REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT

CAC CASE NO: 130/CAC/May14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

OCEANA GROUP LIMITED First Appellant

FOODCORP (PROPRIETARY) LIMITED Second Appellant

And

THE COMPETITION COMMISSION Respondent

J U D G M E N T

VICTOR, AJA:

Introduction

[1] This appeal concerns two iconic South African pilchard fish brands, Lucky Star and Glenryk. The first appellant, Oceana Group Ltd owner of the Luckystar

brand wishes to acquire the total allowable catch ('TAC') quota of small pelagic fish from the second appellant Foodcorp (Pty) Ltd, the owner of the Glenryk brand ('the merging parties'). It does not wish to acquire the Glenryck Label.

[2] The central issue in this appeal is concerns conditions imposed by the Competition Tribunal ('Tribunal') namely that second appellant's small pelagic fish quota (TAC) be disposed of together with the Glenryck brand.

[3] The merging parties first notified respondent ('the Commission') of the transaction on 2 August 2013. The Commission conducted its investigation and raised certain horizontal overlaps in harvesting, processing and marketing of a number of fish products. The Commission found that the merging parties pilchard brands were the closest competitors in the market with a combined market share of 80%, compared to 10% of its next closest competitor. Hence, the Commission found that there was a high barrier to entry and expansion in the form of regulatory barriers, high capital outlays, brand loyalty, input scarcity. In the view of the Commission, the proposed transaction would lead to the removal of an effective competitor.

[4] The Commission concluded that the merged entity had an incentive to resort to unilateral conduct to the detriment of competition due to high entry barriers at the harvesting level; high capital requirements at the processing level; with no other effective competing brand at the marketing level. Further, the

virtual removal of an effective competitor at each level of the value chain, would result in a substantial reduction in competition in the vertically integrated market for the supply of pilchards. Within his context, the Commission considered that the proposal by the merging parties to divest the Glenryck brand without a simultaneous divestment of the quota allocation for pilchards was insufficient to address the Commission's concerns.

[5] There was a request for consideration of an intermediate merger on 13 November 2013. It was the merging party's case that by selling off the Glenryck brand to Bidfish would address any negative competition concerns. On 15 April 2014 the Tribunal approved the merger transaction, subject to the condition that, in addition to the disposal of the Glenryck brand, first appellant had to dispose of all of second appellant's small pelagic quota.

The background to the transaction

[6] Foodcorp wishes to dispose of its fishing operations because it is not core to its future strategic investment and Foodcorp's fishing rights, including the survival of its entire fishing business, were under serious threat from the Department of Agriculture, Fisheries and Forestry ("*DAFF*") as a result of Foodcorp's reduced empowerment shareholding.

[7] DAFF under the Marine Living Resources Act of 1998 ("*the MLRA*") has approved the purchase by Oceana of the TAC, being the fishing rights that have been allocated to Foodcorp and the fishing rights that have been contracted to Foodcorp by third party quota holders to the extent that such holders have consented to the transfer of their rights from Foodcorp to Oceana.

[8] According to the merging parties, the proposed merger will secure the survival of Foodcorp's fishing business, including the Laaiplek processing facility where approximately 1000 people are employed. Oceana has an acceptable empowerment status and established track record in the South African fishing sector. It was on this basis DAFF approved the transfer of Foodcorp's fishing rights to Oceana. Oceana is currently reliant on approximately 64 per cent of its pilchard requirement by way of imports. The acquisition of the Foodcorp quota will allow Oceana to substitute a small percentage of these imports, that is 8.2 per cent of its pilchard requirements with Foodcorp's quota, thereby providing a small advantage at the margin. It is Oceana's case that it would serve no purpose to take over the processing operations without the quota. The Food and Allied Workers Union has supported the merger because of the public interest factor at Laaiplek where it is the majority trade union.

[9] Bidvest Namibia Fishery Holdings (Pty) Ltd ("*Bidvest*") concluded a binding agreement with Foodcorp to purchase the Glenryck brand without the quota. Bidvest does not have a canned pilchards brand in South African market

and Bidvest is well able to support the requirements of the Glenryk brand with its existing allocated and contracted quota.

[10] In motivating that it was not necessary for the quota and the brand name Glenryck to be sold together, the managing director of Bidvest Namibian Fishers ('Bidfish'), Mr Arnold emphasised in his evidence that Bidfish could support the Glenryck brand without the TAC allocation, because it is able to obtain a significant supply from Namibia, supplemented by imports. In addition, Bidfish contends that it is able to expand the presence of the Glenryck brand into the South African market.

According to Mr Arnold:

> 'Bidfish has developed significant resources and expertise in the broader Namibian fishing industry, and possesses both the ability and capacity to acquire the Glenryck brand and to expand its presence in the market against Lucky Star without the small pelagic fishing rights currently held by Foodcorp. Bidfish will also enjoy the support of Bidvest South Africa for the management and development of the Glenryck brand in South Africa, which further strengthens Bidfish's ability to compete effectively with the brand.'

[11] Mr Arnold also testified that Bidfish could maintain Glenryck's standing in the market and indeed grows the business and hence its market share. He noted that Bidfish's Namibian TAC was substantial and no more expensive than the court from a South African source.

The essence of the Commission's case

[12] The Commission, in support of the anti-competitive harm resulting from the proposed merger emphasised to the following aspects:

(a) The current and future market share of the merging parties in the canned pilchards market is, and will continue to be informed, to a significant extent, by the ability of the vertically integrated entity to rely on a secure supply of pilchards through access to a significant percentage of the TAC.

(b) The Commission also contended that Oceana had been allocated 13 507 MT of pilchards (15.01% of the TAC). Foodcorp was allocated 10 074 MT (11.2% of the TAC). Oceana is thus the largest TAC holder, with Foodcorp in second position. In the market for the harvesting of pilchards, the merged entity would have a combined market share of approximately 26.2% if they were allowed to proceed with the transaction in terms of their agreement. This would, in the Commission's view have the effect of:

(1) The removal of an effective competitor which will have repercussions on forward linkage segments of the value chain where competition concerns are transmitted into processing and marketing.

(2) This effect will be amplified in circumstances where Oceana currently benefits from approximately 20 quota contracts and where recent trends indicate a propensity on the part of

smaller rights holders and other third parties to switch supply to Oceana, apparently based on Oceana's willingness and ability to pay a premium. The ability to pay a premium, so the Commission submitted, derives from the market power that is associated with being so significant a player at all levels of the market. In the Commission's view this market power will increase if Oceana has access to an even greater share of the small pelagic fishing allocation, as well as to the contracts currently held by Foodcorp, in consequence of the transaction.

(3) The effect will be seen in the market for the processing/canning of pilchards, where the merged entity would have a combined market share of approximately 34.7% (after the accretion of 16.3%).

[13] Thus the main concern pressed by the Commission arises in the market for the sale of canned pilchards, where Oceana's Lucky Star brand currently enjoys a 73.1% market share. Glenryck has a market share of 8.2%, but Lucky Star, with access to Foodcorp's fishing rights, will be able to ramp up its production and supply. Thus, even if the Glenryck brand were to be supported by alternative supply in the same quantities as are currently employed to support is production, the Commission argued Glenryck's market share percentage would shrink, and that of Lucky Star would grow.

[14] The sale of quotas was thus a significant issue. Pre-merger a number of companies that had received quota allocations from DAFF were not processing their fish. Instead they sold off their quota allocation to larger players in the market which have the financial resources to invest in processing plants and in vessels. Some of the smaller players, even after processing the pilchards, sold to those who had strong brands such Premier Fishing which processes under the Lucky Star brand. According to the Commission, this will inhibit market penetration.

[15] There was also the concern articulated by Pioneer Fishing that the merged parties, by benefiting from the extra local quota, will benefit overall as the volatility of the exchange rates when sourcing raw imports increases their basic costs. There is insufficient local supply; hence there will always reliance on imports and all players would continue to face the volatility of exchange rates.

[16] A further concern articulated was that, once the TAC has been allocated, there was a lock-in period of 8 to 15 years. This, of course, means that Oceana would have the extra TAC for 8 to 15 years. This advantage however must be assessed against the facts that the merger would only result in 650 000 cartons from local source out a market of 8 150 000 cartons.

[17] The Commission also argued that smaller players in the fishing industry may find it difficult to participate in the harvesting market because of the higher

capital requirements to run the fishing boats and the processing clients. Harvesting is a highly capital intensive process. The Commission was also concerned that the smaller quota holders who sell off their fishing rights will have fewer choice and hence less bargaining power. They would only be left with Saldanha and Pioneer as remaining entities to which they sell their fishing rights. It should be noted that the counterfactual position to this is that Oceana would prefer to purchase their stock from local quota holders rather than imports so it would be erroneous to conclude that small quota holders will be prejudiced by not achieving competitive prices from Oceana.

[18] A further theory relied upon by the Commission for the lessening of competition was that Glenryck would be removed as an effective competitor across the value chain and this would occur at the vertically integrated level.

The Tribunal's decision

[19] The Tribunal found that the potential competitive effect brought about by the acquisition of Foodcorp's quota for small pelagic fishing would substantially lessen competition in the market. Notwithstanding the proposed transaction between Bidfish and Foodcorp and the assurances offered by Mr Arnold, the Tribunal held that:

> 'Post-merger, the Glenryck brand once divorced from its quota is unlikely to be an effective competitor in the canned pilchards market. The Glenryck brand owner would have source pilchards from a variety of third parties at a much

higher costs than pre-merger. Reliance on imports for Glenryck is not a reasonable option post-merger and even if it did import product post-merger, its margins would decline significantly….

On the other hand Lucky Star (Oceana) the already dominant player in the market would gain additional advantages through increased access to local quota which would enable it to increase its dominance in the downstream canned pilchards market. This quota once transferred to Oceana was unlikely to be available to smaller competitors.' (paras 120-121)

This finding necessitates a closer examination of the facts.

The Facts

[20] South Africa has a total allowable catch of 90 000 MT. Namibia has a TAC of 25 000MT. Oceana has 13.508MT of the South African TAC. This constitutes 15 % of the total TAC. Glenryck has 10.07MT, being 11 %. The merging parties therefore have 26% of the South African TAC. Of the total TAC, Oceana, Foodcorp Saldanha and Pioneer cumulatively hold 38 % of the TAC. The remaining 68 % is held by the remaining quota holders and is sold off by them.

[21] The market share for canned pilchards is as follows:

- 72 % - Oceana
- 8 % - Glenryck
- 10 % - Shoprite and other white label
- 7 % Saldanha

- 3 %Pioneer

[22] In 2013, Oceana required 7.5 million cartons of pilchards to sustain its production. It imported the equivalent of 4.8 million cartons of pilchards. If the 4.8 million cartons made up by imports is subtracted from its total requirement of 7.5 million cartons, its local source. Thus comprised of 2.7m cartons. Foodcorp's local source amounted to of 650 000 cartons. Thus, post the merger, without the condition relating to the Foodcorp quota, Oceana will acquire a further 9% of its input requirement, thereby reducing its import requirement from 63% to 55%.

[23] It should be noted that, apart from a direct TAC allocation, parties acquire quota from third parties (i.e. from the remaining quota holder who obtain 68% of the total). Foodcorp had a third party quota amounting to 3989 mt, or approximately 4.4% of the South African pilchard TAC in 2013. Of this amount, about 02.6 mt (or 1.1 % of the TAC) will be transferred to Oceana in terms of the merger, as the holders of the remainder have not consented to the transfer of their quotas to Oceana. They have elected, instead, to make it available to other potential purchasers in the market.

[24] Thus, post-merger, Oceana will have access to a total of approximately 50% of the South African pilchard TAC, made up of allocated quota of 23 582 mt (26.2%) and contracted quota of 21 122 mt (23.5%). This represents only 2 682 000 cartons, or 36% of Oceana's total demand for 7 506 000 cartons of

pilchards per year. Of this total demand, the allocated quota accounts for only 19% and the contracted quota (which is not guaranteed from one year to the next) for only 17%.

[25] Given this relatively small overall increase in domestic supply and the identity of the existing market participants, the Commission nonetheless asserted that the effect of the proposed transaction would have consequence for other participants in the market and on the alternative bidders for the Foodcorp fishing business.

[26] The foundation upon which the Tribunal's decision was predicated was couched thus: 'the question that we are concerned with is whether or not the transfer of Foodcorp's quota to Oceana will lead to a reduction in competition in the canned Pilchards market' (para 103). The answer given to the Tribunal to this question is:

> 'We agree that the sale of the Foodcorp quota to Oceana, already the holder of 15.1% of the TAC, shall result in a likelihood of increased barriers to entry for a smaller players in the market, including players with BEE credentials for entry an expansion and for that matter, the sale of Foodcorp's quota is likely further to increase barriers for expansion for Oceana's existing vertically integrated competitors in the downstream canned pilchards market.' (para 104)

[27] The difficulty confronting this Court is that the Tribunal did not run with one coherent theory of harm. Earlier in its determination it said:

> ‘The evidence of the merging parties themselves and indeed Oceana’s stated rational for the acquisition of Foodcorp’s quota - namely that it sought to reduce its reliance on imports for better margins-taken together with the evidence of the other witnesses confirms that the Glenryck brand post-merger without its own quota will be competing at a significant disadvantage to the dominant Lucky Star which, should this merger were allowed on the terms proposed by the merging parties, would have further entrenched it already dominant position with increased access to own quota (sic).’ (para 80)

[28] The Tribunal concluded that even if the some regard be had to the evidence of Mr Arnold, his evidence confirmed the Commission’s concerns that Glenryck as a label could not be sustained without the quota. This conclusion however ignores all the undisputed facts about the Namibian quota enjoyed by Bidfish and its expertise. It also ignores the undisputed evidence that Bidvest South Africa, a most formidable organisation will support the marketing of the product in South Africa.

[29] This observation aside, I turn to deal with both of these theories of harm. To recap, the total market share in the relevant market is 10.25 million cartons. Of this, Oceana holds 72%, Glenryck 8%, Shoprite and other white labels 10%, Saldanha 7% and Pioneer 3%.

[30] The question which the Tribunal failed to answer and which is critical to the assessment on this theory of harm is what effect the absence of the

Foodcorp quota into the general pool would have on existing competitors, all of whom have been listed above.

[31] There is no credible evidence to suggest that the Glenryck label will be put 'into a drawer' in Namibia as suggested by Mr Sanqela of Ntshonalanga Fisheries (Pty) Ltd and thus no longer provide competition in the relevant market. As matters stand presently the Glenryck brand is declining by reason of the fact that fishing is not the core business of Foodcorp. There is no objective evidence to suggest the performance of Bidfish would not be as successful as the other companies in the Bidvest group.

[32] As regards the effect on the smaller participants in the pilchards markets, the Commission relied on an affidavit of Mr Du Preez who did not testify. This evidence remains untested. On the basis of the evidence of Mr Silberman from Saldanha Fisheries, Mr Sanqela and Pioneer's submissions, the Commission raised the issue that small players would be squeezed out of the market. However, this has not been supported by any empirical evidence or facts based on commercial reality. The smaller players had their difficulties pre-merger but there are no objective facts to support the assertion that the situation will change dramatically by changing the source of 650 000 cartons of fish from imported to local source.

[33] Mr Silberman was concerned that "*the economies of scale arising out of the potential merger may allow Lucky Star to negotiate deals with retailers and wholesalers which could exclude other suppliers of canned fish*". This opinion is unsupported by the evidence before the Tribunal and is undermined by the successful input by the white label players which are rapidly increasing their share in the market place. Mr Sanqela's main point, apart from his understandable desire to acquire the fishing business of Foodcorp, was that the Glenryck brand would have to be accompanied by Foodcorp's TAC quota. He was concerned that ,absent the quota , Glenryck would fade as a viable participant in the market . Critically however, his main complaint turned on the possible sale of Glenryck to a new participant so as to transform the market . That is not the kind of evidence that supports a case regarding foreclosure of new entrants , particularly on appeal when the only issue before this Court was not about the purchase of Glenryck but only about the condition concerning the quota .

[34] There was the further concern about anti-competitive harm which suggests that the merger may allow Oceana to reduce the price that it is prepared to pay to the smaller quota holders who have been contracted to sell their quota. The evidence of Mr Sanqela and his statement in this regard overlooks the commercial reality of the market pre- and post-merger. The merging parties saw the advantage in having a local fish supply rather than an imported supply. Given the quantum of the quota, there was, unsurprisingly, little evidence to suggest

that much will change post the merger, except that there will be a small reduction in Oceana's cost base.

[35] Mr Silverman was concerned about the exchange rate and the importation of pilchards. He felt that the advantage obtained by Oceana in increasing their local source by eight per cent would mean that Oceana could dominate the market on price. If Oceana has access to greater availability of local fish supply then it would automatically result in Saldanha being prejudiced. Saldanha, in any event has a maximum of eight to ten per cent of the market, which is on par with the white label sellers. Much of the white label sourced fish is imported, yet the cans are sold in the retail sector at highly competitive prices. It was demonstrated in his cross-examination, that the intended transaction would not make Saldanha any more vulnerable to import price fluctuations, since those currency variables are a constant factor irrespective of the merger.

[36] Mr Arnold's evidence that Bidfish would compete with Lucky Star, the absence of the Foodcorp quota notwithstanding cannot be ignored. He confirmed that, given Bidfish's access to a significant Namibian quota, it would be in a sound position to support the Glenryck brand and was in no need of this quota. He was subjected to cross examination on this particular issue. The following exchange is illuminating:

> 'MS ENGELBRECHT: And so, when you talk about the potential for the expansion of the brand, we must understand that the product that you will focus on, is not the pilchard product that traditionally is the Glenryck brand product?

MR ARNOLD: No. I don't think that is entirely correct. If we have the Glenryck brand that puts us in the position to review how aggressive we will formulate the strategy for pilchards for South Africa. And as I said, if we have a brand, and if we have a market demand, we will participate in the pilchard market a bit more aggressively in South Africa, and in Namibia.

MS ENGELBRECHT: Yes, But you did explain to us that you see Lucky Star as such a dominant player, that you don't really want to go and play on their playground. You would rather develop another brand, another product?

MR ARNOLD: We will play on their playground, but it will be arrogant to say we are going to challenge them. But we certainly intend to play on their grounds.

MS ENGELBRECHT: Yes, so don't you believe that you can effectively challenge them in the market, in the pilchards market?

MR ARNOLD: We can challenge them, but to make inroads in the 75% dominance, and here we come with Glenryck in the short term, I think it is a bit arrogant of us to assume that we can seriously compete with them, but it is certainly our intention to do just that, at a level where we can.'

[37] Turning to Pioneer, from the information which it provided to respondent, it appears that in 2013 it enjoyed a surplus of 210 436 cartons and hence was in no need of Foodcorp's quota.

[38] No evidence was provided by the Commission as to any reasons which may cause Shoprite and the other white label products to be less competitive as result of the merger proceeding, absent the quota. Indeed, in a letter generated

by the Commission to the Shoprite Group on 09 September 2013, a series of question with regard to Shoprite's participation in the market were raised.

[39] The answers are again significant:

> '13. Do you regard the Shoprite in-house Pilchard brand as a competitor an effective competitor to the Glenryck and the Lucky Star brand? Kindly explain your answer in as much detail as possible. Yes, our Shoprite In-house brand is an effective competitor on price and quality to Glenryck and Lucky Star.
>
> 14. Do you regard your Shoprite's House brand as constraining the pricing of Glenryck and Lucky Star? All pilchards are imported by ourselves or by local suppliers and governed by the same SABS and NRCS standards. Shoprite in-house brand offers the consumers a saving by cutting out the middle man.'

[40] It is also significant that Shoprite indicated that it sourced its product from Namibia and in Taiwan by way of imports. It was not at all dependant on a domestic source for pilchards. Again the Foodcorp quota would have no effect on the level of its competition in the market.

[41] That left only Saldanha as a market participant which could support the theory of harm advocated by the Commission and which was accepted by the Tribunal. Again the evidence is hardly convincing, as the following exchange in cross examination between Mr Unterhalter who appeared on behalf of the appellant and Mr Silverman on behalf of Saldanha reflects:

'Mr Silverman when you're ready I'd indicated to you before the luncheon adjournment that the effect of this merger is simply that at the margin – and it's a relatively small margin – Oceana will be able to reduce its imports and substitute for local fish but that it remains massively exposed to imports and so all it's trying to do is get a slightly better balance in the local to imported ratio and that that really has minimal impact on you, do you accept that?

MR SILVERMAN: Prima facie it has minimal impact on us but I think that if you look a little bit deeper it dies have an impact because the pricing on the shelf is largely dictated by the costs of your raw material you'd understand that with any commodity and clearly the cheaper you can buy your raw material the better you can price your output product.

MR UNTERHALTER: But all that it's going to mean is that at the margin it's going to assist Lucky Star which is the leading brand and is the price setter in the market do you accept that?

MR SILVERMAN: Yes.'

[42] The upshot of this evaluation is that, even though Oceana enjoyed 72% share in the market, the evidence from the balance of the participants did not support a conclusion that the absence of the Foodcorp quota being reinserted into the general pool would result in a substantial lessening or preventing of competition. Indeed, save for some unsubstantiated averments by Mr Silverman, the other witnesses and documentary evidence provided to the Tribunal pointed clearly in a contrary direction.

[43] It is important to emphasise that this appeal was not concerned with the effect of the merger on competition but only with the effect of the quota on this level of competition in the defined market.

[44] Turning to the question of harvesting, and the smaller entities, the situation of the small players would be unchanged insofar as capital requirements are concerned post-merger. The small TAC quota of Foodcorp will not bring about any change in the financial abilities of the smaller players. Smaller players have not been able to overcome this problem pre-merger and endeavours by smaller players to enter into joint ventures or pool their resources to minimise operational costs will remain unchanged, should the merger go ahead.

[45] The consideration of competition for imported fish will remain the same. In fact, the white brands rely entirely on imports and it is undisputed that the sale of their product has increased rapidly. It represents at 10 per cent share of present. There is no evidence to suggest, on the facts presented, that post-merger the players in the field would change in their import demands. It is suggested that because the merging parties are strong they can absorb the cost of importing and therefore the relevant TAC should not be acquired by Oceana. This is a flawed model of the competitive process and a theoretical abstraction as there is no evidence to support this conclusion.

[46] On the question of brand loyalty and access to shelf space there is no credible evidence that Oceana will put more tins on the shelf post-merger. The only gain by Oceana is some 650 000 cartons on local fish source. In any event it is common cause that the Glenryck brand was declining and the white label brand has become a very important competitor for shelf space. The intervention of Bidfish is likely to enhance competition.

[47] Turning to the question of the possible potential of new participants in the market this Court warned the Tribunal in **Pioneer Hi-Bred International Inc. and another v Competition Commission and another** (CAC Case no: 81/AM/Dec10) that a sound evidential basis was required to arrive at a conclusion such as the one which formed one theory of harm developed by the Tribunal, that is a retardation of access of new smaller players into the relevant market. Regrettably, it again appears that the Tribunal made the same error as it did in **Pioneer**. See the Tribunal's decision at para 111 – 116 where the criticism which was levelled against the Tribunal unfortunately needs to be repeated:

> 'The public interest in maintaining competition in the market, cannot justify the refusal of a merger, on the basis that competition will be maintained in the market, as a consequence of such refusal, by virtue of unsubstantiated speculation that the target firm will enter into a partnership with another firm, which is not a competitor in the market, and which is wholly unsuited to a merger. The Tribunal's approach runs the danger of placing too much emphasis upon the

interest of competitors rather than upon the key principle, of maintaining or promoting competition in the relevant market. The public interest in maintaining competition in the market, does not justify the exploitation of the vulnerability of a target firm, by the competition authorities, in such a manner. To condone such an approach would constitute an intrusion into the management and control of private companies, not justified in the public interest, particularly, as on the available evidence such a merger could not possibly be considered to make financial sense.' (at para 22)

[48] To amplify: the Commission raised the question of the appropriate burden of proof to when the Tribunal considers a merger in terms of s 16 (2) of the Act. The merging parties relied on **Primemedia and Others v Competition Commission** [2007] 1CPLR (CT) where it was found that in large mergers it, the Commission must show that the proposed transaction would likely result in the lessening or prevention of competition. The Commission asserts that when this Court deals with a s 16(2) inquiry, it is hearing an appeal against the original adjudicator, being the Commission and therefore the onus rested on the merging parties.

[49] The argument about onus however obfuscates the critical point. For the Tribunal to reach a proper conclusion there must be sufficient evidence to show justify a conclusion of a prevention of or lessening competition. This cannot be done by simply applying a balance of probabilities test to an untested theory. In

my view, in assessing whether there will be a lessening of competition, the enquiry must be much wider than a mere mechanical implementation of an onus.

[50] Instead of defining where the onus rests in of s 16(2), it would be more constructive to assess the reliability and convincing nature of the evidence adduced by both parties and whether this evidence, read carefully as a whole, can sustain the conclusions reached.

[51] In this case, the Tribunal has drawn inferences from speculative evidence and ultimately its findings have led to conclusions which, as I have shown are not based on the facts.

[52] There was some suggestion that the merger should be rejected because there were alternative offers which had been made by BEE bidders. As I have already noted, because this appeal turns only on one question, namely whether a condition should be attached to a merger which the Tribunal had approved the dispute falls outside of the remit of this appeal. The merger has been approved. That is not the issue which is the subject of this appeal. The question of possible suitors other than Oceana for the Glenryck label is thus not before this Court. [53]It is therefore not necessary to deal with the evidence concerning whether either of the two offers viable and whether they were justifiably rejected on credible commercial reasons.

[54] There is however one significant issue of public interest in terms of s 12 A of the Act which requires emphasis. The continued existence of Foodcorp's fishing rights together+ with its fishing business will result in the survival of its Laaiplek processing facilities and the employment associated therewith for approximately 1000 employees. Understandably, for this reason the Food and Allied Workers Union supported the merger in its present form, for, if the merger is not approved, there would a large scale retrenchment of employees at Laaiplek which would clearly have a significant impact not simply on the employees but on the entire Laaiplek community. It is a consideration which clearly should have been taken into account in the broader assessment of this merger.

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

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the Tribunal of 15 April 2014 is set aside and replaced with the following:

   '*The merger between the Oceana Group Limited and Foodcorp (Pty) Limited is approved subject to conditions which are contained in Annexure A to this judgment.*'

_____

M. VICTOR
ACTING JUDGE OF APPEAL

DAVIS JP and NDITA AJA concurred

Counsel for Appellants Mr D Unterhalter SC and Mr J Wilson

Attorneys for First Appellant Webber Wentzel

Attorneys for Second Appellant Cliffe Dekker Hofmeyer

Counsel for Commission Ms M J Engelbrecht

ANNEXURE A

Oceana Group Limited

and

Foodcorp (Proprietary) Limited

CONDITIONS

1. Interpretations

1.1 The headings of the clauses in this Annexure "A" are for the purposes of convenience and reference only, and shall not be used in the interpretation of, or to modify or amplify, the terms of the referral of the Competition Commission of South Africa to which this document is annexed.

1.2 In this Annexure "A", unless a contrary intention clearly appears, words importing:

1.2.1 any one gender conclude the other genders;

1.2.2 the singular includes the plural and vice versa

1.2.3 natural persons include legal persons and vice versa.

1.3 The following terms shall have the meanings assigned to them hereunder and in any annexure to it, an cognate expressions shall have corresponding meanings, namely:

1.3.1 **"Acquiring Firms"** means the Oceana through its subsidiary companies, Oceana Brands, Amawandle Pelagic;

1.3.2 **"Amawandle Hake"** means Amawandle Hake Proprietary Limited;

1.3.3 **“Amawandle Pelagic”** means Amawandle Pelagic Proprietary Limited;

1.3.4 **“the Act**” – means the Competition Act 89 of 1998, as amended;

1.3.5 **“clearance date”** – the date that the Competition approves the transaction and as referred to in the Merger Clearance Certificate (Form CC15);

1.3.6 **“the Commission”** - means the Competition Commission of South Africa;

1.3.7 **“days”** – means business days;

1.3.8 **“Glenryck Trademark”** means the Glenryck Trademark (and all related trademarks) together with any logo or device associated therewith and all translations, adaptations, derivations and combinations thereof, and whether registered or not;

1.3.9 **“Glenryck Purchasers”** – means any willing and able independent third party, that elects to purchase the Glenryck trademark on terms and conditions that are acceptable to Foodcorp;

1.3.10 **“Glenryck Sale”** – means the subsequent sale by Foodcorp of the Glenryck Trademark to the Glenryck Purchaser;

1.3.11 **“Merger”** means the acquisition of control by Oceana over the fishing business of Foodcorp, excluding the Glenryck Trademark;

1.3.12 **“Merging Parties**” – means Oceana Group Limited (“Oceana”) and the fishing business of Foodcorp (Pty) Ltd (“Foodcorp”);

1.3.13 **"the Regulations"** – means any regulations made in terms of the Act;

1.3.14 **"the Sellers"** - means Foodcorp; Foodcorp Fishing (Pty) Ltd, Bongulethu Fishing Enterprises (Pty) Ltd; Emachibini Fisheries (Pty) Ltd; Ezintlanzini Fishing (Pty) Ltd; Ezolwandle Fishing (Pty) Ltd; Orgel Vismaatskappy Ltd; Sea-Ice Manufacturers (Pty) Ltd; Siyasebenza Fishing (Pty) Ltd; and Umfondini Fishing (Pty) Ltd;

1.3.15 **"Target firm"** means the fishing business of Foodcorp, excluding the Glenryck Trademark.

2. **Recordal**

2.1 On 2 August 2013, the Merging Parties submitted a notice of merger with the Commission. The implementation of the Merger will result in the Acquiring Firms gaining control over the Target Firm. The Merging Parties subsequently reached an agreement in terms of which the Glenryck Trademark is excluded from the transaction and is retained by Foodcorp.

2.2 In order to expedite the Commission's Investigation of the Merger and address the Commission's concerns regarding the market for the supply of canned pilchards, the Merging Parties have agreed to the Condition as set out herein.

2.3 The Commission is of the view that the Conditions sufficiently address potential concerns in relation to the Merger which are likely to arise following the completion of the transaction, as proposed.

3. Conditions

3.1 Foodcorp shall retain and continue to operate the Glenryck Trademark in accordance with good business practice.

3.2 In the event of the subsequent sale of the Glenryck Trademark, Foodcorp shall notify the Commission of the proposed Glenryck Purchaser and shall, to the extent required by the Act or if requested to do so by the Commission, notify the proposed Glenryck Sale to the Commission.

4. Undertakings by Foodcorp

4.1 Foodcorp undertakes, to the best of its ability, to do the following in respect of the Glenryck Trademark, which undertakings are subject to Foodcorp's right to sell the Glenryck Trademark in accordance with clause 3.2 above, in which event these undertakings will lapse:

4.1.1 Preserve and maintain the economic and competitive value of the Glenryck Trademark in accordance with good commercial practice and to manage the Glenryck Trademark in the best interest of such business;

4.1.2 Refrain from carrying out any act that may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the Glenryck Trademark;

4.1.3 Refrain from carrying out any act that may be of such a nature as to, in an adverse way, after the economic value of the Glenryck

Trademark or which could after the commercial strategy in respect of the Glenryck Trademark in a significantly adverse way;

4.1.4 Provide sufficient resources for the maintenance of the business in respect of the Glenryck Trademark.

5. Monitoring of Conditions

5.1 In the event that the Commission receives any complaint in relation to non-compliance with the above conditions, or otherwise determine that there has been an apparent breach by Foodcorp of the conditions, the breach shall be dealt with in terms of Rule 39 of the Competition Commission Rules.

5.2 All correspondences in relation to these Conditions shall be forwarded to mergerconditions@compcom.co.za