



COMPETITION TRIBUNAL OF SOUTH AFRICA

In the matter between:

Case No: FFR006April19

Vresthena (Pty) Ltd 1st Applicant

Dimas Family Trust 2nd Applicant

And

The Competition Commission Respondent

Panel	: M Mazwai (Presiding Member)
	: E Daniels (Tribunal Member)
	: A Ndoni (Tribunal Member)
Heard on	: 9 October 2019
Order issued on	: 9 October 2019
Reasons issued on	: 1 April 2021

REASONS FOR THE DECISION IN THE APPLICATION BY THE APPLICANTS FOR THE REMISSION OF THE MERGER FILING FEE IN TERMS OF RULE 42(1)

Introduction

[1] In this matter, the Applicants have made an application to the Competition Tribunal (“Tribunal”) for a partial refund of the R150 000.00 filing fee paid to the Competition Commission (“Commission”), in respect of an abandoned intermediate merger between the applicants. The partial refund sought by the Applicants amounted to R112 500.00.

[2] On 9 October 2019 we issued an order dismissing the application with no order as to costs.

BACKGROUND

[3] 29 November 2018, the Applicants, through their attorneys (CDH) lodged an application for an intermediate merger with the Commission. In terms of that application, the Applicants intended to acquire a chain of supermarkets and liquor stores called Oxford Freshmarket Supermarkets including, where applicable, the properties in which the supermarkets and liquor stores are operated. Upon receiving the merger notice, the Commission commenced its investigation. The history of that investigation, which must be taken into account, is as follows:

- 3.1. On 3 December 2018, the Commission issued a case allocation notice to CDH.
- 3.2. On 12 December 2018, the Commission issued a notice of incomplete filing and requested further information from CDH.
- 3.3. On 23 January 2019, the Commission contacted CDH to enquire about the status of the matter, because it had not received a response from CDH. On that date, the Commission was informed by CDH that the merging parties intended to proceed with the merger.
- 3.4. When no further information was received from the merging parties, the Commission again contacted CDH on 14 March 2019, and was informed by CDH on that day that the merging parties were not proceeding with the merger. CDH also indicated that an application would be made for a refund of the merger filing fee and enquired whether the Commission would be prepared to consider such a refund.
- 3.5. The Commission responded promptly, on the same day, indicating that since the date on which the merger had been allocated, the Commission had investigated and prepared a draft report and that only a partial refund would be considered.
- 3.6. On 1 April 2019, CDH filed an Abandonment of Merger Notice and, in an accompanying email, indicated that the Commission should not rely on work done after the issuing of the notice of incomplete filing, as the time periods were suspended in terms of the Commission's rules.

- [4] In this application, the Applicants argue that the Commission had issued a notice of incomplete filing a week after the merger notification had been filed (it was in fact 9 days) and that the Commission had expended only minimal resources on investigating the matter prior to the initial period. For those reasons, the Applicants argue that the Commission cannot withhold a significant portion of the filing fee.
- [5] We pause to mention that the Applicants appear to accept that they are not entitled to a refund of the full filing fee as they acknowledge that the Commission had conducted an investigation. The Commission in its answering affidavit states that it is opposing the application for a refund because the amount of work and resources which it had put into the investigation is considerable. The Commission also outlined the processes followed in investigating and assessing the merger transaction, prior to it being withdrawn¹. The Commission's investigators reviewed all the documents submitted in support of the merger and ascertained that the merger filing was incomplete, for various reasons which were not disputed by the Applicants. After analysing the documents and assessing the various transactions involved, the Commission concluded that the merger constitutes an indivisible transaction.
- [6] The Commission also responded fully to the averments made in the founding affidavit by, *inter alia*, (i) detailing all the steps which it took to investigate the merger application, (ii) its preliminary findings on the competition assessment and (iii) its communications with CDH in respect of the outstanding information which the Commission required to finalise its merger recommendation. In essence, in its answering affidavit, the Commission, disputes the Applicants' assertions that it had expended only a minimal amount of time and resources on its investigation. According to the Commission the only outstanding information was board minutes, board presentation documents and proof of service of the merger on the employee representatives of the Target Firms.

¹ The details are set out in paras 16 -29 of the Answering Affidavit.

[7] The Applicants' response to the Commission's answering affidavit is surprising. They state that they rely on the fact that the resources spent on the investigation prior to the initial period were minimal and that the initial period had stopped running as a result of the issuing of Form CC13(2), the Notice of Incomplete Filing and, therefore, the Commission cannot rely on performance outside of the initial period to resist a refund of the filing fee². The Applicants also point out that Form CC13(2) was received a week after the merger notification. Then, it strongly denies that the Commission did the investigative work which it said it had done³ and points out, earlier in its reply, that the Commission did not state when the work was performed⁴.

Our Analysis

[8] The relevant provision governing the refund of merger filing fees is Rule 34 of the Commission Rules which makes provision for abandonment of a proposed merger. It states:

***34. Abandonment of merger**

(1) The primary acquiring firm may notify the Commission in Form CC 6 that it has abandoned the intended merger transaction and has no intention to implement it.

(2) Upon filing of a Form CC6

(a) the parties to the merger are in the same position as if the merger had never been notified, and

(b) the filing fee paid in respect of that merger is forfeited to the Commission, unless the party that paid the fee applies within 10 business days to the Tribunal for a remission of the fee, and the Tribunal, on good cause shown, orders the Commission to refund all or part of the fee."

[9] There is nothing in the Act or Rules which precludes the Commission from continuing its investigation when it has issued a Form CC13(2).

² Para 15 of the Replying Affidavit.

³ Para 24 of the Replying Affidavit.

⁴ Para 12 of the Replying Affidavit.

[10] The Commission relied on a Tribunal decision in *Tiger Equity One*⁵ where the parties successfully contested a Form CC13(2) it had issued. The Tribunal indicated:

*"We would observe that the Commission going forward may wish to consider the consequences of a Notice being set aside as a real possibility and to avoid this outcome it should continue to investigate a merger notwithstanding, and further to be mindful of the need to extend the merger period..."*⁶

[11] Mr Le Grange tried to distinguish this case from the *Tiger* matter in that the merger parties in this case have not contested the issuing of Form CC13(2), therefore the time period is interrupted. However, as indicated there is nothing in the Act that precludes the Commission from continuing its investigation, in order not to delay its assessment when the time period resumes.

[12] The Commission had, as is to be expected from an organ of state and as it is obliged to do in terms of the Competition Act 89 of 1998 (as amended), promptly, upon the merger filing being lodged with the Commission, commenced and continued its investigation and in its answering affidavit states that it would have issued a final recommendation, but for the information which was outstanding.

GOOD CAUSE

[13] The Commission pointed out that the refund may only be made on good cause shown and that the Applicants had not shown such good cause.

[14] In their Heads of Argument, the Applicants state that no documentary proof was submitted by the Commission in support of its averment that it had performed a great deal of work on its investigation. This calls into question the integrity of the Commission and ignores that the Commission had, under oath, provided

⁵ *Tiger Equity One (Pty) Ltd and Murray & Roberts Ltd v Competition Commission* Case No: ADF047Jun14

⁶ Paragraph 44.

the Applicants and the Tribunal with full and complete details of its investigative work.

[15] The Commission is to be commended for the efficient way in which it set about investigating the merger. We have no reason to doubt the Commission when it says that it had investigated the merger and would have been able to make a recommendation, but for the Applicants' failure to provide it with the additional information which it required.

[16] The Commission has referred to several cases in which attention was given to what constitutes "good cause." *Mboso*⁷ provides us with some guidance as it confirms that what constitutes good cause must be decided by taking all relevant facts and circumstances into consideration. The Applicants have, without valid cause, questioned the *bona fides* of the Commission. They have also failed to take the Tribunal into their confidence and have not explained why the merger was not proceeded with; when they took the decision to abandon the merger; and why they took so long to notify the Commission of that decision.

[17] The Applicants only responded to the Commission's requests for information, after the Commission contacted them and only advised the Commission that they were not proceeding with the merger after further enquiries from the Commission. The Commission's approaches to the Applicants for information is adequate proof that the Commission was investigating the merger and that its investigations were at an advanced stage.

[18] The Applicants' conduct caused the Commission to expend resources unnecessarily on the merger investigation. Those resources could more productively have been spent on other investigations.

[19] The Applicants have not shown good cause.

⁷ *Mboso vs Standard Bank of South Africa* (19416/2016) [2018] ZAWCHC 20 (19 February 2018) quoted by the Commission in para 47 of its heads.

Conclusion

[20] Under the circumstances, and due to their failure to show good cause as to why they are entitled to a partial refund, the Applicants' application for a partial refund of the merger filing fee must fail.

[21] For these reasons, the Applicants' application for a partial refund of the merger filing fees is dismissed.

Mr Enver Daniels

1 April 2021
Date

Ms Mondo Mazwai and Ms Andiswa Ndoni concurring

Tribunal Case Manager: Hlumelo Vazi
Kgothatso Kgobe

For the Applicants: A Le Grange of Cliffe Dekker Hofmyer

For the Commission: W Gumbie and N Pakade