IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No.: 84/CAC/Jan09

In the matter between:

A. C. WHITCHER (PTY) LIMITED	**Appellant**
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	**First Respondent**
MTO FORESTRY (PTY) LIMITED	**Second Respondent**
BOSKOR SAAGMEULE (PTY) LIMITED	**Third Respondent**
BOSKOR RIPPLANT (PTY) LIMITED	**Fourth Respondent**

JUDGMENT:

DAVIS JP:

Introduction

[1] On 14 December 2006, the second to fourth respondents submitted an application for consideration of an intermediate merger to the Competition Commission. The second respondent was the primary acquiring firm. The third and fourth respondents were the primary target firms. The second respondent proposed to acquire the assets and the business of the third and fourth respondents in terms of a sale of business agreement.

[2] The Competition Commission ("the Commission") investigated the proposed merger at some length. On 13 March 2007, the Commission decided to approve the merger without conditions.

[3] The reasons for the decision were set out in the Commission's report dated 12 March 2007 ("the final report").

[4] In July 2007, the appellant launched an application before the Competition Tribunal ("the Tribunal") to review and set aside the decision ("the review application"). It was the first such review of its kind before the Tribunal, brought on the basis of the decision of this Court in TWK Agriculture Ltd v the Competition Commission (67/CAC/Jan07).

[5] The Tribunal dismissed the review application. It found that the Commission had not misdirected itself in approving the merger. In addition, the Tribunal held that the appellant had delayed unreasonable before launching the review application. The appellant now appeals to this Court against the Tribunal's decision

The framework of the dispute.

[6] The dispute, as it was argued on appeal, turned on three separate questions:

1. Whether the appellant delayed unreasonably before the launching of the review application;
2. If this court did not consider the delay to be unreasonable, then, on the basis of the merits of the decision, were there justifiable review grounds for setting aside the decision of the Tribunal.
3. If this court decided that the impugned decision was vitiated by a material irregularity, should it then exercise its discretion and refuse to grant relief to appellant.

Unreasonable delay

[7] Mr Gauntlett, who appeared together with Mr Cockrell onn behalf of second, third and fourth respondents, joined cause with Mr Sibeko, who together with Ms Kjoroeadira appeared on behalf of first respondent to emphasise as their primary ground of attack against that the appeal the delay in launching the application was fatal to the application.

[8] The chronology can be summarized thus. The impugned decision was taken by the Commission on 13 March 2007. The review application was launched on 5 July 2007, some three and half months thereafter. It was common cause that appellant learnt of the impugned decision within days after it was taken. On 19 March 2007, appellant’s attorney wrote to the managing director of third and fourth respondents to advise him that the

appellant would ‘in all probability be taking [the impugned decision] on an urgent review to the Competition Tribunal’. However the proclaimed understanding of the inherent urgency of the application notwithstanding the review was only launched on 5 July 2007.

[9] In his answering affidavit on behalf of the second, third and fourth respondents, Mr David Reeves took up the question of delay on the part of applicant. After averring that there had been an unreasonable delay by applicant before it launched its application for review, Mr Reeves pointed out that a number of steps had been taken subsequent to the authorisation of the merger to implement the transaction, including the following:

1. The Boskor mill was transferred to MTO on 5 June 2007
2. The purchase price was paid 7 days thereafter to Swartland (Pty) Ltd, the parent company of third and fourth Respondents;
3. MTO implemented an organisational restructure, and appointed additional regional management to manage its Tsitsikamma region in May 2007. In particular, MTO’s business was restructured into three regions, Boland, Outeniqua and Tsitsikamma;
4. MTO and Boskor have thoroughly integrated their employees into the various regions. In particular:

all employees at the Boskor mill were transferred to MTO;

all employees of the Boskor mill were transferred to the MTO pension fund; and

all Boskor employees were included in the MTO incentive bonus scheme, which will enhance their earnings.

[10] In applicant's replying affidavit, Mr Westcott raised three justifications for appellant's delay in the eventual launching of its review application:

1. Its managing director Mr Raymond Ritchie had been out of the country (in Northern Mozambique) for three weeks after the decision by the Commission had been taken. Appellant considered it unwise to launch the review application without careful consideration of the issues by Mr Ritchie. In particular "upper most in our minds, was the fact that the fact MTO was the appellant's only supplier. There was a concern that launching the review could have serious implications and that it was not a decision taken lightly" by appellant.
2. According to Mr Westcott, to the best of applicant's knowledge, the merger was only 'officially consummated' in June 2007. According to Mr Westcott, a number of rumours have been circulating in April and May 2007 that there were still serious obstacles to the merger. Accordingly, the

application was launched only when appellant became aware that the merger was going ahead in June 2007.

3. When appellant took the decision to proceed with the application, there was great uncertainty as to whether the review had to be brought before the Tribunal or this Court. That uncertainty was only to be resolved after this court handed down its decision in TWK Agriculture Limited v The Competition Commission (Case No 67/CAC/Jan07). Accordingly, Mr Westcott averred that appellant had been advised by its legal representatives that it might wish to wait until the matter of TWK Agriculture had been disposed of before filing its application for review. In justification he noted that some of the appellants legal representatives had been present during the hearing of the TWK Agriculture case and once it 'became apparent in the course of argument the CAC would not readily accept that the Tribunal lacked jurisdiction to review a merger decision taken by the Commission;' the appellant proceeded to launch its review application in the present dispute.

The Tribunal's decision

[11] The Tribunal considered these particular arguments and concluded thus:

> "*the [appellant'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 [appellant's] lackluster 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 willful 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*".

[12] Mr Unterhalter, who appeared together with Mr Gotz on behalf of the appellant, submitted that the Tribunal had erred with regard to this finding; in particular that the review had been brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that the appellant could not rely on the outside limit of 180 days as provided for in PAJA.

[13] Mr Unterhalter submitted that a decision of the Commission to approve an intermediate merger such as the present merger was administrative action as defined in section 1 of PAJA. For this reason, the review proceedings stood to be analysed in terms of section 7 (1) read together with section 6 (1) PAJA. In short, the review had to be instituted without unreasonable delay and 'not later than 180 days after the date on which the person

concerned was informed of the administrative action, became aware of the action and reasons for it or might reasonably have been expected to have become aware of the actions and reasons'.

[14] As the present review proceedings have been initiated within the 180 days period contemplated in section 7 (1) PAJA, the application could not be time barred.

[15] By contrast, Mr Gauntlett submitted that the wording of section 7 (1) made it clear that the application for review may be time barred, even if brought within the 180 day period, the decisive question being whether the appellant delayed unreasonably before launching the application. In this connection he referred to the judgment of Brand JA in Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 382 (SCA) at para 46 in which the learned judge of appeal emphasised that the failure to bring a review within a reasonable time may cause prejudice to the respondent, that there was a public interest element in the finality of administrative decisions and the exercise of administrative functions and that the determination of a reasonableness of delay was entirely dependant on the facts and circumstances of a particular case. Only after a court had determined that the delay was unreasonable, could it proceed to exercise a discretion as to whether the delay should be condoned.

[16] Mr Unterhalter submitted that in this case the explanation provided by the appellant justified a conclusion that the delay was not unreasonable. In my view, the reason offered by the appellant concerning the uncertainty as to the appropriate forum for review which was finally settled in the TWK Agriculture case is of considerable weight. It is understandable for the appellant not to rush to one other forum to bring its review application, until a case which was about to be heard in this court, had been finally determined so that appellant's legal representatives could make an informed decision as to the advice to be given to their clients about the appropriate forum. In summary, the fact that the case was only argued on 12 June 2007, therefore justified a delay until such time as an informed decision could be made as to the appropriate forum for review in the light of the prevailing uncertainty as to the law.

[17] There is a further reason why the delay should not constitute an insurmountable obstacle to an evaluation of the merits. As Brand JA said in the Associated Institutions Pension Fund and others, *supra* at para 46, there is a public interest element in the finality of administrative decisions. There is a public interest element in insuring, within the competition law context, that, when a merger transaction is sanctioned, it is justified within terms of the provisions of the Act. If a competition authority acts in manifestly unreasonable regard for the applicable provisions of the Act in

sanctioning such a transaction, the prejudice to a range of stakeholders including competitors and consumers is potentially significant. Thus, even Mr Gauntlett was constrained to concede that, were there to be an 'egregiously reviewable decision' this consideration would have to be weighed in so far as the evaluation of an unreasonable delay was concerned.

[18] For these reasons therefore, it is necessary to turn to the merits of the Commissions decision.

The merits review

[19] In its answering affidavit first respondent states, 'in its founding affidavit and supplementary affidavit the Applicant places extreme focus on facts used by the 1st Respondent in coming to its conclusion. Knowing that a review application its not merit based it appears as if the Applicant is bringing the application in the guise of an appeal'.

[20] On the basis of this approach two arguments were raised by respondents;

(i) The significance of the distinction between an appeal and the present proceedings, being a review; and

(ii) The standard to be adopted, in so far as review proceedings of this kind, was concerned.

This distinction between an appeal and review is not one without difficulty. Particularly under PAJA, the merits of a decision will, to some extent, form part of the scrutiny to be exercised by the reviewing court. Cora Hoexter Administrative Law in South Africa at 106. As Navsa AJ said in Sidumo and another v Rustenberg Platinum Mines LTD and others 2008 (2) SA 24 (CC) at para 108. 'This court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny'.

[21] For this reason, appellant was correct to contend that the Tribunal was required to scrutinise the reasoning of the Commission in order to establish whether the latter's decision constituted reasonable administrative action. The tribunal was thus tasked not merely to describe the approach adopted by the Commission, and then accept its approach at face value, but rather carefully to examine the Commission's process of reasoning as reflected in its final report and to determine whether that reasoning displayed an appropriate understanding of the law and a reasonable application of the law to the facts as set out.

[22] The Tribunal emphasised the importance of deference to the Commission. It reasoned thus:

"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 decision of the Commission and would only be inclined to 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] There are at least two grave errors contained in this passage. Firstly, the concept of deference needs to be treated carefully. It is not simply jurisprudential war cry. In any event, it has been decidedly overworked in our law. For a general discussion see Hoexter, supra at 138 - 147. In the first place, a distinction must be drawn between deference when it applies within the context of the doctrine of the separation of powers and a case such as the present dispute. The doctrine of separation of powers designates specific areas of competence which are associated with each of these three branches of government. As Prof Jeffrey Jowell has noted:

> "*it is not the province of courts, when judging the administration, to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantage of a decision. We should not expect judges therefore to decide whether the country should join a common currency, or to set a level of taxation. These are matters of policy and the preserve of other branches of government and courts are not constitutionally competent to engage in them.*" Cited by Hoexter, supra at 139

[24] However in this case, the question for determination does not concern the application of the doctrine of separation of powers. It involves the supervisory role of the Tribunal over the Commission in the case of an intermediate merger, in which the latter, is both the investigator and the adjudicator. Manifestly, these rules call for a heightened level of scrutiny. Furthermore, as David Mullan 2006 Acta Juridica 42 at 50 has noted, an important criterion in assessing the level of deference owed in a review application is the expertise of the reviewing court relative to that of the administrative body. In this case, the Tribunal has significant economic expertise and knowledge of competition matters. It was set up for the purpose of constituting a specialist body. It is in an entirely different position from a general court, whose members are not appointed, as is the case with those of the Tribunal, because of their specific expertise in the field upon which they are called to review. A second, significant mistake

committed by the Tribunal is its unfortunate invocation of the law of the European Union. The Tribunal seems to have completely omitted from its consideration the important decision in P, the Commission v Tetra Laval ('Tetra Laval II') [2005] ECR I – 987. The European Court of Justice said, inter alia, in its Tetra Laval decision:

> "*The community courts [must], inter alia establish whether the evidence relied on is factually accurate reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess the complex situation and whether it is capable of substantiating the conclusions drawn from it".* para 39

Thus, the power of review extends to 'whether the factual information on which such assessments are based is accurate and whether the conclusion drawn as to fact are correct; whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors; and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness.' Cited by Bay and Calzado 2005 (28) World Competition 433.

[25] In short, a careful process of investigation of the reasoning adopted by the Commission is required. That does not mean that, where the Commission arrives at a plausible and justifiable conclusion, that it is permissible that this should be substituted for an alternative by the Tribunal. Its task is to ask whether the process of reasoning as contained in the Commission's report can justify the conclusion at which the latter arrived.

The Commission's reasoning

[26] Mr Unterhalter, in his oral argument before the court, concentrated on two central findings of the Commission namely, the question of foreclosure and the definition of the market.

[27] The concern of a number of enterprises like appellant, which conduct the business of a sawmills, was that, if the proposed merger took place, the increased concentration in the downstream sawmilling market would make the merged entity dominant in the market for sawn timber. This was made clear to the Commission in representations generated by appellant's attorney on 29 January 2007. The following was stated with regard to vertical foreclosure:

"1. *CSG would secure a sustainable and long term supply of saw logs for the sawmills under its control, the commercial imperative of which is self evident if one has regard to the*

fact that up to 40% of the total plantation area in the WSC could be phased out, Boskor is operating well below capacity and significant capital investments have been made at the Longmore saw mill.

2. *CSG would be able to ensure that its sawmills get a better log mix, leaving competing sawmills to compete over a low-grade log mix. Even where ACW is provided with the contract volume, the merged entity could easily manipulate the quality log supply. ACW can be given all the hard species, small logs, logs with knots, crooked, burnt, worm eaten, as well as inaccessible mountainous area timber (which have a higher cost of harvesting and is of poorer quality), etc. This would significantly raise ACW's costs due to the lower production rates and higher wastage associated with the sawing of poorer quality logs, ACW has on a number of occasions experienced the manipulation of the quality of its log supply*."

In the founding affidavit, deposed to on behalf of appellant, Mr Westcott noted that this representation 'proved to be prophetic because ACW was already experiencing an increase in the manipulation of the quality of its log supply since the merger was approved'.

[28] In summary, appellant's complaint was that, while it may not be immediately foreclosed in the sense of being denied total access to saw logs, its dependence on the merged entity meant that it was no longer an effective competitor with the emerged entity. The best that appellant could hope for was compliance by the merged entity with its contractual obligations to supply appellant with 28 500 cbms saw logs per year. But it would not be able to access more logs nor could it be sure of the quality thereof.

[29] Read accordingly, the complaint concerned foreclosure not only of volume but of quality of product. The Commission completely ignored the question of the quality of logs which might have been provided to appellant: thereby not considering at all the question of quality foreclosure.

[30] Turning to volume foreclosure, the Commission made much of the estimated 100 000 cbms of logs which would not be available after March 2008 as a result of fires in the Tsitsikamma / Longmore region. This observation then supported the following critical conclusion on vertical concerns:

> *"MTO's output of saw logs is going to decline by 100 000 cbms of saw logs, or approximately 15 per cent of its total volume. Due to the location of the fires, all of this volume is going to be reduced in the Tsitsikamma / Longmore region, where all the interveners*

(except Steinhoff) are located. Existing log output in the Tsitsikamma region is 267 , 500 cbms, of which 137,500 would continue to be sold to Boskor without the merger, 28, 500 cbms would be sold to ACW and 101,500 cbms were sold on the open market. The entire volume sold on the open market is eliminated as a result of the fires. This effectively amounts to the volumes sold to ACW and the smaller millers, and their reduction in volume is not merger specific."

[31] This conclusion is manifestly unreasoned. In terms of section 12 A of the Act, the Commission must initially determine whether or not the merger is likely to substantially prevent or lessen the competition. Thus, the key question is to determine the effect of the merger; in this case; in a market in which supplies had already declined because of the fire. The fire can therefore not be taken out of the equation to justify a rather cavalier conclusion that the consequent reduction in volume was not merger specific.

[32] A rational enquiry would examine how the distribution of the logs took place before the merger and then compared this position to what would be likely after the merger. Before the merger, a supplier of logs would rationally decide how to distribute its product between appellant and, for example Boskor, on the basis of financial considerations. Clearly once

the merger had taken place, there was an incentive to self supply downstream. The fire exacerbated the problem because, after the merger, there was now greater scarcity than would have been the case had there not been a fire. This in itself would presumably mean that there was less largesse for appellant to distribute to mills other than its own. But none of these issues appear to have taken up any of the consideration of the Commission.

[33] An argument which was raised and canvassed by the Commission concerned whether Boskor prior to the merger, had countervailing power which would have constrained second respondent prior to the merger. The Commission concluded that, although this theory was credible, it did not have any evidence of constraining power in practice. However, a few pages later in its own report it summarises the evidence of the Steinhoff group to conclude 'that they believe that the merger results in fundamental and irreversible structural change in the saw milling market in the region. The reason for this claim is Steinhoff's evidence that there would be less constraining power as a result of the merger with Boskor than previously was the case.

[34] Turning to the market, the Commission found that:

> "*Even though price differentials and transport costs at first glance would suggest a separate Eastern, Western and Southern Cape*

market this would appear to be a temporary phenomenon. In the future we expect a lot more product to come from KZN and the Northern Provinces and even possibly from imports, discussed below".

In coming to this conclusion, the Commission relied on a report produced on behalf of appellant by Mr Crickmay to the effect that approximately 75 000 cbms of product came into the Eastern and Western Cape from KZN and Mpumalanga. But Mr Crickmay's own report indicates that only a small quantity of timber could be expected to 'make their way to the W, S, N Cape from (the) mills in the Northern Provinces'. In a report which would pass a standard of reasonableness as outlined in this judgment, it was to have been expected that the Commission engaged properly with Crickmay report to the effect that there was simply not enough supply to meet the demand in the provinces of KZN or Mpumalanga and further the costs of transporting sawn timber from those provinces over the distance would add so significantly to the costs to make sourcing of sawn timber from those provinces either unfeasible is the provinces concerned or at the very least, to give second respondent a significant degree of market power to increase prices by the addition of the transport costs.

[35] Within this context, consider the following key passage in the Commission's report in which it summarises its geographic market definition:

> "*Even though price differentials and transport costs at first glance would suggest a separate Eastern, Western and Southern Cape market this would appear to be a temporary phenomenon. In the future, we expect a lot more product to come from KZN and the Northern Provinces and even possibly from imports*".

This expectation of the Commission is never justified in its report nor does the evidence appear to support its enthusiastic embrace of the extended market.

[36] A reasoned conclusion about the market is particularly important to consider the Commission's own finding with regard to the Herfindahl – Hirschman index (HHI) which is employed to measure the level of market concentration. If the narrower geographic market definition (the Cape's) was employed, the HHI would increase from 1058 to 1508, an addition of some 450 points. This is a figure which may have triggered a greater level of scrutiny on the part of the Commission.

Conclusion

[37] The Commission committed a number of errors, of both commission and omission, with regard to its calculations on critical areas of foreclosure and market definition. The conclusions which it reached, in particular, its ability to undertake the predictive evaluation contemplated in section 12 A (1) of the Act was vitiated by these significant errors which no reasonable

decision maker in the position of the Commission would have so taken or omitted to consider.

[38] Section 2 of the Act contains as one of the purposes of the Act, that small and medium sized enterprises have an equitable opportunity to participate in the economy. Appellant falls into this catergory enterprise and the purpose of the Act would be subverted if the evaluation of the merger between second and third respondent took place in circumstances where significant errors had been constituted so as to justify a conclusion that an unreasonable decision had been made to the detriment of small and medium enterprises.

[39] Without dealing with these critical question, which were thus not properly determined in its report, doubt must exist as to whether the concerns articulated, for example by Steinhoff, have been resolved: that is that the merger would result in a fundamental and irreversible structural change in the saw milling market in the region. To return to the argument about unreasonable delay; the errors committed by the Commission and the importance of the merger for so significant a part of the economy in the region supports the dismissal of the delay argument.

Is the merger irreversible?

[40] Mr Gauntlett emphasized the decision in Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others [2005] 4 All SA 487 (SCA) at paras 20 – 29, namely that the court may exercise its discretion not to grant a review because any relief granted would be incapable of practical implementation, given the lapse of time between the launch of the proceedings and the granting judgment. In other words, the transactions set out by Mr Reeves, as described earlier in this judgment, meant that huge prejudice would be suffered were appellant to obtain relief.

[41] Given the nature of merger proceedings, were this argument to succeed, it would be extremely difficult for any successful party to gain substantive relief in a merger review. Mergers require expedition; litigation of a complex kind demands careful deliberation. A balance has to be struck between these considerations as opposed to an abandonment of the deliberative requirements of adjudication. In any event, the effect of a decision to refer the matter back to the Commission would not practically undo the various transactions described by Mr Reeves. On the strength of Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA), a decision to merge would have taken place, pursuant to what was then a duly authorised decision on the part of the Commission. In terms of the findings of this court, that decision by the Commission must be set

aside. But the order which is to be made in this case does not effect the legal consequences of any decision or act taken pursuant to the merger as approved by the Commission. What flowed legally from the Commission's decision to permit the merger, cannot be set aside in these proceedings nor can any of the contractual obligations entered into by the merged parties automatically be declared to be of no force and effect in law, until a court, upon hearing the merits of a duly formulated application so decides. Hence, any setting aside of acts taken pursuant to the authorisation of the merger by the Commission would have to flow from such a duly launched application which would need to be successfully upheld by another court.

[42] Any such application would, of course, have to be brought during the period in which the Commission would be required to reconsider its decision, itself an indication that a stay of any such proceedings would, in the ordinary course, be far more appropriate than the granting of irreversible relief; that is setting aside of transactions already undertaken at the very time that the Commission is reconsidering whether to permit the merger.

[43] Thus, it does not appear that this argument concerning prejudice which has been raised by the respondents should be fatal to the relief due to appellant.

[44] For these reasons therefore, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The decision of the Competition Commission of 12 March 2007 to approve the merger between MTO Forestry (Pty) Limited and Boskor Saagmeule (Pty) Limited and Boskor Ripplant (Pty) Ltd is set aside.
3. The transaction is referred back to the Commission for further consideration as to whether the merger should be approved and if so whether appropriate conditions should be attached to such approval pursuant to the decision of the Commission to approve the merger.

____

DAVIS J P

TSHIQI and ZONDI AJJA concurred