IN THE COMPETITION APPEAL COURT

CAC Case No's: 46/CAC/FEB05
Tribunal Case No's: 105/LM/DEC04

In the matter between:

COMMUNITY HEALTHCARE HOLDINGS (PTY) LIMITED	First Applicant
CORNUCOPIA (PTY) LIMITED	Second Applicant

and

THE COMPETITION TRIBUNAL	First Respondent
THE COMPETITION COMMISSION	Second Respondent
BUSINESS VENTURE INVESTMENTS NO.. 790 (PTY) LIMITED *["BIDCO"]*	Third Respondent
AFROX HEALTHCARE LIMITED *["Ahealth"]*	Fourth Respondent
BRIMSTONE INVESTMENTS CORPORATION LIMITED *["Brimstone"]*	Fifth Respondent
MVELAPHANDA STRATEGIC INVESTMENTS (PTY) LIMITED *["Mvelaphanda"]*	Sixth Respondent
AFRICAN OXYGEN LIMITED *["AOL"]*	Seventh Respondent
THE MINISTER OF TRADE AND INDUSTRY	Eighth Respondent

J U D G M E N T

HUSSAIN, J:

On 11 March 2005 the applicants brought an urgent application before me where the following relief was sought:

The applicants apply for an order in terms of section 38(2A)(d) of the Competition Act No, 89 of 1998 (hereinafter referred to as *"the Acf)* for an order in the following terms:

> "1 *Suspending the operation and execution of the following decisions of the Competition Tribunal ('the Tribunal') that are the subject of a review and/or an appeal before this Honourable Court:*
>
> *11The decision of the Tribunal taken on Tuesday 8th February 2005 under case number 105/LM/Dec 04, dismissing the applications that were brought by the First and Second Applicants, in terms of the provisions of section 53(1)(c)(v) of the Act, for leave to be recognised as participants ('the intervention applications') in the application in terms of section 16(2) of the Act for the approval of the Bidco Ahealth merger ('the merger approval application') that was brought under the same case number.*
>
> *12The decision of the Tribunal taken on Tuesday 8th February 2005, under case number 105/LM/Dec 04, refusing the application brought by the Applicants to postpone the hearing of the merger approval application ('the application for a postponement'),*
>
> *1.3 The decision of the Tribunal handed down on Wednesday 2 March 2005 and pursuant whereto the Tribunal decided to grant the merger approval application without:*

131recognizing the First and/or the Second Applicants as participants in terms of the provisions of section 53(1)(c)(v) of the Act, and/or

132affording the First and/or Second Applicant the opportunity through their representative to put any questions to witnesses and/or to inspect any books, items and documents presented at the hearing of the merger

2.Granting the Applicants such further or alternative relief as this Honourable Court deems appropriate.

3.Directing that those of the Respondents who may oppose this application pay the costs thereof, jointly and severally"

After hearing counsel, and having read the papers, I granted the following order:

" *1. The application is dismissed.*

2 The first and second applicants are ordered to pay the costs of this application, which costs include the costs of two counsel, on a scale as between attorney and own client"

When I gave the above order it was not possible, in the circumstances, to give full reasons I indicated to the parties that my reasons will be given in due course. What follows herein are my reasons. In this judgment *"the respondents"* mean the third to the seventh respondents The first, second and eighth respondents were not represented in court and no order was sought against them. In this judgment reference to *"the Tribunaf* and *"the Commission"* means the Competition Tribunal and the Competition

Commission respectively as defined in the Act, A reference to *"merger approvaf* means the conditional approval handed down by the Tribunal,

Before dealing with the merits of the application I deem it necessary to say something about the conduct of the applicants,

The applicants filed their Notice of Motion with the Registrar of this Court on 3 March 2005, The Notice of Motion did not stipulate a date for the hearing, but it nevertheless afforded the respondents *"10 business days"* to deliver their answering affidavit, The Registrar was informed, by the applicants' attorneys, that the urgent application will proceed and that arrangements be made with the duty judge, I received a call from the Judge President of this Court, Mr Justice Davis, requesting me to hear the application, I agreed to do so,, On 4 March 2005 the applicants' attorneys wrote to the respondents' attorneys seeking an undertaking that the respondents will not proceed with the merger that was approved by the Tribunal On 8 March 2005 the respondents' attorneys wrote to the applicants' attorneys stating that their instructions were to proceed with the impiementation of the merger, In the meantime the Registrar of this Court had set down the hearing of the applicants' appeal/review for 23 March 2005, This date was communicated to all the parties, The applicants adopted the view that the matter was so urgent that it could not wait until 23 March 2005, in fact the applicants adopted the attitude that the matter could not even wait until Monday 14 March 2005,

Upon the request of the applicants a hearing date was arranged before me for 11 March 2005, On the morning of 11 March 2005 I indicated to counsel that I had read the papers the night before and that I was ready to hear the matter immediately, Mr Subel SC who appeared for the respondents indicated that he and his team were ready to proceed, Mr Nelson SC who appeared for the applicants asked that the matter stand down as *"the applicant was considering its position".* The matter stood down and over an hour later I was still waiting in chambers I then indicated to the parties that I wanted to hear the matter and enquired into the delay,

I was then called to court where the applicants indicated that they wanted to bring an application:

a)to compel the respondents to provide access to certain documents; and

b)to ask that the matter be postponed

The respondents indicated that they will oppose both the applications, After hearing argument I dismissed both the applications and reserved my reasons After I dismissed the applications counsel for the applicants requested that I should stand the matter down until Monday 14 March 2005 This, a dramatic change in their attitude that they originally adopted namely that the matter had to be heard on 11 March 2005, The respondents opposed this and after hearing more argument I refused to allow the matter to stand down till Monday

The application to compel the respondents to give access to documents was merely made from the Bar. The applicants did not prepare any papers Upon hearing this application, I was not satisfied that the applicants had made out a case in law to compel the respondents to deliver or grant access to the documents the applicants requested. The applicants could show no clear right to have access to these documents The documents related to the merger that was approved by the Tribunal I was also concerned that the applicants were unable to show how these documents could possibly advance their case against the respondents, nor were they able to show how their access to these documents could possibly assist the Tribunal. I was alive to the fact that all of the documents requested by the applicants had already been filed with the Commission and the Tribunal I was accordingly not persuaded to come to the applicants' assistance.

I was equally not persuaded to grant a postponement The applicants' reason for the postponement was to enable them to file a replying affidavit. I was told by Mr Nelson that they had only received the respondents' answering affidavit that morning and that he read the affidavit *"in the car on the way to court'* The respondents' attorneys, I was informed, tried to deliver the answering affidavit to the applicants late on 10 March 2005 They were unable to make contact with any of the applicants' legal representatives, both attorneys and advocates For some reason no one was answering their telephones.

Again the applicants failed to convince me that the filing of a replying affidavit will in some way advance their case The contents of the respondents' answering affidavit must have presented no surprises to the applicants On 8 March 2005, in response to a request from the applicants for an undertaking from the respondents to delay implementation of the merger, the respondents' attorneys wrote a letter to the applicants' attorneys stating fully why such an undertaking was being declined I read this letter and it was clear to me that the contents of this letter was repeated and expanded in the respondents' answering affidavit. In fact there was nothing new in the respondents' answering affidavit I drew counsel's attention to this but Mr Nelson insisted that his client needed a postponement 1 refused the postponement and asked Mr Nelson to proceed with his client's application. It was at this stage that Mr Nelson asked that the matter stand down till Monday 14 March 2005 I reminded Mr Nelson that it was his clients who insisted that the matter was so urgent that it had to be heard on Friday 11 March 2005 Mr Nelson still insisted that he wants the matter stood down I refused this request but indicated that I was willing to stand the matter down till 14h00 I indicated that at 14h00 I will hear the applicants' application. Mr Nelson accepted this and the matter stood down till 14h00

At 14h00 Mr Nelson still wanted the matter to stand down till Monday I refused to do so and asked him to proceed with his case. At this point Mr Nelson handed up to me 46 pages of heads of argument that he had prepared It became quite clear to me that these heads were, all along, in Mr Nelson's bag and that he was indeed ready, all along, to argue the matter. At

all material times the respondents indicated that they were ready to proceed and wanted to proceed with the case, they opposed the postponement as well as the request to stand the matter down till Monday

It became abundantly clear to me that the applicants came to court and tried to manipulate the situation in order to delay the hearing of the application, This would have suited their agenda while possibly causing irreparable harm to the respondents, I realised then that the applicants were not litigating with any senous and *bona fide* competition concerns in mind but rather to cause delay in the respondents' implementation of the merger,

I took the time and trouble to set these events out because it is important for practitioners to realise that this kind of conduct is frowned upon and should not be encouraged in this Court The conduct of the applicants and their legal representatives was unprofessional and disrespectful to the court as well as to the respondents,, This kind of gamesmanship will not be tolerated in this Court This Court should not hesitate to punish such conduct with appropriate orders as to costs,

I now deal with the merits of the application:

The factual background

[1] On 13 December 2004 the respondents, under case number 105/LM/DEC04 applied to the Competition Commission for merger approval in terms of Chapter 3 of the Act. This was a large merger involving the private health care industry.. The merger hearing was set down before the Tribunal on 10 February 2005

[2] On 28 January 2005 the applicants launched a formal application before the Tribunal to be recognised as a participant in the said merger proceedings in terms of section 53(c)(v) of the Act The applicants filed a comprehensive Notice of Motion supported by a detailed affidavit. The respondents, the parties to the merger, opposed the application and filed an answering affidavit. The applicants filed a replying affidavit, These papers as well as the record of the proceedings before the Tribunal were made available to me and I read them The applicants' application was set down before the Tribunal for hearing on 8 February 2005. Counsel for both sets of parties prepared heads of argument which were handed to the Tribunal..

[3] At the hearing of the application the Tribunal decided, in view of the deficiencies in the applicants' papers, to allow the applicants to lead oral evidence To this end the deponent to the applicants' affidavit, Mr Dempers, was led in evidence by senior counsel for the applicants. Having considered the record of the proceedings before the Tribunal I was satisfied that the

applicants were given more than a fair chance to make out a case for their participation in terms of section 53(c)(v) of the Act.

[4] After a full and proper hearing the Tribunal dismissed the applicants' application. The Tribunal found that principally:

a) The applicants had failed to persuade it that it had an interest in the merger proceedings as contemplated in section 53(c)(v) of the Act and

b) The applicants failed to show that they had anything to contribute to the hearing which will be of assistance to the Tribunal in the discharge of the latter's statutory duties.

Having read the papers and having considered the Tribunal's reasons, I could find no fault in the Tribunal's findings and ultimate order dismissing the application

[5] Once the Tribunal announced its decision the applicants' counsel did two things, namely:

(a) He immediately noted the applicants' intention to appeal or review the Tribunal's decision (notwithstanding that the Tribunal had not yet furnished its full reasons) and

(b) Made application for an order postponing the scheduled merger hearing,

This application was opposed by the merging parties and full argument was addressed, The Tribunal refused to grant an order postponing the merger hearing, The hearing proceeded on 10 and 11 February 2005,

[6] On 2 March 2005 the Tribunal issued an order approving the merger in terms of section 16(2)(b) of the Act,, The applicant, on 3 March 2005 launched an application to review the Tribunal's merger decision,

[7] The applicants now bring this application in order to suspend the operation and execution of the Tribunal's orders pending the outcome of their appeal/review to the Competition Appeal Court,

Urgency

[8] The applicants bring this application in terms of section 38(2A)(d) of the Act, In order for the Judge President of this Court to allocate the matter to the duty judge, the applicants had to make out a case for urgency To this end the applicants were called upon to file a supplementary affidavit dealing with urgency, The applicants filed this affidavit on 9 March 2005 Thereafter I was directed to hear the matter, Such direction by the Judge President does not mean that the matter will be treated and heard as an urgent application The question of urgency remains an issue to be dealt with before the duty judge,

The respondents indicated that they were challenging the urgency raised by the applicants. Having read the papers in the matter I realised that although the applicants' grounds for urgency were questionable, this was a matter which both the parties had an interest in finalising and in addition there was considerable public interest.. Accordingly I decided that it was in the best interests of all the interested parties that I should hear the matter. Before the hearing commenced I indicated to counsel that I did not want to waste time debating urgency and that I will hear the application. Where urgency is an issue the *onus* remains on the applicant to show good cause why the matter must be heard immediately and why it could not be afforded substantial redress in due course.. The principles developed in the interpretation and application of Rule 6(12) of the Uniform Rules of the High Court are applicable.

The nature of the order

[9] In effect the applicants seek a stay of the merger proceedings in terms of section 38(2A)(d) of the Act, pending the outcome of an appeal and/or review of the Tribunal's decisions mentioned above and in particular the Tribunal's decision to approve the merger The applicants' case before me is firmly anchored to the review of the Tribunal's merger approval. Clearly but for noting such review the applicants will have no case for a stay of the merger proceedings The applicants' appeal/review of the Tribunal's decisions not to recognise them as participants and the Tribunal's refusal to postpone the merger herein does not take the matter any further

Accordingly, in order to make out a proper case for a stay in these circumstances the applicants will have to persuade me that there are reasonable prospects of success in their review against the Tribunal's decision to approve the merger.

[10] At all material times the respondents took up the attitude that the Tribunal had given its approval and they intended to continue to implement the merger. The respondents, in my view, were perfectly entitled to proceed with implementation notwithstanding the applicants' appeal. Even if the Tribunal's decision was unlawful it continues to have effect until such time as it is set aside by a court In other words the Tribunal's order is: *"Treated as though it is valid until a court pronounces authoritatively on its validity*

See: Hoexter - *The New Constitutional and Administrative Law* Volume 2 (Juta 2002) 291.

Transnet Bpk N/A Coach Express v Voorsitter, Nasionale Vervoerkommissie 1995 (3) SA 844 at 846-847.

This approach is consistent with the principle that administrative action is rebuttably presumed to be regular *(omnia praesumuntur rite esse acta)*

"Because of the presumption of validity, all administrative action remains in effect until such time as it is set aside or declared invalid by a court of competent jurisdiction If the action is not challenged timeously in a court with jurisdiction by a person with locus standi, or if the person affected by the

action has waived his/her rights, or if a court refuses to declare it invalid, the act will, in spite of its technical invalidity, retain its legal effect" (my emphasis)

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Equally, and thankfully, the Act does not provide for the automatic suspension of an order under review or appeal, The party seeking suspension must apply to the Competition Appeal Court in terms of section 38(2A)(d) of the Act, There are important policy considerations behind this, One can imagine, if a notice of appeal automatically suspended operation of an order of the Tribunal, the havoc vexatious litigants could wreak on approved transactions This is in fact a case in point, As will appear elsewhere in this judgment, the applicants' motives for suspending the implementation of the merger is not grounded in any genuine competition concerns, but rather in their own commercial interests,

Section 38(2AMch

[11] This section provides as follows:

> *"The Judge President, or any other Judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an ,,, application to suspend the operation and execution of an order that is the subject of a review or appeal"*

This Court enjoys a discretion whether to grant a suspension order

See: *Glaxo Wellcome (Pty) Ltd v Terblanche NO and Others (No 1)* 2001 (4)SA901 (CAC)

The discretion must be exercised judicially but *"generally speaking a court will grant a stay of execution where real and substantial justice requires such a stay or where injustice would otherwise be done"*.

See: *Santam Ltd v Norman and Another* 1996 (3) SA 502 (C).

In considering an application in terms of section 38(2A)(d) of the Act the presiding judge has to be very careful and must be alive to the prospect of abuse based on hidden agenda or selfish commercial or other interests The presiding judge must consider ail of the facts and circumstances very carefully, including the record of the proceedings before the Tribunal.. An in depth enquiry into the motivation for the stay or suspension of the order must be undertaken The judge must enquire into whether or not the applicants' application is grounded in genuine competition related issues or is merger specific. In this regard the parties have a duty to make full disclosure to the court and counsel representing the parties are under a duty to assist the judge An application in terms of this section cannot be treated lightly as there is always the potential for abuse Equally judges hearing applications of this nature should not hesitate to punish any of the parties, with an appropriate

cost order or otherwise, where such party was found not to have acted in good faith or had been obstructive in the conduct of the proceedings

In this regard I would like to quote, with approval, what Davis JP stated in the *Glaxo Wellcome* case *(supra):*

> *"The position can be summarised thus: In exercising its discretion a court must, of necessity, enquire as to whether there is a prima facie case that an applicant's rights have been infringed. Further, the court must locate where the balance of convenience lies But that is not all that has to be considered in the exercise of the discretion to grant such an order: Within the context of the Act there is the additional consideration that the suspension of an interim order in terms of section 59 can, if granted too easily, subvert the very purpose of an important provision of the Act which created this kind of order: Hence the court must exercise its discretion by means of a careful consideration of the policy considerations of the Act in the context of the facts of the case*
>
> *For this reason a court must enquire as to whether the applicant can show prima facie that its order has infringed a right which the applicant enjoys, further that the balance of convenience favours the granting of such interim relief within the context of the factual matrix of the case and that the injustice caused by the perpetuation of the order would be greater than the possibility of jeopardising the purposes of the Act promoted by the continuation of the section 59 order itself"*

The issues

[12] In order to adjudicate this application the following must be addressed:

12.1 Does the applicants' review of the Tribunal's merger approval enjoy *prima facie* prospects of success?

122In whose favour does the balance of convenience lie?

123Would any injustice caused by the implementation of the merger outweigh any subversion of the purposes of the Act caused by a suspension of the Tribunal's approval of the merger?

The prospects of success

[13] The acquisition by the third respondent of the entire issued shared capital of the fourth respondent was first notified to the Competition Commission on 5 December 2003 under case number 2003/DEC/785 The detail of this filing is not relevant to this judgment and I will not set the facts out. What is relevant is that the first applicant was recognised by the Tribunal as a participant in terms of section 53(1)(c)(v) of the Act, Pursuant to a hearing before the Tribunal the matter was postponed, Thereafter the merging parties entered into negotiations to deal with various concerns that were raised at the hearing (the details of which are again not relevant for purposes of this judgment). Thereafter the merging parties filed another application with the Commission This was treated as a new filing and the first applicant was expected to apply to the Tribunal to be recognised as a participant in terms of the Act At the hearing of the application before me the applicants, in particular the first applicant, made much of the fact that it was not allowed to participate by the Tribunal This is cited as grounds for success in their review I considered the argument fully and decided to dismiss it as a red-herring There is no substance in it due to the fact that the applicants were

afforded a full hearing, including the hearing of oral evidence, by the Tribunal. The applicants were given every opportunity to persuade the Tribunal that they should be recognised as participants. The Tribunal rejected the applicants' application and gave full reasons for its decision I read the record of the proceedings and I am satisfied that the Tribunal was correct and that there is no reasonable prospect of this issue being reversed on appeal or review. It must be said that the principal reason for the Tribunal's decision is that the applicants failed to convince the Tribunal that they were in a position to make a material contribution towards assisting the Tribunal in the discharge of the latter's statutory mandate.. I was unable to fault this finding.

In any event it must be realised that the applicants' appeal against the Tribunal's decision to refuse participation and its refusal of an application to postpone the merger hearing cannot found a basis for this application The applicants must show that they have prospects of success in the review against the merger approval.

[14] Inasmuch as the Tribunal found that the applicants would be of no assistance in the merger hearing, the applicants were now given another opportunity to present a case as to how their participation could assist the Tribunal Again the applicants failed dismally. I could find nothing in the papers presented to me to persuade me that the applicants had anything relevant or material to contribute to the merger hearing The applicants' papers are entirely lacking in substance The applicants refer and quote extensively from relevant legislation without setting out any facts or evidence

which triggers the application of such legislation. The applicants repeatedly set out allegations and sweeping statements which look impressive but does not withstand even the slightest scrutiny, To give a few examples of this:

a) Implementation of the merger will have *"catastrophic consequences".* The applicants did not state what these consequences will be and at best were vague about them. There is absolutely no reference in the papers as to any consequences for competition..

b) If the appeal succeeds it will *"no longer be possible to unscramble the egg".* There is no reference as to what this means. The applicants conveniently failed to deal with the question of divestiture and that it was the respondents who were at risk

c) If the merger proceeds and the appeal succeeds *"the horse wilt have bolted and it will be impossible to correct the position"* There is no reference as to what this means

d) If the merger proceeds *"the consequences for the applicants and for all small and medium sized firms will be dire".* There were no facts to support this

e) If the merger proceeds the applicant will *"probably have to exit the market'.* This is a serious allegation for which no facts in support appear in the papers.

f) *"The market for healthcare in South Africa will be permanently reshaped and the applicants would be unable to do anything to protect their right'..* No facts are presented to support this sweeping allegation, nor do the applicants explain what *"right* they will not be able to protect.

g)"... *The merging party attempted to get approval for a transaction that was patently objectionable"* No facts appear in the papers to support this. Why the *"transaction"* was *"patently objectionable"* is not explained.

(h) The applicants have *"legitimate issues".* This, without saying what issues and why they are legitimate

The applicants' papers were lacking in substance. The applicants failed to set out facts which demonstrate that their issues are grounded in genuine competition concerns or that they are merger specific.

[15] It was abundantly clear to me that the only point to *"reviewing"* the merger approval is in order to found jurisdiction for this application. It was equally clear to me that the purpose of this application was merely to create

delay and frustration in the implementation of the merger I accept what was decided in the *Glaxo Wellcome* case *(supra)* that it would be improper to grant a stay in circumstances where the review application formed part of dilatory tactics Davis JP said the following:

> *"The purpose of the Act would be frustrated if the interim order granted by the Tribunal, after consideration of the available facts, were to be suspended in circumstances where the review application ... was launched merely to confirm jurisdiction on the court to hear the stay application and represented* a *dilatory tactic that amounted to an abuse of the court process"* (my emphasis)

There is an abuse of the process of the court when a litigant invokes judicial machinery in an endeavour to achieve an end or purpose for which it was not intended

[16] In this case it is clear, on the applicants' own version, that their desire to participate in the merger proceedings was motivated, not by a desire to ensure that the merger would not substantially prevent or lessen competition, but by an attempt to protect the applicants' own commercial interest,, I refer to Dempers' oral evidence:

> *"Mr Dempers: I would like to be able to advise my Board appropriately and accordingly to what I believe the future of our organisation is and the only way I can do that is by being a participant in these proceedings and make an informed decision*
>
> *Adv Subel Now we have heard when you motivated today why you want to participate in these proceedings. The impression that we gained, correct me if I am wrong, is that really Community Healthcare Holdings wants to look after its position and wants to basically assess where it is in the market. Is that a correct statement? Mr Dempers: That's correct yes.*

> *Adv Subel: And the end of your business is really what your concerned about not what effect the end of your business may have on competition in the market?*
>
> *Mr Dempers: Sir i must be quite honest with you, we're not a market leader We're a small player We're a small empowerment company within the hospital industry My first responsibility at this stage is with our organisation, the staff that works for us and our shareholders Yes, so my first consideration is definitely the competitiveness and the future of our organisation and not necessarily the macro economics at play"*

The finding made by the Tribunal, which appears in their reasons, is as follows:

> *"This, as Mr Subel for the respondents point out, is not a concern for a genuine interest in terms of the Competition Act, but is about the first applicant's own commercial interests"*

By their own admission the applicants had an ulterior motive in seeking to participate in the merger proceedings.

[17] In my view the applicants' review application in respect of the merger approval has no prospects of success. The grounds for review relied on by the applicants amount to nothing more than a rehashing of the provisions of section 62 of the Promotion of Administrative Justice Act No. 3 of 2000 (hereinafter referred to as *"PAJA"),* this without stating the facts which trigger the provisions of PAJA. I will now deal briefly with the applicants' grounds for review:

17.1 Section 62(a)(i) of PAJA - unauthorised decision The Tribunal considered the applicants' submissions regarding the status of the merger proceedings and in particular if the proceedings were

the same or a sequel to the first filing. As 1 have already stated, the applicants were given a full hearing in an application to be recognised as participant The Tribunal properly dismissed the application Neither in their review nor in this application do the applicants suggest that there was anything improper or unauthorised about the manner in which the Tribunal reached this decision. It clearly fell within the Tribunal's powers. There is no merit in this ground of review.

17.2 Section 62(a)(iii) of PAJA - bias. This allegation amounts to nothing more than an unsubstantiated and scurrilous attack on the chairperson of the Tribunal. The merger involved the participation of the Industrial Development Corporation Ltd *("IDC").* The chairperson of the Tribunal serves on the Board of the IDC. The chairperson disclosed this at the commencement of merger proceedings at a pre-hearing conference This conference was attended, *inter alia,* by the representatives of the first applicant No party, having been invited to do so, expressed any reservations about the chairperson, What is more the applicants, in this application, provide absolutely no evidence of actual bias They cannot rely on merely an alleged perception of bias on the part of the chairperson. This ground of review is without merit

3Section 62(2)(c) of PAJA - procedural unfairness. This can be disposed of very quickly This ground of review relates to the Tribunal's exclusion of the applicants as interveners and the Tribunal's refusal to postpone the merger hearing and not to the Tribunal's merger approval, This ground has no prospect of success

4Section 62(d) of PAJA - decision materially influenced by an error of law Again according to the applicants, any error of law which may have occurred, occurred in relation to the Tribunal's decision to dismiss the intervention application and the application to postpone the merger hearing, No factual and/or legal basis whatsoever is put up in support of any error of law in relation to the Tribunal's decision to approve the merger Thus, the applicants enjoy no prospect of success on this ground

,5 Section 62(e)(ii) of PAJA - decision taken for an ulterior purpose or motive.. The applicants have put up no facts or evidence whatsoever of any ulterior motive or purpose on the part of the Tribunal or any of its members including the chairperson There was a vague reference to the Tribunal being motivated by wanting to expedite the merger, but this was not supported by any evidence Yet again, any ulterior purpose which might have been demonstrated (and 1 was unable to find any) would arise in the context of the Tribunal's decision to dismiss the application

for intervention and the application for a postponement of the merger hearing and not in the context of the Tribunal's approval of the merger. This ground enjoys no merit

176 Section 62fe)fiii) of PAJA - irrelevant considerations taken into account or relevant considerations not considered. The applicants' submission in this regard reveals that the issues here relate to the Tribunal's dismissal of the intervention and postponement applications.. This ground has little or nothing to do with the merger approval. The applicants state that the Tribunal took into account irrelevant considerations in *"deciding to refuse the intervention application"* Similarly the allegation that the Tribunal failed to take into account relevant considerations relates to matters relevant to the intervention application and not to the merger approval This ground, insofar as it relates to the merger approval, enjoys no prospect of success.

177 Section 62(e)(iv) of PAJA - action taken because of unauthorised or unwarranted dictates of another person or body is a reference to the chairperson's involvement with the IDC I have already dealt with this aspect. Suffice to say that this ground can best be described as spurious

17.8 Section 62(fl(ift(aa) and (bb) of PAJA - action not rationally linked to purposes of the Act. Again, in the applicants' own terms, this ground of review is solely concerned with the Tribunal's decision regarding the intervention application. It too gives rise to no prospects of success in the review application.

Accordingly I am persuaded that the applicants do not enjoy any prospects of success insofar as it relates to the review of the merger approval.

Balance of convenience

[18] The applicants, in their founding papers, failed to deal with this requirement adequately. This requirement goes to the root of the relief that the applicants seek and yet they dealt with it in rather vague terms. It must be remembered, at the outset, that the respondents, in no uncertain terms, informed the applicants that they were proceeding to implement the merger. At best for the applicants, they alleged that they will suffer prejudice if the merger is implemented This allegation must be weighed in the context of the law of competition and in particular in the light of whether, in the absence of the relief sought in this application, there is likely to be a substantial prevention or lessening of competition The applicants, in my view, made out no such case. It is plain that the applicants were not motivated by any of the aims of the Act, but rather their own commercial interests. The commercial interests of and possible prejudice to the applicants is in fact of little or no consequence in the context of competition law

[19] Although the applicants' allege prejudice they say very little about it Exactly what prejudice will be suffered by them at which stage of the implementation of the merger is not dealt with The applicants on their own submissions deal with prejudice in the vaguest of terms, leaving just about everything to speculation. Instead of presenting credible evidence and facts they chose to rely on the *"unscrambling of eggs"* and the *"bolting of horses"*

The applicants allege that if the review succeeds then it will be impossible to reverse the merger itself. This appears to be the applicants' strongest point, Having said this the applicants failed to deal with the provisions of section 60(1)(a) of the Act which provides:

> *'If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may ... order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger"*

Thus, in a proper case, the Tribunal has the powers to order divestiture in respect of a merger which was implemented prior to final approval In the context of this merger it is the respondents who run the risk of reversal through divestiture. The respondents made it very clear that they were willing to accept this risk in proceeding to implement the merger By the same token the applicants suffer no risk one way or the other. The applicants did not even tender an indemnity in their application.

[20] As against the paucity of evidence of any genuine prejudice on the part of the applicants, the respondents disclosed irremediable prejudice including the potential loss of the entire merger transaction. According to the respondents:

20.1 In order to finance the merger transaction certain hedge instruments were procured An interest rate hedge position must immediately be closed out or transferred to the third respondent If the merger is implemented as planned the hedge position will be transferred to the third respondent, carried by the business of the fourth respondent and closed out at an advantageous time. If this application succeeds, however, the hedge position will have to be closed out on 23 March 2005 and will result in a tangible loss of between R20 million and R35 million. This will be extremely prejudicial to the Black Economic Empowerment entities in particular

20 2 In terms of the funding arrangements any additional funding needs are to be borne by Bidco's shareholders. The purchase consideration payable for the acquisition of the Ahealth shares is presently escalating at approximately R15 million per month This means that Brimstone, Mvelaphanda and others incur additional financial burdens each month that the mergers implementation is delayed

20 3 The market has acted and will continue to act in reliance on the public announcements which the respondents have been obliged to make, including an announcement advising Aheaith shareholders of the following salient dates:

20.3111 March 2005 - last date for shareholders to trade in shares to be eligible to receive the scheme consideration;

20.3214 March 2005 - date on which the listing of Ahealth's shares on the JSE Securities Exchange will be suspended;

20.3318 March 2005 - date on which shareholders must be registered as such to receive the Scheme consideration;

20.3422 March 2005 - operative date of the Scheme when the Scheme consideration will be posted to participants and

20.3523 March 2005 - date on which the listing of Aheaith shares on the JSE Securities Exchange will be terminated.

This information, which is in the public domain, will be rendered inaccurate by an order suspending the implementation of the merger,

4Should there be a further delay in the implementation of the merger, there is no guarantee that the banks will agree to an extension of their existing funding commitments beyond the end of April 2005, being the date by which the draw down must take place, Finding banks willing and able to finance a transaction of this magnitude is no easy matter, especially not at short notice, Hence, if this application is successful the inevitable delays will imperil the merger itself

5Should the merger be lost to Bidco due to its implementation being delayed beyond 30 April 2005:

20,5 1 Costs of approximately R73 million will not be capable of being recouped via the conduct of Ahealth's business and will have to be absorbed by Brimstone and Mvelaphanda

20 5,2 An amount of R1,5 billion injected into Bidco by its shareholders will be at risk of being lost in the event that Bidco's underlying asset (Ahealth) is sold in execution so as to meet Bidco's debt obligations, These outcomes will

have a potentially devastating impact on the wellbeing of all the effective parties and in particular the Black Economic Empowerment entities

The above stated factors were not challenged by the applicants I must accept that the risks detailed above are very real and in particular the potential exists for the loss of the entire merger transaction. In my opinion this merger represents a sound Black Economic Empowerment opportunity within the healthcare sector of our economy.. It is essential for the long-term sustainability of the industry that ownership should reflect the demographics of this country.

I am satisfied that the balance of convenience clearly favours the respondents.

Injustice caused by implementation of merger as against subversion of purposes of the Act caused by suspension of Tribunal's approval of merger

[21] This prerequisite for the grant of relief under section 38(2A)(d) of the Act can conveniently be considered by reference to three questions:

21.1 Will any injustice be caused by the implementation of the merger prior to the determination of the underlying review application?

212 Will any subversion of the purposes of the Act be caused by the suspension of the Tribunal's approval of the merger pending the determination of the underlying review application?

213 What bearing do the answers to these enquiries have on the proper exercise of the court's discretion under section 38(2A)(d) of the Act?

The first enquiry

[22] The applicants have presented no evidence of any such injustice. There is no information provided by the applicants of any anti-competitive effects that will be occasioned by implementation of the merger. As I have already stated the applicants present no evidence of any prejudice that they will suffer if the merger is implemented Equally I found that the applicants enjoy no prospect of success in respect of the review application underlying this application. Finally, on this enquiry, I found that the balance of convenience favours the respondents.

The second enquiry

[23] Section 2(a) and 2(f) of the Act provides as follows:

"The purpose of this Act is to promote and maintain competition in the Republic in order-

(a) to promote the efficiency, adaptability and development of the economy;

(f) to promote a greater spread of ownership, in particular to increase the ownership states of historically disadvantaged persons"

The purposes of the Act will certainty be subverted if this merger is delayed. I accept that a delay in implementation can potentially cause the merger to be lost. Section 12(A)(3) of the Act provides that in considering a proposed merger the Commission or the Tribunal must have regard to whether it can be justified on substantial public interest grounds, including its effect on the ability of firms controlled by historically disadvantaged persons to become competitive.. The Commission pertinently raised this issue in recommending approval of the merger. The Commission remarked as follows:

"The Commission has attempted to indicate that this transaction will result in significant advantages for public interest According to the Commission Mvelaphanda and Brimstone will be able to become competitors in the private hospital market through ownership of a significant shareholding in Bidco, which will control Ahealth

Furthermore the Commission is confident that this transaction will facilitate positive growth opportunities in the public hospital sector through public private partnership. According to the Commission Government will be eager to conclude management agreements with empowerment firms to transform public hospitals"

Accordingly I find that there are substantial considerations which weigh against the grant of the relief sought by the applicants.

The third enquiry

[24] In my view the responses to the first and second enquiries must be weighed in the exercise of the court's discretion in granting or refusing an order in terms of section 32(2A)(d) of the Act, Having weighed all of the factors I was persuaded to exercise my discretion in favour of the respondents.

[25] Finally, I deal with the issue of costs. I came to the conclusion that the applicants' case in this application was not grounded in any competition or merger specific issues. The applicants, I found, were motivated by their own selfish commercial interests. I also concluded that this application was brought merely to cause delay in the implementation of the merger The applicants, in my view, abused the processes of this Court. To this end I decided that a punitive cost order was appropriate.

I HUSSAIN JUDGE OF THE COMPETITION APPEAL COURT

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