

REPUBLIC OF SOUTH AFRICA



**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
(4)08 July 2022.....
DATE SIGNATURE

Case NO: 200/CAC/May22

In the matter between

AFRICA DATA CENTRES SA DEVELOPMENT (PTY) LTD Appellant

and

DIGITAL TITAN (PTY) LTD

First Respondent

TDE INVESTMENTS (PTY) LTD

Second Respondent

COMPETITION COMMISSION OF SOUTH AFRICA Third respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 08 July 2022

JUDGMENT

Nkosi AJA (Davis and Nuku AJA concurring)

Introduction

[1] This is an appeal by Africa Data Centres SA Development (Pty) Ltd (“the appellant”) against a part of the decision and order of the Competition Tribunal (“the Tribunal”) that were issued on 17 May 2022, in terms of which the appellant was recognised as a participant in the large merger proceeding before the Tribunal involving Digital Titan (Pty) Ltd (“the first respondent”) and TDE Investments (Pty) Ltd (“the second respondent”), albeit in respect of only two of the three theories of harm it raised as a concern regarding the proposed merger. The part of the decision appealed against is the order in which the Tribunal limited the appellant’s participation in the merger proceedings to only two of the three theories of harm which the appellant sought to advance before the Tribunal.

Factual background

[2] The factual background to the matter, briefly stated, is that the appellant is currently one of a few main players involved in the business of providing the co-location data centre services in South Africa. One of its direct competitors in the business is Teraco Data Environments (Pty) Ltd (“Teraco”), which is a subsidiary of the second respondent. It was for this reason that the appellant was one of the interested parties approached by the Competition Commission (“the third respondent”) for information and comment during its investigation into the proposed merger.

[3] At the conclusion of its investigation the third respondent compiled a report dated 8 April 2022 in which it stated that, *inter alia*, it was of the view that the proposed transaction was unlikely to substantially prevent or lessen competition in the market for the provision of data centre services in South Africa. This was disputed by the appellant, which then proceeded to lodge an application to the Tribunal (“the intervention application”) in terms of section 53(c)(v) of the Competition Act¹ (“the Act”) to intervene as a participant during the pending merger proceedings before the Tribunal.

[4] The appellant’s intervention application was based primarily on three theories of harm. These were, firstly, that the merged entity would benefit from the network-effects that would lead to the substantial lessening of competition in the market (“the network-effect theory of harm”); secondly, that there was a material risk that the proposed merger would result in input foreclosure (“the foreclosure theory of harm”); and, thirdly, that absent the proposed merger, the first respondent would likely enter the South African market itself as a provider of co-location data-centre services, and so the likely effect of the proposed merger would be to prevent the entry of a new competitor in the South African co-location and data-centre market (“the new entry theory of harm”).

The Tribunal decision

[5] The intervention application was heard by the Tribunal on 12 May 2022. On 17 May 2022, the Tribunal issued an order granting the appellant leave to intervene in respect of two of the theories of harm the appellant had raised as its concerns regarding the relevant merger. These were the network-effect theory of harm and the foreclosure theory of harm. On 23 May 2022 the Tribunal issued

¹ No. 89 of 1998

reasons for its decision, in which it stated that, in its view, the appellant as a competitor could possibly assist it (the Tribunal) in gaining insights into the nature of competition in the relevant markets of its business. Apparently, such view was largely influenced by the legal arguments advanced on behalf of the appellant at the hearing of the intervention application.

[6] Insofar as the new entry theory of harm is concerned, the Tribunal exercised its discretion by having regard to the interest of the appellant and the extent to which it could assist the Tribunal in its deliberations. In so doing, it found at para 20 that ‘it was less clear what additional insights ADC (the appellant) could provide on potential entry by the acquiring firm (first respondent) absent the proposed transaction.’ It went on to state that when considering an application for intervention by a direct competitor, the Tribunal ought to guard against merger proceedings, where the Commission is present and has not identified any competition concerns, being unduly protracted by the participation of a competitor who might be incentivised to delay merger proceeding ‘for the reason of protecting its own market position.

[7] The Tribunal was critical of what it perceived to be an apparent attempt by the appellant to duplicate the role of the third respondent, which was statutorily tasked with assisting the Tribunal in its deliberations on all other matters relating to proposed mergers. It also mentioned that, in any event, it has inquisitorial powers in merger proceedings to call for more evidence or to require the third respondent to investigate further any aspect of the proposed transaction that is sought to be fully ventilated.

Grounds of appeal

[8] The appellant was not satisfied with the Tribunal's decision to grant it leave to intervene in respect of only two of the three theories of harm which formed the basis of its application to intervene in the relevant merger proceedings. Consequently, it appealed to this court against the part of the Tribunal's decision which refused its application to intervene in the merger proceedings in relation to the new entry theory of harm. Therefore, it is within the context of the appellant's concern in relation to the new entry theory of harm that the grounds of appeal are formulated.

[9] The first ground is that the appellant's argument based on a new entrant theory of harm is recognized in merger analysis not only in South Africa² but also in numerous competition law jurisdictions internationally, including the European Union and the United States; the second is that the Tribunal misdirected itself in dismissing the appellant's application to intervene in relation to its concern on the grounds that the third respondent had already conducted '*a thorough investigation*' into the proposed transaction and had found that the transaction did not give rise to such concern; the third is that the Tribunal misdirected itself in finding that there was no need for the appellant to duplicate the role of the third respondent in relation to the appellant's concern; and, the fourth is that the Tribunal misdirected itself in failing to find that the appellant was well placed to assist the Tribunal in relation to its concern.

[10] It was further contended by the appellant in amplification of its grounds of appeal that the Tribunal ought to have found that, as a matter of fact, the third respondent did not investigate its concern thoroughly or at all, despite its

² See in this connection *MIHeCommerce Holdings(Pty)Ltd t/a OLX South Africa v WeBuy Cars(Pty)Ltd* (LM183Sept18)

request for it to do so; that even if the third respondent had investigated such concern, that should not have been the basis for the dismissal of its application to intervene in the merger proceedings in relation thereto; that given the third respondent's decision not to advance its concern to the Tribunal, no other party but the appellant itself would have the incentive and/or ability to ventilate such concern in the merger proceedings before the Tribunal; and, that as a market participant with several years of experience in the relevant data centre market, the appellant would be able to assist the Tribunal with specific insights into the nature of, and competitive dynamics within, the relevant market.

[11] On the basis of these arguments, the appellant sought an order that the order issued by the Tribunal in the matter be amended by the insertion of a new paragraph therein to read as follows: *"that the proposed transaction is likely to lead to the elimination of the acquiring firm as a competitor in the relevant South African data centre market"*. The appeal was opposed by the first and second respondents, while the third respondent decided to abide the decision of this court.

[12] The issue as to whether the arguments raised by the appellant were based on pure speculation as opposed to being grounded in evidence was central to the debate before the Tribunal. As a consequence, the Chief Investment Officer (CIO) of Digital Realty Trust Inc, which is the parent company of the first respondent, deemed it necessary to depose to a brief affidavit, the contents of which were keenly analysed by counsel on appeal. The affidavit read thus:

"I, the undersigned

GREGORY SCOTT WRIGHT

do hereby make oath and say that;

1. *I am an adult male and the Chief Investment Officer of Digital Realty Trust Inc and a Director of Digital Titan (Pty) Ltd (Digital Titan) (collectively "Digital").*
2. *I am duly authorised to depose to this affidavit on behalf of (the) Digital.*
3. *Unless excluded by the context or otherwise indicated in this affidavit, the facts to which I depose in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.*
4. *I confirm that:*
 - 4.1 *Digital does not have any current plans to enter South Africa in the absence of the proposed transactions between Digital Titan and TDE Investments Proprietary Limited; and*
 - 4.2 *Digital has had no such plans at any stage in the past three and half years, which is the period I have been involved in Digital.*

GREGORY SCOTT WRIGHT

[13] In response, the deponent to the appellant's founding affidavit, Michael Silber, deposed to a supplementary affidavit in which he challenged as evasive the following statements made by Mr Wright in his aforesaid affidavit : "*Digital does not have any current plans to enter South Africa in the absence of the proposed transaction between Digital Titan and TDE Investments Proprietary Limited*"; and "*Digital has had no such plans at any stage in the past three and half years, which is the period I have been involved in Digital*". Mr Silber argued that the effect of the said statements was that Mr Wright had failed to state categorically that the first respondent would not enter the South African market absent the merger with the second respondent. Therefore, so he argued, Mr Wright's affidavit, far from "putting to bed" the theory of harm that the

proposed merger would eliminate a potential competitor in the South African market, raised more questions than it answered, which called for careful scrutiny by the Tribunal at the merger hearing.

The legal principles

[14] Against this factual background, I turn to section 53(c) of the Competition Act (read with the relevant provisions of Chapter 3 of the same Act dealing with the control of mergers), the provisions of which read as follows:

“The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

(c) *if the hearing is in terms of Chapter 3 –*

- (i) *any party to the merger;*
- (ii) *the Competition Commission;*
- (iii) *any person who was entitled to receive a notice in terms of section 13A (2), and who indicated to the Commission an intention to participate, in the prescribed form;*
- (iv) *the Minister, if the Minister has indicated an intention to participate; and*
- (v) *any other person whom the Tribunal recognises as a participant.”*

[15] In essence, the provisions of section 53(c)(i) to (iv) of the Competition Act specify the parties who are entitled to participate in merger proceedings, while the provisions of sub-section 53(c)(v) grant the Tribunal the discretion to

recognise any other person who is not a party to the merger to participate in the merger proceedings. While the discretion is wide, it was authoritatively held by this court in the case of *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another*³ that such discretion is not unfettered, and must be exercised judicially in accordance with the rules of reason and justice⁴.

[16] The legal principles enunciated in the case of *Anglo South Africa Capital v IDC (supra)* were endorsed and applied by this court in the case of *Community Health Holdings (Pty) Ltd and Another v Competition Tribunal*⁵. In the latter case the court held that although the intervention regime in mergers is more liberal than that provided for in rule 46(1) of the Rules of the Tribunal, that does not mean that the Tribunal is obliged to let in any party who knocks on its doors seeking to intervene. The threshold for admission may not be as high as is the case in restricted practice cases, but it requires justification based on evidence; hence the necessity for the Tribunal to enquire into the question as to whether the party applying to intervene will assist it in its enquiry in terms of section 12A of the Act.

[17] This entails taking into account the likelihood of assistance promised by the prospective intervener, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener assisting the Tribunal's enquiry is doubtful, while the impact of the intervention is more than likely to impact on the expedition of the proceedings, then the Tribunal should decline the intervention or curtail its extent⁶.

³ [2003] 1 CPLR 10 (CAC)

⁴ *Anglo South Africa Capital (Pty) Ltd (supra)* at p21 I - J

⁵ 2005 (5) SA 175 (CAC) at para 38

⁶ *Community Healthcare Holdings (supra)* para 39

[18] Within the framework of the legal principles set out above, the finding made by this court in the case of *Anglo South Africa Capital v IDC (supra)* was that the Tribunal acted judicially when it exercised its discretion in favour of allowing a party who was in a position to show that its participation in the merger proceedings would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act⁷. In essence, the applicant must demonstrate an evidential basis as opposed to speculation by which it may assist the Tribunal in carrying out its statutory mandate⁸.

Application to the factual matrix

[19] I turn to apply the facts of this case, to the law as outlined. It was argued by Adv Cockrell SC, who appeared together with Mr Olivier on behalf of the appellant, that the appellant is well placed to assist the Tribunal in its deliberations regarding the proposed merger between the first and second respondents in relation to the new entry theory of harm. As an active participant in the market for co-location data centre services it can provide the Tribunal with detailed and credible information about the competitive landscape, including the potential barriers to entry which may confront a new entrant into the defined market. Therefore, so he argued, the Tribunal ought to have exercised its discretion in favour of allowing the appellant to participate in the merger proceedings in respect of the new entry theory of harm as well.

[20] In response, it was argued by Adv Budlender SC, who appeared together with Adv Ngcongco and Adv Mhlongo on behalf of the appellant, that as a matter of competition economics, a potential competition theory of harm is

⁷ *Anglo South Africa Capital (supra)* at p22 A - B

⁸ *WeBuyCars (supra)* para 27

essentially a unilateral effects theory of harm, being a concern that merging parties will, post-merger, find it unilaterally profitable to worsen their competitive offering as a result of the loss of the rivalry between themselves⁹. He added that it is trite in competition law that to establish such a concern two prerequisites must be met¹⁰; firstly, there must be reasonable certainty that the firm would have entered the market absent the merger; and, secondly, that the (new) entrant would have been considered a formidable competitor in the market, or would have significantly altered the competitive dynamics. He argued that the appellant fell short of the threshold because none of the said conditions were met in the present case.

[21] Whether there is merit in Adv Cockell's contention that the appellant is best suited to assist the Tribunal in its deliberations in relation to the new entry theory of harm elides over the prior question: is the new entrant argument based on any justification save for speculation. The appellant was unable to demonstrate to the Tribunal that it had a genuine ability to assist the Tribunal in its determination as to whether the first respondent would enter the South African market as a competitor absent the merger. Without such evidence, which could only be factual, it was pointless for the Tribunal to even consider the second prerequisite as to whether the first respondent would have been considered a formidable competitor if it entered the South African market on a 'greenfield' basis. I arrive at this conclusion on the basis that other than the proposed merger there was no evidence advanced by the appellant to suggest that a greenfield investment had any basis in evidence. The only arguments put up by the appellant to gainsay the criticism that it was not in the realm of speculation was that the CEO OF Digital Royalty, the holding company of first

⁹ Bishop, S. and Walker, M. (2010). *The Economics of EC competition Law: concepts, application and measurement*. London: Sweet & Maxwell, p 367

¹⁰ *MIH eCommerce Holdings (Pty) Ltd t/a OLX South Africa v WeBuyCars (Pty) Ltd* (case no. LM183Sep18) at paras 189; *DowDuPont Inc and the Dow Chemical Company and Another*, case no. LM030May16 (3 November 2017) at paras 45 to 46

respondent, publicly stated that the company saw expansion into Africa as a growth opportunity, the company appeared to have an African acquisition strategy and that the South African market is underserviced. It is difficult not to classify these arguments as more than speculation when a new entrant into South Africa is being raised.

[22] Further, the foreseeable consequence of the appellant's intervention in the merger proceedings in relation to the new entry theory of harm would be a possible delay in the resolution of the merger proceedings, which are now only three weeks away. It was apparent from the appellant's founding papers that it could not provide any additional insights to the Tribunal on potential entry by the first respondent absent the proposed transaction. That appellant's offer to assist the Tribunal was based on mere speculation that its 'specific insights into the nature of, and competitive dynamics within, the relevant market' would enable it to procure additional information from the first respondent through formal processes, such as discovery, only adds to the concern that it hopes to convert its speculation by way of discovery. That was also apparent from Adv Cockrell's non-committal responses to the questions posed to him by members of this court about possible delay in the resolution of this matter due to procedural steps, such as discovery, if the appellant's appeal was successful.

[23] In my view, the statement made by Mr Wright in his affidavit that the first respondent did not have any current plans to enter the South African market in the absence of the proposed transaction, nor had it had such plans at any stage in the past three and half years of his involvement with Digital, ought to have been sufficient to put that particular concern to rest. Unless the appellant was in a position to adduce evidence to the contrary, I am at loss as to how its intervention in the merger proceedings in relation to such concern would be of assistance to the Tribunal in its enquiry in terms of section 12A of the Act. As

Adv Budlender correctly noted, the statement on oath that first respondent had no plans to enter South Africa absent the proposed merger, meant that no papers relevant to a greenfield entry were available in that this was not in the plans of the first respondent.

[24] Adv Budlender contended that, the paucity of justification of a new entry theory of harm regarding the proposed transaction supported his clients concern that the appellant had been influenced more by its own commercial interest than a genuine desire to assist the Tribunal in its deliberations in relation thereto. Such conduct is obviously not in accordance with the spirit or purport of the Act. This court has held that commercial interest or strategic inspirations are insufficient to warrant participation in merger proceedings¹¹, and that the founding papers must detail the unique contribution that the applicant is able to make to the Tribunal¹². Inference or speculation will not suffice, which is what the appellant was offering to the Tribunal.

[25] Admittedly, a lot was said by both counsel in their legal arguments about the juristic nature of the discretion which must be exercised by the Tribunal in terms of section 53(c) of the Act. However, if the Tribunal does not consider that a prospective intervener is likely to assist it in its deliberations, such as it correctly found in the present case, the debate as to whether the discretion conferred to it is a discretion in the strict or narrow sense or a discretion in the loose sense is, in my view, of no relevance. It would be pointless for the Tribunal to allow the appellant to participate in the merger proceedings in relation to the said concern if the appellant would not add any value in those proceedings.

¹¹ Community Healthcare Holdings (supra) para 32.5

¹² Community Healthcare Holdings (supra) para 56

[26] Let me emphasize, it cannot be denied that the appellant has a material interest in the first respondent entering the South African market as an independent competitor in the data centre business. However, that in itself does not necessarily entitle it to intervene in the merger proceedings in relation to the new entry theory of harm unless it could demonstrate to the satisfaction of the Tribunal that there is a reasonable likelihood of the first respondent entering the South African market absent the merger. In the absence of any evidence to refute the statement made by Mr Wright in his aforesaid affidavit, the Tribunal does not appear to be in a position to take the matter any further. If the Tribunal decides, for whatever reason, to obtain additional information or clarification from the first respondent or Mr Wright himself, there is nothing preventing it from utilizing its inquisitorial powers to obtain such information or clarification directly without the appellant's involvement. It is not confined to the submissions or evidence placed before it by the parties¹³.

[27] It was argued by Adv Cockrell that the appellant is well placed, by virtue of its several years of experience in the relevant industry, to assist the Tribunal in relation to the concern which forms the subject of this appeal. However, except for the unsubstantiated statements that the appellant has 'specific insights into the nature of, and competitive dynamics within, the relevant market, Adv Cockrell's submissions were confronted with the fundamental problem of a basis for entry on the new entrant theory, and thus as to how the appellant was better placed than the Tribunal itself to probe further the likelihood of the first respondent entering the South African market absent the proposed transaction. In fact, that is a determination to be made by the Tribunal, as opposed to a prospective intervener, in order to avoid the opening of floodgates with every prospective intervener claiming to be better placed than the Tribunal to obtain

¹³ Ango v IDC at page 17

additional information in relation to the merger proceedings in which it applies to participate.

Finding

[28] In the circumstances, I am not persuaded that the Tribunal misdirected itself in dismissing the appellant's application to intervene in relation to its concern that the proposed transaction is likely to eliminate the first respondent as an independent competitor in the relevant data centre market in South Africa.

Order

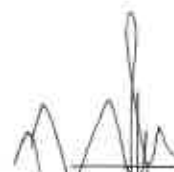
[29] Accordingly, I make the following order:

1. The appeal is dismissed with costs, such costs to include the costs of only two counsel.



M ENKOSI
ACTING JUDGE OF
APPEAL

I concur



D DAVIES
 ACTING JUDGE OF
 APPEAL


LG NUKU
 ACTING JUDGE OF
 APPEAL

I concur

Date of Hearing: 24 June 2022

Judgement delivered: 08 July 2022

APPEARANCES

For the Appellant: Adv A Cockrell SC and Adv Piet Olivier

Instructed by: Nortons Incorporated

**For the First and
Second Respondents:** Adv S Budlender SC, Adv P Ngcongo, Adv E
van Heerden and Adv S Mhlongo

Instructed by: Bowmans

For the Third Respondent: Thabelo Masithulela and Zanele Hadebe