COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 41/LM/Aug03

In the application to amend the order in the large merger between:

Boart Longyear (a division of Anglo Operations Limited)

and

Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd

Reasons for decision

Introduction

1. In December 2003, we approved the parties' merger subject to conditions. The parties now seek an amendment to those conditions. On 3 March 2004 we issued an order dismissing the application. Our reasons follow.

Background

2. On the 8 December 2003 the Tribunal conditionally approved the merger between Boart Longyear, a division of Anglo Operations Limited ("Boart") and Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd (collectively "Huddy").

3. The conditions were that:

    1. *Boart Longyear ("Boart") appoints two independent agents to sell the Kempe machine, as well as the spare parts for the machine. The concluded agency agreements must be in force for a period of not less than three (3) years ("the period") and must provide that the following terms apply for the period, at least:*

        1.1 Boart must supply the agents with the Kempe machines and the spares.
        1.2 Boart must undertake to provide the appointed agents with consignment stock of the Kempe machines so that each agent has at least two (2) machines on consignment at all

times;

1.3 *Boart must sell the Kempe machines and the spare parts to the agents at the standard discount rate it offers to its agents from time to time, provided that the discount rate must not be less than15% off the list price applicable at the time. The list price for 2003 is attached hereto as annexure "A". Thereafter the list price for the Kempe and the spares may escalate annually on 1 December provided, however, that the increase does not exceed an amount greater than the consumer price index, excluding mortgage bond rates (CPIx), for the year immediately prior to the increase*[1].

2. Boart must enter into the agreements within three (3) months of date of this order.

3. The agents must be financially independent of one another and must conduct business in South Africa.

4. For the period that these conditions are in force, Boart must, within fourteen(14) days of the conclusion of the agency agreements, and, the preparation of the annual price list, provide the Commission, with –

i. Copies of the agreements concluded with each of the agents; and

ii. The annual price lists reflecting the prices of the Kempe machine and the spares.

4. The order thus required Boart to enter into the agreements with the agents, by no later than the 8 March 2004.

The application

5. On the 4 February 2004 the merging parties filed their application to vary paragraph 2 of the condition.

6. The parties sought to have the words "within three (3) months of the date of this order" deleted and replaced with the words "within three (3) months of the effective date of the merger." The parties do not define what the effective

1 By way of example, this means that on 1 December 2004 the prices will be increased by an amount not exceeding the CPI*x* for the period 1 December 2003 to 30 November 2004.

date means but by implication it appears to be the date on which the merger is implemented, a date which was still not ascertainable at the time the application was heard.

7. In the affidavit supporting the application, the parties state that subsequent to the order being made, it became apparent, that they would not be able to fulfill the conditions within the stipulated three months.[2] The explanation for this apparent difficulty is that the parties had, after the approval, decided that they would be able to implement the merger by 1 March 2004. They had also agreed that Boart would perform a due diligence of Huddy's business prior to that date, as the completion of a satisfactory due diligence was one of the conditions of the sale. Boart was subsequently informed by its auditors that they would be unable to complete the due diligence before the end of March. Boart alleges that until all the conditions of sale are met it is unable to enter into agreements with third parties to act as agents for the Kempe range of machines. Thus they maintain they would be unable to comply with the condition by 8 March 2004 as required by the order.

8. The Commission did not oppose the application and indicated that it would abide the decision of the Tribunal.

The hearing

9. At the hearing counsel for the merging parties argued that the application was brought in terms of section 66 of the Act, which corresponds with Rule 42(1) of the Uniform Rules of Court.[3] This fact was not clear from the papers themselves which make no mention of which section of the Act they rely upon for the application. Whilst this omission on its own is not fatal to the application, if the merging parties seek to rely on section 66, they must at the very least lay out the jurisdictional basis - this as we show later they have failed to do.

10. Section 66 of the Act states that:

2 See paragraph 5 of the affidavit of Mr Carel Stephanus Erasmus Pretorius.
3 See the decision of the appeal court in Mike's Chicken(Pty) Ltd and others / Astral Foods Limited, case no. 32/CAC/Sep03.

(1) "The Competition Tribunal, or the Appeal Court, acting of its own accord or on application of a person affected by a decision or order may vary or rescind a 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 the parties to the proceeding."

11. The Tribunal therefore has the power to amend its order in the circumstances as set out in section 66(1).

12. In argument counsel for the merging parties averred that there was a "patent error" in the order in that it is impossible for the merging parties to comply with the order, prior to the effective date of the merger transaction. He argued that Boart Longyear cannot enter into agreements with third parties, on behalf of Huddy, until it actually controls Huddy, that is, until the effective date of the transaction.

13. Furthermore, he contended that the order was granted as a result of an error common to all the parties. Although the parties were given the opportunity to consider the conditions prior to the order being handed down, they did not "pick up" that Boart would not be able to comply with the order within the stipulated three months.

14. Thus, the parties' application was founded on both sub-sections (b) and (c) of section 66 of the Act.

15. A further argument advanced at the hearing is that the Tribunal could not have intended the order to read "three months from the <u>date of this order</u>", since the merger had not yet occurred. According to counsel, the Tribunal merely intended to give the parties 90 days within which to enter into the agreements and not to tie this time period to the date of the approval of the merger.

<u>The Commission's view</u>

16. Although it did not oppose the application, the Commission did not agree with the parties that the order was made as a result of a mistake common to all parties. The Commission states that its understanding, at the time of the merger hearing and when the order was given, was that Boart would be in a position to comply with the order. The Commission points out that by agreeing to the terms of the Tribunal's order, when they were given the opportunity to make submissions in respect of the order, by implication, the parties indicated that they would be able to comply with the terms of the order.

17. According to the Commission, the papers filed by the parties appear to indicate that it was only subsequent to the Tribunal's order that it became apparent to the parties that they would not be able to comply with the order, for whatever reasons.

Our approach

18. It is widely accepted that the general approach of courts to varying a final order is a conservative one, an approach aimed at preserving the finality of litigation. The courts have recognised a limited number of exceptions to this approach and these are captured in section 66 of the Act.[4]

19. In Mike's Chicken (Pty) Ltd and others / Astral Foods Limited, the Competition Appeal Court noted that since section 66(1) was modeled on Rule 42, the principles developed by the courts, in regard to Rule 42 accordingly provide guidance in the interpretation of section 66(1).

20. Adopting this approach to the present case, the following questions arise:

a) is there an obvious error in the order, and
b) was the order made or granted as a result of a mistake common to all the parties to the proceedings?

Is there an obvious error in the order ?

4 See the Tribunal's decision in Astral Foods Limited / Mike's Chicken (Pty) Ltd and others, case no. 69/AM/Dec01, at page 6 where the Tribunal quoted the Firestone South Africa (Pty) Ltd v Genticuro decision [1977(4) SA (298) (A)].

21. Rule 42(1) (b) provides for the variation of an order where there is an ambiguity or a patent error or omission. It is the equivalent of section 66(1)(b) of the Act.

22. A patent error has been described as "an error as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it ".[5] In First National Bank of South Africa Ltd v Jurgens and others the court re-iterated the requirement, for relief under this subsection of Rule, that the patent error must be attributable to the court itself.[6] Leveson J held that relief will only be accorded where the terms of the judgment do not reflect the true intention of the presiding judge.

23. Thus, to succeed with this line of argument, the parties must show that a patent error in the order was engendered by the Tribunal.

24. The merging parties argue that there is a patent error in the order, on the basis that it is impossible for Boart Longyear to comply with the order prior to the effective date of the merger. Although not expressed as such, this argument seems to suggest that the Tribunal could not have intended to grant on order, which is impossible to comply with.

25. We are not persuaded that the wording of paragraph two of the order is a result of an error made by the Tribunal.

26. Firstly, the parties have not established that it is indeed impossible to comply with the order. As pointed out by the panel at the hearing of this matter, nothing precludes Boart Longyear from entering into agency agreements, which are conditional on the merger coming into effect. In other words, the agreements can be entered into now and the implementation thereof suspended until the merger transaction is complete. Not only are such agreements an everyday commercial reality, but there is also nothing in the order indicating that this would not be accepted as compliance with the merger condition.

5 Erasmus, Superior Court Practice, B1- 310.

6 First National Bank of South Africa Ltd v Jurgens and others 1993 (1) SA 245 (W) at 246 F.

27. Furthermore, Rule 39 of the Competition Commission's rules for the conduct of proceedings provides a remedy, where there is apparent non-compliance with merger conditions. In terms of Rule 39, if a firm appears to have breached an obligation that was part of a conditional approval of its merger, the Commission must deliver a "Notice of Apparent Breach" to that firm. Within ten days thereafter, such a firm is entitled to submit to the Commission a plan to remedy the breach. In response thereto, the Commission may accept the plan or reject it and invite the firm to consult with it to establish a more satisfactory plan.

28. At the hearing, the panel suggested that if indeed it is impossible for Boart to comply with the merger conditions, and if it is served with a Notice of Apparent Breach by the Commission, the route prescribed above is a more suitable one than that proposed in this application.

29. Secondly, there is nothing in the record to suggest that the intention of the Tribunal was other than that expressed in its order of the 8 December 2003. In general merger conditions are intended to remedy the anti-competitive effects of the transaction, to achieve this it is imperative that such conditions are clear, certain and enforceable. The condition that Boart Longyear enters into the agency agreements within the stipulated period from the date of the order is precisely aimed at ensuring certainty and enforceability.

30. The formulation proffered by the parties – that the stipulated period be within three months of the 'effective date' of the merger, would render compliance with the condition dependent upon some unknown date, itself dependent on extraneous circumstances and subject to change at the will of the parties. The Tribunal could not have intended to impose a condition on the merger that would create such uncertainty. Such a condition would not be effective, instead it would be impossible to enforce.

Was the order made or granted as a result of a mistake common to all the parties to the proceedings?

31. This basis is catered for in Rule 42(1)(c), its equivalent being section 66(1)(c) of the Act.

32. In Tshivase Royal Council and another v Tshivase and another the Appellate Division held that to succeed on this ground two broad requirements must be satisfied.[7] Firstly, there must be a mistake common to both parties. Nestadt JA stated that:

" as in the field of contract law, this would occur where both parties are of one mind and share the same mistake – they are, in this regard, ad idem" [8]

33. It is widely accepted that it is not sufficient if the error is that of one of parties only, or of the court, or of a legal representative.[9] In the present case, this would entail a mistake common to the merging parties, the Commission and the Tribunal. The Commission does not agree with the parties that the order was based on a mistaken view that Boart would be in a position to comply with the order. This clearly indicates that even if such a mistake existed, it was not common to all the parties.

34. Secondly, there must be a causative link between the mistake and the grant of the order or judgment. In Seedat v Arai Eloff J held that this requires that the mistake relate to and be based on something relevant to the question to be decided by the court at the time.[10] The principle is that fresh evidence, not relevant to any issue that had to be determined when the order was made, cannot subsequently be used to create a retrospective mistake.

35. At the hearing the representative for the Commission correctly pointed out that the effective date of the merger was irrelevant to the consideration of the competitive impact of the merger. There is no causal link between the effective date of the merger and the Tribunal's order as it

7 Tshivase Royal Council and another v Tshivase and another 1992(4) SA 852 (A) at p 864 A-B.
8 op.cit.
9 Erasmus, Superior Court Practice B1-311. See also Groenewald v Gracia Edms Bpk 1985 (3)SA 968 (T) ; Seatle v Protea Assurance Co Ltd 1984(2) SA 537(C) .
10 Seedat v Arai and another 1984 (2) SA 198 (T) at 201D.

stands.

36. Furthermore, paragraph five (5) of the affidavit in support of this application states:

" It has ***since*** *come to the Applicant's attention that it will be impossible for it to fulfill the Kempe agency order within the period specified, namely by 8 March 2004."*

37. This clearly indicates that it was only subsequent to the merger hearing and the date of the Tribunal's order, that the parties formed the opinion that they would not be able to comply with the order. This view is reinforced when one considers that the parties were given an opportunity to consider the conditions prior to the granting of the order and that the parties submitted their comments on the draft conditions to the Tribunal. If it was known to them at that stage that it would not be possible to comply with the order, their legal representatives would have stated so.

38. For all of the above reasons we are not persuaded that a variation of, or an amendment to the order, is warranted. We find that the parties have not satisfied the requirements for the order to be amended or varied in terms of section 66(1) (b) or (c).

Conclusion

39. The application is therefore dismissed.

19 April 2004

N. Manoim Date

Concurring: D. Lewis, T. Orleyn.

For the merging parties: Adv. W Pretorius

Roestoff Venter & Kruse.

For the Commission: Mr M Worsley assisted by Mr M van Hooven.