IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 59/CAC-200606-02

DATE: 20 JUNE 2006

In the matter between:

MYBICO Applicant

And

DAVID LEWIS N.O. (in his capacity as the presiding member of the Competition Tribunal) 1ST RESPONDENT

THE COMPETITION TRIBUNAL 2ND RESPONDENT

VODAFONE GROUP PLC 3RD RESPONDENT

VENFIN (PTY) LIMITED 4TH RESPONDENT

JUDGMENT

DAVIS, JP:

On the 11th of January 2006 the second respondent issued merger clearance certificates approving the merger between third and fourth respondents as well as Business Venture Investments No 951 LTD and fourth respondent.

Although the transactions were filed separately, they were considered by second respondent to be inter-dependent. Argument relating to these transactions was heard by the

second respondent simultaneously. In reasons which were provided later by the Tribunal, the transactions were approved.

On 24 February 2006 applicant sought relief by way of a notice of motion, the relief being set out as follows: the decision taken by the first and second respondents to approve the merger between third and fourth respondents in terms of Section 16 (2) (a) of the Competition Act 98 of 1998 ('the Act') and the decision to issue a merger clearance certificate in terms of the Competition Tribunal Rule 35 (5) (a) be reviewed and set aside.

The matter was initially enrolled by this court and, given certain defects, it was then withdrawn. This Court sought to accommodate applicant, particularly because applicant had raised considerations relating to black economic empowerment and participation in the economy by historically disadvantaged communities, being key objectives of the Act.

Accordingly, the Court set the matter down for this morning. In terms of the Rules of this Court, a directive was issued in terms of which heads of argument were required to be filed by applicant fifteen court days prior to the hearing and in the case of the respondent, ten court days. When it became apparent that these heads of argument were not going to be filed

timeously, as a Judge President of this Court, I instructed the Registrar to make contact with the attorney who represented the applicant. The Registrar informed me that the attorney had withdrawn, in that the applicant was not able to provide sufficient funds for the costs of representation.

Pursuant to this information I instructed the Registrar to make contact with applicant, which proved to be extremely difficult. Faxes were sent, telephone contact was attempted but with no success. Indeed, as at yesterday (that is one day before the matter is to be heard) this Court had no idea as to whether the matter was to proceed and, if so, in what format. In a spirit of ensuring that parties should feel comfortable in approaching this Court, the Registrar even went to the lengths of contacting respondents' attorney in order to obtain some assistance from that office as to how this Court might contact applicant. All of these attempts proved to be futile.

This morning I was informed at 8.03 by the Registrar of the Court that a fax would be received by my office entitled 'request for postponement'. Mr Cockrell, who appears on behalf of the respondents, informed this Court that his client had received this fax at approximately 16:30, the day before the hearing. The request for postponement which is

unaccompanied by any affidavit or substantiation of the points made reads thus,

> "the organisation MYBICO requests the Presiding Officer "Judge President" of the Competition Appeal Court to postpone the hearing of 20 June 2006 for the following reasons.
>
> 1. Although we filed an appeal our attorneys of record has withdrawn due to lack of funds to pay them.
> 2. We have not been able to draft heads of argument as we do not have an attorney.
> 3. We have approached the Legal Aid Board who cannot assist us.
> 4. We are currently trying to obtain the services of one of the legal aid clinics at the universities.
> 5. We are also setting up a trust fund to fundraise for the funds required.
> 6. We request the Court to postpone the hearing for ten weeks."

Mr Mothopeng, who appeared for the applicant this morning informed this Court that applicant was involved in negotiations with various firms of attorneys in order to procure legal representation; accordingly he felt confident that within ten weeks, applicant would be able to provide heads of argument to substantiate its case. Hence he requested a postponement.

As Mr Cockrell correctly submitted, postponements are not merely for the taking. They have to be properly motivated and substantiated. As the Court said in Madnitsky v Rosenberg, 1949 (2) SA 392 (A) at 399,

> "No doubt a Court should be slow to refuse to grant postponement where the true reasons for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case".

These are weighty considerations. In this case, the pattern of applicant's conduct has been to generate delay after delay without any substantiation as to why such delays were created. The first respondent, in his answering affidavit sets out the background to much of this dispute as follows:

> "20.1 At no stage did the applicant make any submissions to the Competition Commission during its investigation of the merger;
>
> 20.2 The applicant never applied to intervene in the second respondent's proceedings;
>
> 20.3 The applicant never in any other way made itself a party to the merger proceedings;

20.4 The applicant was not present at the hearing as it is evidenced by the attendance register ..."

Third respondent then continues,

"The applicant submitted the documents referred herein on the 11th of January 2006 at 10:12. The documents were provided to the merging parties at the commencement of the hearing which considered same and made a joint submission to the effect that the objection therein should not be entertained."

The narrative can then be picked up in the reasons provided by second respondent in which the following is stated:

"The Tribunal received a last minute objection to the merger in the form of a joint written statement from the two groupings called MYBICO and HBR Foundation. The objection arrived after the proceedings were due to begin. However fortuitously it was received by the panel minutes before the hearing actually began. The objection was nevertheless put to the merging parties who argued that it should not be admissible. We are of the view that the written submission containing the objection should be considered despite the un-procedural manner in which it was brought. The authors of the objection did not attend the hearings

and therefore did not speak to their submissions." (para 13)

Thereafter second respondent sets out the basis by which it rejected these submissions. In particular it states;

"In terms of the Competition Act the Tribunal does not have the power to tell parties whom they should sell to. At most the Tribunal is empowered to prohibit a merger on the grounds listed in the Act." (para 14)

It appears to be that applicant's real complaint is that part of the shareholding should have been sold to "a true BBBEE with the same or even subsidised share value of R47,25".

The Tribunal them concluded: "It would take an enormously ambitious reading of this provision to contend that it empowers us to require parties to sell the interest, which is the subject of the merger, not to their chosen acquirer but to a person, or class of persons, of our making." (para 17)

On this basis, the Tribunal considered and dismissed the objection. So much therefore for the background to both the substance of the dispute and the conduct of applicant in prosecuting its case.

As I have noted earlier in Madnitsky case, supra, the Court should grant a postponement where the true reasons have been fully explained, where there have been no delaying tactics, and where justice so demands. Manifestly, we have not been provided, with an adequate explanation for applicant's dilitory conduct throughout these proceedings. There is at least an inference that can be drawn that there have been some delaying tactics, particularly in that this Court has bent over backwards to accommodate applicant on at least two separate occasions. Insofar as this particular application is concerned, I have already set out, in my view, the extraordinary steps to which this Court went in order to facilitate this application being heard properly.

As to the question of justice, two issues should be considered. One concern as Mr Cockrell submits, is the significant prejudice to the respondents in this case, particularly third and fourth respondents. Clearly if a merger has been approved by the Tribunal some six months ago there must be prejudice if a cloud of litigation hangs over the merger for an indefinite period.

Secondly it seems to me that the Court needs to consider, to some extent, the substance of the application. Applicants have suggested three separate grounds by which their relief

should be granted; Firstly, non-compliance by the second respondent with the principle of *audi alteram partem,* secondly, bias on the part of the second respondent and thirdly, failure to apply its mind.

Insofar as the second and the third grounds are concerned, that is bias and failure to apply its mind, there is no evidence provided in the founding affidavit of applicant to substantiate this particular set of objections. Insofar as the first objection is concerned, that is a breach *audi alteram partem*, as Mr Cockrell submitted in his written heads of argument, it is difficult to understand how applicant can seriously advance this complaint in the circumstances where it did not attend the hearing. If applicant had been present at the hearing, it might have sought leave to address the second respondent. The fact is that applicant did not seek to do so. Indeed the affidavits which have been put before this Court make it clear that applicant's representative arrived at the offices of second respondent at 11.15, that is significantly after the hearing had ended.

Notwithstanding this, as Mr Cockrell said, it is somewhat surprising to read the averment of Mr Mothopeng that;

> "he together with other members of the applicant attended at the hearing on the 11th of January 2006"

As Mr Cockrell submitted, since applicant failed to attend the hearing there can be no basis for its complaint that it was not afforded an opportunity to make oral representations to second respondent. In my view, after a careful consideration of the papers which have been provided in this Court, there is no justification for any other conclusion than that there is no meaningful substance in the case which has been brought by applicant.

I want to make one final point. Mr Mothopeng very eloquently told this Court that the youth of this country should participate in the economy. There can be no question that he is absolutely correct. There can be no doubt that the future of this country's democracy depends upon the most widespread participation in the economy by all South Africans, particularly those millions who were precluded from adequate and fair participation in the economy due to 300 years of racist rule. This judgment should not be construed in any way to contradict or not to support this line of argument. However a Court must follow the rules which are laid down, the procedures which are contained in the Act and the jurisprudence which has been set out over a long period of time.

There is no merit in granting a postponement when a Court does not consider there to be any substance in the application. The fact that there is no substance in the application does not however mean that Mr Mothopeng's client should not seek to negotiate with respondents to ensure the implementation of his commendable vision. Indeed, this Court offered the parties an opportunity to do that, and it was only upon their refusal to continue along these lines, that this Court was compelled to come to this conclusion.

In the result, the procedural defects in the application, are condoned given that the applicant is not legally represented. The application for postponement and the main application are dismissed, together with costs.

DAVIS, JP

Mailula and Patel AJJA's concurred.