competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 80/AM/0CT04

In the matter between:

LONDOLOZA FORESTRY CONSORTIUM (PROPRIETARY) LIMITED	**Applicant**
And	
BONHEUR 50 GENERAL TRADING (PROPRIETARY) LIMITED	**1st Respondent**
KOMATILAND FORESTS (PROPRIETARY) LIMITED	**2nd Respondent**
THE COMPETITION COMMISSION	**3rd Respondent**

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (TribunalMember) Mbuyiseli Madlanga (Tribunal Member)
Heard on	:	1 December 2010
Order issued on	:	25 July 2011
Reasons issued on	:	25 July 2011

Reasons for Decision and Order

Introduction

[1] This is an application by Londoloza Forestry Consortium (Pty) Ltd ("Londoloza") for a costs order against the first respondent, Bonheur 50 General Trading (Pty) Ltd ("Bonheur") and second respondent, Komatiland Forests (Pty) Ltd ("KLF").

[2] The application comes to us some 5 years after the withdrawal of a consideration application by the respondents and does not include the costs already tendered by Bonheur in relation to the fifth set of conditions proposed by it in that process.

Background

[3] Londoloza is a consortium that was established for the sole purpose of bidding for the forests owned by KLF in a privatisation process. The government, represented by the South African Forestry Company Ltd ("SAFCOL") embarked on privatizing some of its forests in the Limpopo and Mpumalanga provinces. It transferred these forests into KLF and proceeded with an Invitation to Bid/tender process for 75% of KLF. Bonheur and Londoloza were competing bidders in this process.

[4] Bonheur was the winning bidder. One of the conditions of the award was the unconditional approval of the transaction by the competition authorities.[1]

[5] The merging parties, Bonheur and KLF, notified the transaction to the Competition Commission ("Commission") in terms of section 13A on 29 June 2004. In terms of the threshold requirements of the Competition Act ("the Act"), the transaction constituted an intermediate merger. On 22 September 2004, the Commission, after conducting its investigation, prohibited the merger.

[6] The merging parties, as they are entitled to, in terms of section 16(1)(a), requested the Competition Tribunal ("Tribunal") to reconsider the transaction on 18 November 2004. At the same time, they proposed certain behavioural conditions in an effort to address the competition concerns of the Commission.

[7] The consideration application was opposed by a number of industry participants and on 9 December 2004, fifteen parties were permitted to intervene in the proceedings, Londoloza being one of them. The proceedings were dragged out not least because of the involvement of the intervenors. Although, the hearing of the matter was set down for 16 November 2005 to 2 December 2005, on 15 November 2005, the merging parties indicated that they were not ready to proceed with the hearing on 16 November. It was then agreed that the hearing would commence on 17 November 2005. However during

[1] Clause 10.5 of the Information Memorandum

this period, Bonheur made submissions on further conditions[2] to be imposed on the transaction but this was opposed by all the other parties. The hearing was set to continue on 26-27 January 2006 and 6-10 February 2006. However on 6 February 2006 the merging parties withdrew their application for consideration of the merger and no tender of costs was made.

[8] In a separate but parallel case, Londoloza had launched litigation in the High Court against Bonheur (a few days before the withdrawal of the consideration) in which it sought a declaratory order from the High Court to the effect that Bonheur was not entitled to seek conditional approval of the merger because clause 10.5 of the Information Memorandum ("IM") in the bidding documents required an unconditional approval of the transaction. While we were advised about this litigation we were not asked to decide that issue. It appears that Londoloza was successful in that case and has now approached this Tribunal to award costs against Bonheur & KLF.

[9] Londoloza argued that it is entitled to costs in the consideration application because the respondents, being aware that the tender conditions required unconditional competition approval, could not have sought conditional approval of the merger from the Tribunal in the plausible or reasonable belief that this would have been acceptable to the shareholder of KLF, SAFCOL. Furthermore the proposal of these conditions had resulted in the merger proceedings being unnecessarily delayed. For this reason costs ought to be awarded against them.

[10] Bonheur and KLF relying on the *Omnia Fertilizer v Competition Commission* [3] cases argued that the Tribunal was jurisdictionally barred from awarding costs against the merging parties. In any event by requesting a consideration of the merger, they were simply exercising their rights under the Act. Bonheur submitted that the last set of conditions had been proposed after careful consideration and in the belief that they would be approved by SAFCOL. They had acted in the bona fide belief that the proposed conditions would not contravene any rules or requirements of the bid process. The conditions were withdrawn as soon as it became clear that they were not approved by SAFCOL. It had tendered all costs pertaining to those conditions and denied that it had delayed the merger proceedings unnecessarily.

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[2] These were the fifth set of conditions proposed. There were five different conditions proposed at different times. These fifth set of conditions were later withdrawn by Bonheur.

[3] *Omnia Fertilizer Ltd v The Competition Commission*, case no: 77/CAC/Jul08 and *Competition Commission v Yara SA (Pty) Ltd, Omnia Fertilizer Ltd*, case no: 31/CR/MAY05

Decision

[11] Section 57(1) provides that –

> *(1) "Subject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.*
>
> *(2) If the Competition Tribunal –*
>
> *(a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 51(1); or*
>
> *(b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51(1)."*

[12] In *Omnia Fertilizer v Competition Commission*, the Tribunal expressed the view that in terms of section 57(1), the general framework for the award of costs is that each party to a hearing must bear its own costs. It is only in exceptional circumstances that costs can be awarded. In that case, the Tribunal held that the only circumstances in which it could award costs is if there were private litigants (complainants and respondents) in a s51(2) referral. This is because section 57(2) provides for that exception. The Tribunal was not entitled to award costs against the Commission. Tribunal rules 50(3) and 58 must be read as regulating the issue of costs within this limitation. This decision was confirmed by the CAC on appeal.[4]

[13] Rule 50(3) provides that a notice of withdrawal may contain consent to pay costs. Where it does not contain such consent then the other party is entitled to apply to the Tribunal for costs.[5] Rule 58 regulates the costs that can be ordered by the Tribunal.

[14] The meaning of the words "*Subject to sub-section (2) and the Competition Tribunal's rules...*" in section 57(1) was the focus of much debate. The applicant argued that the words must be interpreted to mean that the circumstances in which costs could be awarded can be expanded beyond the section 51(1) stipulation in s57(2) by the rules of the Tribunal. Hence if the rules of the Tribunal provided for a tender or an award of costs upon a Notice of Withdrawal, as did rule 50(3), this expanded the Tribunal's power to impose costs in such circumstances.

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[4] Supra

[5] The applicant has brought this application in terms of this rule.

[15] A similar argument was made by the applicant in the *Omnia* case. Given that that matter has already been decided by the CAC, we find it unnecessary to repeat the debates and arguments canvassed in that case and to make any further remarks on the jurisdictional point.

[16] This however does not preclude us from assessing the merits of this application.

[17] Let us assume, for argument's sake, that we are empowered to grant costs as argued by the applicant in circumstances contemplated in rule 50(3).

[18] Merger control is a regulatory mechanism provided for in the Act. In terms of section 13A of the Act, any party to an intermediate or large merger *must* notify it to the Commission in the prescribed form.[6] Moreover the parties to that merger cannot implement it unless it has been approved, with or without conditions by the Commission or the Tribunal.[7]

[19] The purpose of notification is to obtain a view from the Commission or the Tribunal whether or not a transaction will give rise to competition concerns in markets in which the merging parties participate. Hence while merging parties have a commercial discretion to engage in a merger or an acquisition, once they exercise that discretion they must notify the transaction to the Commission and cannot implement it without prior approval.

[20] Most transactions are however subject to a number of pre-conditions – whether these are regulatory requirements or contractual rights and obligations. Larger transactions are usually subject to sector regulatory approval, compliance with treasury or JSE rules. If merging parties obtain approval from the Commission or the Tribunal, with or without conditions they have obtained clearance only for purposes of competition concerns.

[21] When merging parties obtain competition clearance from us, they are still at liberty to walk away from the transaction for any other reason. The mere fact that they have obtained approval does not mean that their commercial discretion is fettered and that the transaction will inevitably be implemented.

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[6] Section13A(1)
[7] Section 13A(3)

[22] Similarly, a prohibition of a transaction does not mean that the merging parties are permanently prohibited from pursuing their merger or acquisition. The very same transaction could be structured differently so as to remove the competition concerns of the Commission or the Tribunal. That is a choice open to the merging parties.

[23] As discussed above, merging parties are by *operation of law* required to notify to the Commission. Unlike in private civil court cases, they are not brought before the Commission or the Tribunal, as the case may be, by a private party. Likewise, unlike in private civil actions, they do not come before the Tribunal as an adversary but rather as a party or parties exercising obligations and rights conferred on them by legislation. Once they exercise their right to approach, they are then required to participate in the Tribunal's proceedings.

[24] The Commission and the Tribunal act in the public interest. In engaging with merging parties, concerns raised by objectors or the authorities are canvassed with merging parties. Often in these proceedings, where there are competition concerns, conditions to address these are debated as a matter of course. At times, the proposed conditions are accepted because they address the concerns. At other times, however, they are not accepted and the merger is prohibited. As a matter of law the Commission and the Tribunal are entitled to impose conditions on mergers and the merger process is enhanced by merging parties making concessions to address concerns that the transaction may raise.

[25] Intervenors on the other hand are not required to participate in either the Commission's or the Tribunal's proceedings. They may elect to do so and can only participate with the leave of the Tribunal. In the past, the Tribunal had adopted a permissive attitude towards intervention especially in large complicated cases. However, in recent times the Tribunal has limited either ground or scope of intervention, especially in intermediate mergers, in an effort to balance the rights of merging parties against objections of intervenors. In a sense, intervenors participate in these proceedings at their own risk and they may face, as has happened in some cases, an application for costs against them or draw criticism from the Tribunal for putting merging parties to the expense of defending a case without merits.[8]

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[8] See *Naspers Limited v Electronic Media Network Limited and Supersport International Holdings Limited*, case no: 23/LM/Feb07. See also *Altech Technologies Limited v Mobile Telephone Networks Holdings (Proprietary) Limited and Verizon SA (Proprietary) Limited*, case no: 81/LM/Jul08

[26] In this case we note that the applicant does not make the case that the merging parties ought not to have applied for a consideration of the transaction but that they ought not to have sought a conditional approval of the merger because of clause 10.5.

[27] The interpretation of clause 10.5 was not an issue for us to decide. However, we note that Londoloza who has obtained victory for its interpretation of clause 10.5 in the IM now belatedly makes the argument that the merging parties were not entitled to seek conditional approval in our forum.

[28] Recall that obtaining competition clearance with or without conditions is a duty imposed upon merging parties by s13A. Whether their transaction was subject to other pre-conditions or regulatory approvals is not a matter that we would be concerned with, except for purposes of information. So, for example, if a telecoms merger was approved by us this does not mean that the merger will receive ICASA approval based on other sector specific policy imperatives. Likewise if the transaction is not in compliance with JSE rules it can still be un-done although having received competition clearance.

[29] The merging parties, as a matter of law, were entitled to approach us for a consideration of their transaction. As a matter of law they were entitled to engage with us about possible conditions that would address competition concerns raised by the Commission or objectors. As a matter of law we would have been entitled to consider those conditions had the matter continued. Nothing in the Competition Act prevents us from approving the merger with those conditions. If the conditions are unacceptable to the seller (SAFCOL) or to the shareholder of the acquirer that is an issue as between them. Obviously it does not make commercial sense for merging parties or their representatives to seek a conditional approval when they do not have shareholder approval for it.

[30] This is exactly what happened in this case. Bonheur, the winning bidder, was desperate to save the transaction. In order to gain competition approval it proposed a set of conditions which it was entitled to do in our proceedings. Once it became clear that SAFCOL was not happy with these conditions it abandoned them.

[31] Recall that Londoloza sought to intervene in this matter to pursue its own interests, it was not asked or compelled to do so. The Commission had already prohibited the merger and had articulated serious competition concerns with the transaction. If Londoloza was uncertain about the Commission's ability to defend its decision, it could

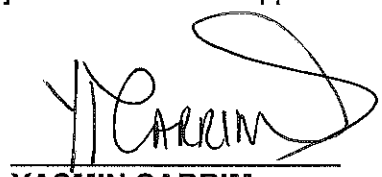
have come to its assistance in many different ways. It could have, for example, elected to appear as a witness for the Commission, it could have made its expert witness available to the Commission, provided it with materials or it could have intervened to a limited extent both in scope and grounds. However, it chose instead to participate fully and to that extent also elected to incur the cost of its participation.

Conclusion

[32] In our view the merging parties simply exercised their rights in terms of the Act and attempted to enhance the merger process by proposing a set of conditions to alleviate competition concerns. They have already tendered costs occasioned by the delay of their fifth set of conditions.

[33] The applicants are not entitled to any further costs and the application is accordingly dismissed.

[34] Costs of this application are awarded to first and second respondents.



YASMIN CARRIM

25 July 2011
DATE

Norman Manoim and Mbuyiseli Madlanga concurring.

Tribunal Researcher	Tebogo Hlafane
For the Applicant:	Adv Vincent Maleka SC instructed by Webber Wentzel
For the 1st and 2nd respondents:	Roestoff and Kruse Attorneys