COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 69/AM/Dec01

In the appeal in the intermediate merger between:

Astral Foods Limited

and

National Chick Limited

Reasons for Decision and Order

Introduction

Astral Foods Limited (Astral), the acquiring party in a merger with National Chick Limited (Natchix), seeks to have our order approving that merger subject to conditions, varied on the grounds that the order is ambiguous. We will refer to this as the variation application. Prior to us considering the variation application, we have to decide whether three firms, the applicants in this matter, who allege that they have an interest in opposing the variation application, can intervene. We will refer to this application, which is the subject matter of this decision, as the intervention application.

Background

In December 2001 the Competition Commission considered the intermediate merger between Astral and Natchix and decided to prohibit it. The merging parties then requested us to consider the merger in terms of section 16(1)(a).

After hearing further evidence we decided on 16 April 2002 to approve the merger subject to certain conditions to remedy concerns about both the horizontal and vertical effects of the merger. The conditions that concern the variation application are those that relate to the vertical aspects of the merger and for this reason we set out only those provisions.

Conditions in relation to the Broiler Industry

1. *Astral must supply any independent customer on the following basis:*

   1.1. *Subject to sub-paragraphs 1.3 and 1.4 below, in terms of a standard form contract approved by the Competition Commission.*

   1.2. *In the case of any disease or other form of force majeure, Astral must reduce its supply to all customers, including entities within the Astral group, pro rata to their ordinary volumes purchased*

   1.3. *In the event that an independent customer does not wish to enter into the standard contract with Astral, then Astral must supply that customer in accordance with the principles set out in sub-paragraph 1.4 below, except for those that relate to notice periods.*

   1.4. *Astral may not discriminate in its conditions of supply between entities in its own group and its independent customers for equivalent transactions. In particular it may not discriminate between them in relation to price, discounts or rebates offered. The determination of prices remains in the discretion of Astral. Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral. The parties to the agreement must each be required to give notice to the other if they do not wish to renew the contract. The length of this period must be the same for both parties and must be reasonable having regard to the nature of the industry. The contracts must be of a five year duration.*

2. *The conditions set out in clause 1 above shall apply for five years from date of this order.*

3. *The Commission's discretion in approving the standard form contract is limited to ensuring that it complies with the principles set out in sub-paragraph 1.4 above.*

A commercial dispute has developed between Astral and the applicants subsequent to the merger. The nub of the dispute, which for the purpose of this decision we need not elaborate upon, is whether our order entitled the first two applicants to resile from existing contracts that they have with Astral. The applicants maintain that our order voided the contracts and hence they have resiled lawfully. According to their founding affidavit:

> "Those Conditions [the conditions attached to the approval of the merger] *necessarily terminated any existing contracts and permitted customers to enter into the standard form agreement, or to be supplied on the basis of new contracts that complied with paragraph 1.4 of the conditions."*[1]

Astral's reading of our order leads them to the opposite conclusion. They assert that the first two applicants continue to be bound by their respective existing contracts. Astral however alleges that our order is ambiguous and hence they propose that it be varied in terms of section 66 of the Act by the insertion of a par. 1.5 into the present order of the following clauses which they argue will cure the ambiguity and bring the order into line with our original intent.

> *"1.5*
> *1.5.1 Existing contracts with independent customers are unaffected by this Order, subject to amendments required to ensure consistency with sub-paragraph 1.4 of the Tribunal Order, such amendments pertaining to price, discounts or rebates, exclusive purchasing obligations, notice periods and the length of the contract;*
> *1.5.2 Independent customers who have concluded supply contracts must be afforded an opportunity to enter into the standard form contract approved by the Competition Commission;*
> 1.5.3 *In the event of any independent customer with an existing contract concluding a standard form contract, neither the volume of chicks ordered in terms of the existing contract, nor the notice periods specified therein, can be varied in the standard form contract."*

They also seek a declaratory order on the following terms:

> 1. *Existing contracts with independent customers are unaffected by this order, subject to amendments required to ensure consistency with subparagraph 1.4 of the Tribunal order, such amendments pertaining to price, discounts or rebates, exclusive purchasing obligations, notice periods and the length of the contract;*

1 See paragraph 3.31 of the applicants ' founding affidavit

2. *Independent customers who have concluded supply contracts are to be afforded and opportunity to enter into the standard form contract approved by the Competition Commission;*

3. *In the event of any independent customer with an existing contract concluding a standard contract, neither the volume of chicks ordered in terms of the existing contract, nor the notice periods specified therein, can be varied in the standard contract;*

4. *In the event of an independent customer with an existing contract not concluding the standard contract, the existing contract remains of full force and effect as per paragraph 3.1 above.*

After the variation application was filed on 27 November 2002 the applicants, who apparently were served with a courtesy copy, applied to intervene in the variation application. Astral has opposed the intervention application and hence the need for us to decide this issue before we can get to the variation application.

Consideration of the application

Astral's opposition to the intervention application is founded on two arguments: 1) that there is no legal basis for parties to intervene in variation proceedings, and 2) that even if there is, the interveners have not made out grounds for intervention, as they were not parties to the merger proceedings before us and hence can have no interest in the outcome of a proceeding to vary such an order.

a) *Is there a legal basis for the intervention?*

The variation application is being brought in terms of section 66 of the Act, which states:

> 1) *The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order-*
>
> (a) *Erroneously sought or granted in the absence of a party affected by it;*
> (b) *In which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or*

omission; or

(c) *Made or granted as a result of a mistake common to all of the parties to the proceeding.*

Astral argues that this is the only section governing the procedure for variation applications and that the language of the section manifestly does not contemplate applications to intervene in such proceedings. It simply provides for a party affected by an order to make an application.

Section 53 which provides for the rights of third parties to intervene in proceedings does not assist the applicants either it argues, as in the case of mergers the right to intervene in such proceedings is limited by the opening words of section 53(1)(c) which states:

" if the hearing is in terms of Chapter 3 – …"

Since section 66 is located in Chapter 6, the argument continues, the variation application is not a hearing in terms of Chapter 3 and hence the provision does not apply. As the Tribunal is a creature of statute it is not competent for the applicants to intervene in these proceedings without a statutory basis.

In our view, Astral's narrow reading of section 66 forces it into an absurdity. If an application to vary can be brought by anyone *affected* by an order it would seem to follow that anyone *affected* by the application to vary, even if they did not bring the application, is entitled to be heard. If not, it would mean that everyone affected must bring their own application, leading to a plethora of applications with potentially contradictory outcomes.

At the very least, another party to the original proceedings should properly be joined as a respondent in variation proceedings. There is no significance to the fact that section 66 does not provide for this expressly one would not expect it. Statutes, do not ordinarily, when providing for a right to bring an application, state that there is a right to oppose – it follows as an obvious corollary of the first proposition that a right to bring an application contemplates a right to oppose it. Indeed in this case Astral has cited the Commission as a respondent.[2]

The fact that a person who is affected by the variation order was not a party to the original proceedings does not make a difference to the issue of standing to oppose the application, but should rather be subsumed under the enquiry as to whether they have grounds to oppose, an approach that we have taken in this decision.

2 The Commission has not filed papers in the proceedings and according to Astral regards the issue as one for the Tribunal to resolve/

We find then that on a proper reading of section 66 alone the applicants are entitled to intervene in the variation proceeding if they can demonstrate that they are affected by the order sought to be varied.

We deal below with the argument that the applicants are precluded from participation on the grounds that they were not participants in the merger hearings.

However, we further find that section 53 also applies to this type of proceeding, and it is wrong for Astral to argue that because section 66 is located in Chapter 6 it is immunised from section 53.

The order sought to be varied is an order made pursuant to a hearing in terms of Chapter 3. If the rights of participation that section 53 affords apply to a hearing that gave rise to the original order, it follows as a matter of logic and consistent policy that those same rights apply to a procedure to vary that order. That being the case the intervenors are entitled to argue their right to intervene is governed by section 53(1)(c)(v), which, as we have observed before in our decisions[3], affords a wide discretion to the Tribunal. What that interest is has been the subject of debate in earlier cases, but we need not decide here what the correct test of the interest is because if the applicants meet the most stringent test the rest is academic.

b) *Are there grounds for intervention?*

Having decided that the Act allows parties to intervene in merger proceedings we must decide now if the applicants have made out a case justifying their intervention i.e. have they made out a case that they are either, affected by the order (section 66 read in isolation) or that they have some threshold interest (section 53 read with the rules).

It appears to be common cause that the purpose of the variation application is to resolve in Astral's favour the interpretation of our order and that this will have a significant impact on the commercial dispute between the parties. Astral in its founding affidavit in the variation application states:

> *"Astral has accordingly been obliged to approach this Tribunal at this stage, as a matter of urgency, for a variation and clarification of the Tribunal order. Astral also seeks a declaratory order to ensure that there can be no further misunderstandings by Daybreak and Mikes (or any*

3 See IDC v Anglo American Holdings, Tribunal Case No 45/LM/Jun02 and 46/LM/Jun02

other interested party) as to the nature and consequences of the Tribunal order." [4]

Later, in its answering affidavit in the intervention application it states:

> *"The fact that the order of the Tribunal would impact on them is a consequence that would have been the case in any event. I respectfully submit that this does not establish for them a direct and substantial interest in the proceedings."*[5]

Indeed if the order is amended as suggested by Astral then it would lead to an interpretation of the order diametrically opposed to the one the applicants seek to advance and wish to rely on in their commercial dispute. Without leave to intervene in our proceedings they have no other forum in which to argue their construction of our order. It requires little reflection to realise that the notion that we could do so without giving them a hearing would be a serious misdirection contrary to any of the most basic notions of justice and fairness.

That being so it is unarguable that the applicants have an interest in the variation proceedings that meets the most demanding test of materiality and by necessary implication means of course that they are affected by the order. Astral did not seriously dispute this.

It remains for us to consider the central argument of Astral, which is that the applicants have no interest in intervening in a proceeding now, that they did not intervene in earlier. As we understand it, what Astral is arguing is that the order, in the form as varied, is the very order that we had intended to give in our decision of 16 April 2002. Had we been asked to make it in that form then we would have done so at the time, and the applicants not being there, would not have been heard, and would have had to accept the order as it was.

Why should they now be in any better a position today than they were on the day the order was granted?

There is some dispute about why the applicants were not intervenors in the merger hearing before us in April 2002. We do not need to decide whether it is because, as suggested by Astral that they were content with their contract under the then prevailing market conditions or as the applicants suggest that they were happy to leave matters to the Commission which had opposed the merger.

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4 See paragraph 63.

5 Page 31 of the record, paragraph 16.

The fact that the applicants were not before us previously for whatever reason should not be decisive. What is decisive is whether they are affected or have an interest in our order. We have found that they do and therefore are entitled to a hearing.

Some of Astral's fears, which perhaps motivated its opposition to the intervention application, seem to be predicated on the concern that the scope of this application may be unnecessarily widened if the applicants are allowed to intervene. Certain passages in the applicants founding papers demonstrate that they have an expansive notion of what their intervention will entitle them to bring before us by way of evidence. In their founding affidavit, on page 18 of the record, par 4.2, in the intervention application the applicants state:

> *"To assist the Competition Tribunal in resolving this matter it is proposed that the intervening parties file an affidavit dealing with the material facts. I am advised that it is necessary to fully explain the current market conditions, set out the intentions of Mike's and Daybreak in relation to Midway and its role in the market, and to correct some of the factual inaccuracies in Kingston's affidavit. Should there be material disputes of fact necessary for the determination of the matter, then the intervening parties seek leave to participate in the proceedings to hear such evidence as may be called to resolve the disputes of fact." (Our emphasis)*

We questioned their counsel about this at the hearing and he was astute to assure us that the evidence would be less extensive than it might seem from the papers and that it was merely necessary to explain the context. Indeed, as he pointed out, Astral in its own papers had spent much time on setting out the context of the application.

Nevertheless we are confined to inquiring into whether our order is ambiguous and if it is, how it should be remedied. To answer these questions necessitates argument about what was originally intended and for this purpose the record of the original proceeding suffices. Evidence about what is happening in the market now, although interesting background to explaining why the application has come about, is not relevant to resolving these questions.

In their founding affidavit the applicants make out a case for opposing the variation. For this reason we find that they are entitled to the ordinary rights accorded to a respondent in application proceedings, the right to file answering papers and to present written and oral argument. They further ask that if the order is ambiguous, a fact that they deny, they should then be allowed to propose a declaratory order to the effect that the conditions necessarily

terminated the existing supply contracts. [6]

We will allow the applicants to do so, if they deem it necessary, but if they do they must bring a counter-application setting out their proposed variation of the order. However, the applicants are not entitled to adduce evidence on current market conditions, save to the extent that they need to do so in order to respond to any allegation made out in the founding papers.

ORDER

1. The applicants are granted leave to intervene in the application brought by Astral Foods Limited in terms of section 66(1)(b) of the Competition Act, for clarification and/or variation of the order made by the Competition Tribunal in Case No 69/AM/Dec01, (the 'variation application').

2. The intervention is subject to the following conditions:

   2.1. The applicants will be accorded the same rights as a respondent in application proceedings in order to oppose the variation application;
   2.2. The applicants will be entitled to bring a counter-application to apply to vary the conditions in the order in Case No 69/AM/Dec01, referred to as the Broiler conditions;
   2.3. The answering affidavit and counter-application, if any, must be filed within 10 business days of this order;
   2.4. Any further filings by either party will be subject to the time periods for that type of affidavit set out in Rule 42 of the Tribunal rules;
   2.5. the variation application and any counter-application will be heard at the same time;
   2.6. That if the applicants adduce evidence of current market conditions that it be confined to factual allegations concerning the context of the variation application or counter-application.

3. The applicants are awarded the costs of the intervention application, which include the costs occasioned by the employment of two legal representatives.

20 February 2003

N. Manoim **Date**

6 See paragraph 4.1 of the applicants founding affidavit page 18.

Concurring: D. Lewis and P. E. Maponya

For Respondents - Attorneys Sonnenberg Hoffman Galombik: R Wilson. Council P Hodes and P Farlam
For Applicants - Espag Hatting: BD Hattingh. Council :D Unterhalter and A Gotz