Pension Fund v Van Zyl*[40], the court stated there is a duty on applicants not to take an <u>indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them</u>.

[39] See supra fn 38 Harms B53.21

[40] 2005 (2) SA 302 (SCA) at para 51

58. In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*[41] the SCA confirmed the approach taken by the Court in *Associated Institutions Pension Fund matter* and held that the object of the rule was not to punish the party seeking the review but, quoting from *Associated Institutions* at para 28, was two-fold namely :-

> "Firstly, the failure to bring a review within a reasonable period of time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions"[42]

59. In the *Sapela* case the Supreme Court of Appeal held that under the rubric of the public interest referred to above, the court would include considerations of pragmatism and practicality.[43]

60. The applicant is a competitor of the merging parties and by all accounts has been involved in the business of saw milling for some years and has demonstrated that it is well acquainted with the competitive landscape in the Tsitstikamma area. The applicant was intricately involved in the Commission's investigation from inception. It appears that the applicant sought legal advice at an early stage of the Commission's investigation and was represented at all material times by a firm of attorneys specializing in the field of competition law. It also sought the advice and assistance of an industry expert, Mr Crickmay and submitted a report prepared by him to the Commission as part of its comments on the possible competition harm that the merger could lead to.

61. What is obvious from the time, effort and expense incurred by the applicant in this process is that it considered the matter of grave importance for its business. Given this the applicant's explanation that Mr Ritchie was unavailable in northern Mozambique and a decision could not be taken without him seems incredible. Mr Ritchie could have flown or even driven home, northern Mozambique not being that far or remote as suggested by the applicant. Indeed such a discussion could also be held on the telephone.

62. The second reason proffered by the applicant which is that it was understood in the industry that the merger had hit a snag is also rejected as a basis for delaying the review. We are not told what this "snag" is and whether it involved some disaffection between the parties or

[41] [2005] 4 All SA 487 (SCA)

[42] See also *Associated Institutions* at para 46

[43] See Sapela supra fn 41 at para 29

reconsideration by the seller or whether in the applicant's view it was of a kind that warranted a wait and see attitude. For all we know the "snag" may have been a mere technicality. On the basis of mere gossip and rumour the applicant, despite predicting dire consequences for itself should the merger be approved by the Commission, simply folded its arms and waited.

63. The third basis for the delay appears to be the uncertainty in the law whether review proceedings ought to be brought in the Tribunal or the CAC. Mr Scott does not indicate at what point in time the applicant debated this point with its attorneys. This uncertainty does not seem to bedevil the attorneys when they remitted the letter to the merging parties asserting that their client intended to bring "urgent review proceedings in the Competition Tribunal".[44]

64. Mr Unterhalter suggested that through the very same correspondence the merging parties were notified of the applicant's intention to bring review proceedings and ought not to have implemented the merger. In that letter the applicant proclaims its intention to bring urgent proceedings against the decision of the Commission but does not ask the merging parties to desist with the implementation. It merely suggests that they limit the extent to which they implement the transaction. How were the merging parties expected to understand this suggestion? We would have expected the applicant, given its active involvement in the Commission's investigation, and the very prejudice that it proclaimed it might suffer, to have at the very least sought interim relief preventing the merging parties from implementing the merger. Instead the applicant merely requested the merging parties not to rush ahead with the implementation, sat back, bided its time and sought to hedge its bets through correspondence.

65. The merging parties on the other hand were entitled to ignore the applicant's request not to implement the merger. If every merger was halted by the mere threat of review or appeal being made in correspondence by a jilted suitor or competitor the entire rationale for merger regulation in the economy would be defeated and the work of the competition agencies would forever remain suspended.

66. As far as the filing of the supplementary affidavit is concerned, the applicant submits that they required Mr Crickmay's input and had to wait until he had looked through the record of proceedings. The status of the supplementary affidavit remains uncertain since the parties

[44] See pg. 104 of the transcript

came to an agreement among themselves.[45] However the consequence of the agreement was that the hearing of this matter could only be set down until after the supplementary affidavit was filed. Needless to say that Mr Crickmay had been integrally involved in the matter – both on behalf of the applicant and the Commission– and from all accounts was very well acquainted with all of the issues in the case. Seemingly he would not have needed to look at anything more than the Commission's recommendation and perhaps the views of some of the other competitors which he may not previously have seen which he could have easily done in a week, given the urgency and alleged seriousness of the matter.

67. The merging parties have gone some way in implementing this merger. They have already taken steps to integrate and re-structure the target firm, with its attendant consequences on finances, employees, customers and investors, a reversal of some of which may be difficult to achieve.

68. The public interest in the finality of the Commission's decision is also a significant factor to take into account. In the context of mergers and acquisitions, which in their nature create uncertainty in the marketplace, there is a need to bring certainty to a range of stakeholders, including investors, customers and employees alike.

69. Having regard to all the factors above, we accordingly find that the applicant's delay of some 75 business days in bringing the review application was unreasonable in the circumstances of this case, and does not warrant this Tribunal overlooking it. Indeed the applicant's lacklustre conduct in seeking interim relief, its inclination to adopt a wait and see attitude and its rather limp suggestion that the merging parties would not rush ahead with the merger, suggests that the delay may in fact have been wilful and that this application is nothing more than a ploy to extract some form of commercial advantage rather than the pursuit of the public interest.

The order

70. The application is accordingly dismissed with costs including the cost of two counsel.

_____ 10 December 2008

Y Carrim **Date**

[45] Accordingly we place no reliance on its contents

D Lewis and M Mokuena concurring

Researcher: L Xaba

For the Applicant: Adv. Unterhalter SC and Adv Gotz instructed by Webber Wentzel Bowens

For the First Respondent: Adv Kgoroeadira instructed by the Competition Commission

For the Second, Third and Fourth Respondents: Adv Gauntlett SC and Adv Cockrell instructed by Edward Nathan Sonnenbergs