IN THE COMPETITION APPEAL COURT

CAC Case No. 39/CAC/FEB04

[Tribunal Case No. : 69/AM/Dec/01]

In the matter between:

ASTRAL FOODS LIMITED Applicant/Appellant

and

THE COMPETITION COMMISSION Respondent

JUDGMENT

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1. Malan AJA

1. In this appeal the Appellant submits that the order of the Tribunal falls to be set aside because the Tribunal mistakenly failed to reflect its true intention in its written judgment and is unable itself to correct the error. The Appellant therefore appeals to this Court to have the order that the Tribunal intended to give substituted for the order that the Tribunal inadvertently handed down.

2. When the relevant Tribunal order (which related to an intermediate

merger, and will thus be referred to as "the Merger Order") was handed down, both the Appellant and the Commission were in no doubt as to what it meant. The Appellant implemented the Merger Order on that basis. The Commission, which is abiding this appeal, appeared to have had a similar understanding. It was when two customers of the Appellant contended for a different interpretation some months later that the Appellant felt obliged to obtain some clarification from the competition authorities that its own understanding was correct.

3. After initially approaching the Commission (which was not prepared to become involved), the Appellant brought an application to the Tribunal. The Tribunal confirmed that the Appellant's reading of the Merger Order was in accordance with what it had intended and that the customers' contentions were wrong. Those customers – who had been permitted to intervene in the variation/clarification application brought by the Appellant before the Tribunal ("the Variation Application") appealed that determination of the Tribunal to this Court. This Court then held that the Merger Order clearly and unambiguously meant what the two customers in question claimed, and that it was accordingly beyond the power of the Tribunal to have declared that it should be read in any other way (see the judgment of this court in *Mike's Chicken (Pty) Ltd, Daybreak farms (Pty) Ltd and Midway Chix (Pty) Ltd v Astral Foods Limited and The Competition Commission*CAC 32/cac/sept/03; Tribunal Case 69/am/dec01 of 28 January 2004) where the history of this matter is set out).

4. After considering its position, in view of the decision of this Court, the Appellant decided to appeal. It did so within 20 business days of the date of this Court's order. The Merger Order was made by the Tribunal under Tribunal Case No. 69/AM/Dec01 in the intermediate merger between the Appellant (also referred to as "*Astral*") and Natchix. The Merger Order was handed down on 2 April 2002 and the judgment of this court on 28 January 2004.

5. At the time of the merger, the primary business of Natchix (the target firm) was the sale of day-old chicks (hatched in its hatcheries) to the broiler and egg-producing industry. It also controlled a company operating in the animal feed market.

6. The Merger Order approved the merger between Astral and Natchix subject to a number of conditions, some relating to the broiler industry and others to the animal feed industry. Only the conditions pertaining to the former are relevant to this appeal, and were considered by the Tribunal in the Variation Application.

7. Under the heading, "Conditions in relation to the Broiler Industry", there are definitions of "Astral" and "Independent customer", and thereafter three clauses, the first of which has four parts.

7.1. Clause 1 provides that:

> "Astral must supply any independent customer on the following basis:
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> 1.1 Subject to sub-paragraphs 1.3 and 1.4 below, in terms of a standard form contract approved by the Competition Commission.
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> 1.2 In the case of any disease or any other form of force majeure, Astral must reduce its supply to all customers, including entities within the Astral group, pro rata to their ordinary volumes purchased.
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> 1.3 In the event that an independent customer does not wish to enter into the standard contract with Astral, Astral must supply that customer in accordance with the principles set out in sub-paragraph 1.4 below, except for those that relate to notice

periods.

1.4 Astral may not discriminate in its conditions of supply between entities in its own group and its independent customers for equivalent transactions. In particular it may not discriminate between them in relation to price, discounts or rebates offered. The determination of prices remains in the discretion of Astral. Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral. The parties to the agreement must each be required to give notice to the other if they do not wish to renew the contract. The length of this period must be the same for both parties and must be reasonable having regard to the nature of the industry. The contracts must be of a five-year duration."

7.2 Clause 2 stipulates that the "conditions set out in clause 1 above shall apply for five years from [the] date of this order".

8. The conditions relating to the broiler industry did not specifically refer to existing long-term contracts between independent customers and Natchix; nor were such contracts mentioned elsewhere in the Merger Order. The Tribunal itself commented on this in its decision and reasons in the Variation Application, handed down on 18 July 2003 ("the Variation Application Decision and Reasons"). In the first

sentence of paragraph 20 thereof, the Tribunal noted: "The order does not specifically address long-term supply agreements that existed before the merger". At the beginning of paragraph 23 thereof, the Tribunal recorded that:

> "The order does not shed any light on the status of long-term supply agreements post the merger, nor is the language of the order clear on what the Tribunal's intentions were" (Bundle I: 41, 43).

9. As of late 2001/early 2002 six independent customers were party to long-term supply contracts. One of them was Daybreak Farms (Pty) Limited ("Daybreak"), which was obliged in terms of its contract to purchase a minimum of 220 000 chicks per week, subject to a notice of termination being given not less than 18 months before the anniversary date of the contract. Another customer that had concluded a long-term supply contract was Mike's Chicken (Pty) Limited ("Mike's"). Mike's was obliged in terms of its contract to purchase a minimum of 54 000 chicks per week, subject to termination of the agreement on 6 months written notice. Daybreak and Mike's were the two customers who had contested the Appellant's interpretation of the Merger Order and had intervened in the Variation Application.

10. The Appellant and its legal advisors were, as of 2 April 2002, when the Merger Order was handed down, of the view that such conditions in no way affected, let alone invalidated, supply agreements concluded between Natchix and independent customers prior to the date of the approval of the merger. The Merger Order was implemented almost immediately, on 9 April 2002.

11. The Tribunal delivered reasons for the Merger Order on 16 April 2002. The Tribunal did not expressly refer to the long-term supply agreements in those reasons. What appears from them is a concern on the part of the Tribunal that, after the merger, Astral could potentially use its dominant position as sole supplier of Ross Parent Stock to foreclose markets downstream to those independent entities that reared parent broiler chickens. The broiler conditions imposed in the Merger Order where therefore designed to prevent downstream foreclosure after the merger.

12. A dispute developed between the Appellant and Daybreak and Mike's as to the validity of the long-term supply contracts. One of contentions was that the conditions relating to the broiler industry imposed by the Merger Order had the effect of terminating, or voiding, all pre-merger supply agreements entered into between Natchix and independent customers. When resolution of the dispute was unsuccessful, the Appellant brought an urgent application, the Variation Application, to the Tribunal in November 2002. This application was brought in terms of s 66(1)(b) and/or s 27(1)(d) of the Competition Act, 89 of 1998 ("the Act"), for variation, alternatively clarification, of the Merger Order.

13. The finalisation of the Variation Application was delayed by an intervention application brought by Mike's, Daybreak and Midway Chicks (Pty) Limited ("Midway") (a hatchery operation established by the shareholders of Mike's and Daybreak), as well as by a counter-application brought by them to clarify, alternatively vary, the Merger Order in a way that supported their interpretation. The Tribunal ruled in the intervention application on 20 February 2003, whereafter a date was set for a hearing on the merits of the Variation Application.

14. The Tribunal handed down a written decision in the Variation Application on 18 July 2003. In that determination (referred to as the Variation Application Decision and Reasons), the Tribunal confirmed the Appellant's interpretation of the Merger Order, insofar as the validity of the long-term supply contracts was concerned.

15. The Tribunal's order in the Variation Application was as follows:

> "49. In view of the fact that the reference to the five years period in paragraph 1.4 is confusing we are persuaded that the Order is ambiguous and that the ambiguity will be cured by its deletion. In order to make the status of contracts that were in existence at the time of the Order clear, we do not need to amend the Order, but it will suffice to add two declaratory orders as well, given the dispute between the parties.
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> 50. We make the following order:
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> 1) Varying the Order of the Tribunal dated 2 April 2002, (the "Order") by deleting in paragraph 1.4 the words: *"The contracts must be of a five year duration."*
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> 2) Declaring that the validity of any contract that was in existence with an independent customer, at the time of the Order, remains unaffected by the Order.
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> 3) Declaring that to the extent that any provision in any existing contract with an independent customer, is inconsistent with the principles in paragraph 1.4 of the Order, as amended by this order, that such inconsistency does not invalidate those terms of the contract, but will if enforced by Astral Foods Limited and/or National Chick Limited constitute a breach of the conditions attached to the approval of the merger."

16. The reasoning in support of this conclusion, in the Variation Application Decision and Reasons, was broadly as set out in the following paragraphs.

17. The Tribunal recognized that it had the power to vary an order in the circumstances set out in s 66(1) of the Act, but that its powers in this regard are circumscribed. The Tribunal stated, in this regard, at paragraph 11:

> "It is a limited inquiry and the basic rule that the court follows is to ascertain the court's intention, primarily, from the language of the order. If the meaning of the order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. It is decisive and cannot be restricted or extended by anything else in the judgement. But, if any uncertainty in its meaning emerges, the extrinsic circumstances surrounding or leading up to the court's granting of the order may be investigated and taken into account in order to clarify it. In doing so the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. Only if it still leaves the matter unclear and ambiguous would the court go to the record to cure the ambiguity" (Bundle I : 40).

18. The Tribunal then considered whether the words "independent customers" were ambiguous and whether a variation of the 2003 Tribunal Order was needed in that regard. It concluded that this phrase was not ambiguous. It applied to all customers of Natchix that were not controlled by the Appellant, whether they were party to a

long-term agreement or not (Bundle I: 40-41).

19. The Tribunal next addressed the effect of the conditional approval of the intermediate merger on existing long-term supply contracts.

> "23. The order does not shed any light on the status of long-term supply agreements post the merger, nor is the language of the order clear on what the Tribunal's intentions were. To find clarity we will consider the Tribunal's reasons. If no clear answer can be found, we'll step back further in history, to search the record of the hearing.

> 24. The Tribunal concluded in its reasons that the merger raised competition concerns and that it needed to impose conditions specifically in order to lower the risk of foreclosure, which was very real in the short term because of structural problems in the upstream market. The concern of those participants at the hearing who represented the industry was not that they would be held to an oppressive contract by the merged firm but that, on the contrary, the merged firm with its own broiler outlets would self deal and not supply them. It was told that Cobb, Ross' main rival in the upstream market needed at least 5 years to fully enter the South African market. However, nowhere in its reasons does it specifically mention or address the status of existing long-term contracts post the merger or is it possible to derive what the Tribunal had in mind. There was simply no necessity to do this.

> 25. Existing customers who were supplied in terms of valid contracts were, per definition, not foreclosed. In the event that their contract expired or was terminated and they were then faced with the threat of foreclosure, they could then have availed themselves, in the same way that any other ad hoc customer would avail itself, of the protection extended by the conditions imposed by the Tribunal on Astral. But until they were denied supply by Astral the existing contract holders had no need of the protection of the conditions – they were protected by the terms of their existing supply contracts. At no stage during the merger proceedings was it ever suggested that the existing contracts were anti-competitive and should thus be vitiated

by the insertion of an appropriate condition. It was rather suggested that the structural changes wrought by the merger would permit Astral to favour downstream customers within its own stable over 'independent' customers, that is customers outside of the Astral stable. This was the purpose of the conditions that were imposed.

26. In the record of the merger proceedings we find a passage where the presiding member briefly referred to the status of existing customers at page 65 of the transcript of 20 March 2002:

> 'It's just to say that our reach does not extend beyond ensuring that you have a supplier of day-old chicks and that the transaction does not foreclose that. … I presume that they [referring to Astral] *have arrangements with existing customers and it would simply be some sort of alteration in that arrangement to ensure that those customers did not have any reason to fear that their supply would be foreclosed*.'

27. From the above it is clear that the Tribunal did not think that it had the power to render void any pre-merger supply contracts, nor did it intend for its conditions to have such far-reaching consequences because it refers to its "reach" as not extending beyond the prevention of foreclosure. It merely envisaged that those clauses in existing contracts that did not comply with the Tribunal's intention to prevent foreclosure should not be enforced or exercised in a manner contrary to the principles set out in paragraph 1.4." [emphasis added] (Bundle I : 43-44 par 23-27).

20. The Tribunal thereafter turned its attention to the "juristic nature of the condition attached to a merger". Under this hea, the Tribunal considered, first, whether the Tribunal has the power to require, as a condition of approval of a merger, that the merged firm void all or part of an existing agreement. Secondly, on the assumption that it has such a power, the Tribunal addressed the question of whether the

imposition of the condition would mean that the contract is *ipso facto* voided if the merger is implemented. For present purposes, it is only necessary to quote the Tribunal's conclusion on these points: "In the present case there was indeed no express requirement in the order that the merged firm cancel its existing contracts. But to the extent that there may be an implied one, which we do not concede, it still would not have invalidated the existing contracts for the reasons we have outlined" [emphasis added] (Bundle I: 44 par 28, 46 par 40).

21. The Tribunal subsequently addressed two issues that were irrelevant to the previous appeal to this Court and are also not at issue in this appeal: (i) the duration of the long-term supply agreements specified in clause 1.4 of the broiler industry conditions, and (ii) whether the Merger Order forbade any contract to provide for minimum or fixed quantities of supply. The Tribunal concluded:

> "The Tribunal order is clear and no ambiguity exists with regard to minimum or fixed quantities of supply. We find no reference to minimum quantity or fixed quantity of supply in the Tribunal order. In fact the intervenors acknowledge this in their answering affidavit by saying that it is 'implicit' in the conditions that Astral may not include in the new contract a clause which has the effect of requiring customers to purchase minimum or fixed quantities" (Bundle I: 47 par 47).

22. Mike's, Daybreak and Midway brought an appeal against the Tribunal's declarator in the Variation Application. The appeal lodged by Mike's, Daybreak and Midway was argued in December 2003. Judgment of the Court was given on 28 January 2004. This Court (*per* Malan AJA, Selikowitz JA and Mailula AJA concurring) upheld the appeal, and found that the Merger Order could not bear the meaning that the Tribunal had intended to give to it, and thus, also, the meaning which the Appellant had ascribed to it.

23. This Court did, however, confirm that the arguments by Mike's and Daybreak to the effect that their supply contracts were automatically voided on 2 April 2002, the date of the Merger Order, were incorrect. This Court affirmed that those contracts were still in existence and with full force and effect. It stated the following in this regard (at paragraph 15 of its judgment):

> "As the Tribunal has recognized in its *Reasons and Decisions*, it would have been beyond the power of the Tribunal to "void" or cancel the existing long-term contracts of the Appellants (§ 29ff at Record 419). Section 16(2) of the Competition Act gives the Tribunal the power to (a) approve a merger, (b) approve a merger "subject to any conditions", or (c) prohibit implementation of a merger. There is no restriction in the Act on the kind of conditions that may be imposed, but they must be conditions, to which the merger by law is subject. The Tribunal could not have interfered with an existing and on-going contractual relationship between Natchix and its customers.
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> …
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> But the Tribunal could not, and did not, declare, when approving the merger, that all such long-term contracts were "voided" (see s 65(1))" (Bundle II, Part 3 : 662-663).

24. The effect of this Court's judgment on 28 January 2004 judgment was, consequently, not that the long-term supply agreements with Daybreak and Mike's were at an end. It did, however, mean that in seeking to enforce those agreements against Daybreak and Mike's, contrary to their wishes, the Appellant would be acting in breach of the merger conditions. As a result the Appellant would potentially be liable for any of the sanctions that the Act provides for in the event of an acquiring party not honouring the conditions under which its

merger was approved. (See s 16(3) of the Act, read with s 18(1)(c) thereof, and s 59 of the Act.)

25. As a result of the judgment of this Court, the Appellant on 25 February 2004, within 20 business days of the date of the Appeal Judgment, lodged a notice of appeal. This course open to the Appellant was referred to by this Court (at paragraph 15 of the judgment) stating that "[i]f Natchix finds that it cannot comply with the conditions then it has the option of not continuing with the merger or of seeking to appeal against the Tribunal's decision on the grounds that the conditions are unreasonable"..

26. Section 17(1) of the Act regulates the procedure applicable to appeals in merger proceedings. It provides that:

> "Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by –
>
> (a) any party to the merger; or
>
> (b) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided that the person had been a participant in the proceedings of the Competition Tribunal."

27. Other applicable provisions are Rules 16(1)(a) and 32 of the Rules for the Conduct of Proceedings in the Competition Appeal Court ("the CAC Rules").

27.1. Rule 16(1) reads as follows:

> "A person who has a right of appeal to the Court may file a Notice of Appeal, which must satisfy the requirements of sub-rule (3), -

(a) within the time, if any, prescribed by the Act or the Competition Tribunal Rules;

(b) if no time is prescribed by the Act or the Competition Tribunal Rules, within 15 business days after the date of the decision or order that is the subject of the appeal."

27.2. Rule 32 states that:

"The Court may, for sufficient cause shown,

(a) excuse the parties from compliance with any of these rules; or

(b) condone any technical irregularity arising in any of its proceedings."

28. The reasons for the delay that have been set out in the condonation application are persuasive. It could not be suggested that the Appellant was flagrantly or grossly acting in breach of the Act or the CAC Rules. The reason for the late filing of the appeal has also been fully explained. In short, the need for condonation has arisen because none of the entities involved in the merger interpreted the Merger Order in the way that this Court held that it should be. It was only when it became apparent that the Tribunal had, in its Merger Order, erroneously failed to reflect its true intention, and the common understanding of all the participants in the hearing, that the need to appeal the Merger Order became apparent to the Appellant.

29. The time period for lodging an appeal to this Court in merger proceedings is, in the first instance, found in the Act rather than the CAC Rules. Rule 32(b), however, seems to provide for an eventuality such as this (cf *The Competition Commission and Distillers Corporation (SA) Limited and Another* (Case No. 31/CAC/Sept 03)11 December 2003) at paragraphs [2] and [4] although the matter was not decided).

Since this Court is a Court with a status similar to that of a High Court (s 36(1) of the Act) it has the power to condone non-compliance with time limits prescribed by statute (*Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue* 2002 (4) SA 281 (SCA) at paragraph [10] at 286). No purpose would be served by fixing an inflexible time period within which to lodge appeals in merger cases giving this Court no power to condone any non-compliance therewith. There is no reason why there must be rigid adherence to the 20 business day period referred to in s 17(1) of the Act. It is important that the acquiring and target firms obtain certainty as to whether they can merge, and, if so, subject to what conditions. But this interest can be accommodated in the exercise of this Court's discretion when considering whether to condone any delay.

An important factor in this regard is that, were s 17(1) of the Act to be interpreted as denying a party to a merger the right to appeal the merger decision of the Tribunal after 20 business days, no matter what the circumstances, this would result in that party being denied the right of access to a court of law. The undesirability of such a result was recognised by the Appellate Division in 1959 in *Phillips*(*supra*). See *Price Waterhouse Coopers Inc et al v National Potato Co-Operative Ltd* (Case 448/02 (SCA) 1 June 2004) at paragraph 43) and cf *Mohlomi v Minister of Defence*1997 (1) SA 124 (CC); *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* (4) SA 491 (CC).)

30. There are also textual indications that the time stipulated for the lodging of appeals in s 17(1) of the Act is not intended to be peremptory. The word "may" is used, rather than "must" or "shall". Section 17(1) is also phrased positively, rather than being cast in negative form (for example, as an injunction that an appeal must not be lodged later than twenty days). Both of these are indications that there is no mandatory, or peremptory, requirement, and that the provision is instead directory with the result that this Court is permitted to condone non-compliance.

31. In the circumstances, the Appellants' late lodging of its notice of appeal is condoned.

32. It is clear from what has been set out above that the Tribunal erred in the formulation of the Merger Order. More particularly, it erred by requiring Astral to offer allindependent customers, even those party to long-term supply contracts with 6 or 18 month lead-in times and termination periods, new contracts immediately after the implementation of the merger. The Merger Order should be set aside because the Tribunal misstated its intention because the order as formulated was unreasonable and excessive; went beyond the competition concerns (relating to foreclosure) that the Tribunal sought to address; was not justified by the evidence before the Tribunal in the intermediate merger proceedings; was illogical in the light of the commercial realities explained to the Tribunal in the merger proceedings; could potentially contribute to the occurrence of the very prejudicial effects about which the Tribunal and the Commission were concerned (by removing the security that various independent customers enjoyed as a result of their long-term supply contracts); had further potentially deleterious consequences for the independent customers who were party to such contracts, in that they could be deprived of special concessions or benefits that they had negotiated (relating for example to payment conditions or placement of orders); and was commercially impractical and untenable, in that it made it extremely difficult, if not impossible, for Astral to value the merged entity (Natchix), because there was no certainty about whether the customers who were party to long-term supply contracts, and who purchased over fifty per cent of the day-old chicks sold by Natchix in South Africa, would take the opportunity to resile from their contracts without any regard to the notice periods required for termination of such contracts, the length of time it would take for Natchix to reduce the numbers of parent stock to reflect the decreased orders, or the array of contracts with other suppliers that Natchix would be forced to break. I need not deal with all these grounds of appeal in this judgment.

33. It should be noted, in the first instance, that at no stage in the proceedings did any of the entities participating therein or submitting evidence thereto argue that there was a need not only to prevent

downstream foreclosure by Astral, but also to facilitate the opportunity of upstream / backward integration by independent customers who at that time sourced their day-old chicks from Natchix. There was in fact no suggestion in the merger proceedings that such upstream or backward integration by existing customers of Natchix was required, or that their supply of day-old chicks needed to be protected other than through Astral being obliged to guarantee supplies of day-old chicks to its independent customers for a period of 5 years after the Merger Order. As a result, the Merger Order was not even intended to assist Natchix's customers indirectly to integrate backwards (or upstream) after that order. This is confirmed by the fact that, as the Tribunal stated in the Variation Application Decision and Reasons, the Merger Order did not preclude Astral from stipulating in its contracts a minimum, or a fixed, quantity of day-old chicks that various independent customers were required to purchase. It is significant in this regard that Mike's, Daybreak and Midway unsuccessfully argued before the Tribunal in the Variation Application that the Merger Order should be construed as forbidding Astral to stipulate minimum or fixed quantities of supply because that would retard the backward integration of its customers.

34. Moreover, not only was there no evidence upon which the Tribunal could have relied in order to craft an order assisting upstream or backward integration of Natchix's customers, but any such order would have gone beyond imposing behavioural remedies, and resulted in a grossly disproportionate remedy.

35. Without the order given by the Tribunal, Astral would not be blocking the backward integration of the Mike's Chicken and Daybreak

businesses. Astral would be permitted to insist that Mike's Chicken and Daybreak honour their contractual obligations. Astral could thus not have prevented Mike's from giving 6-month's notice in April 2002, and then terminating its contract, at the expiry of that period, in October of that year. Daybreak could have given notice in August 2002, resulting in its contract coming to an end 18 months later in February 2004.

36. The Tribunal and the Commission were concerned with preventing downstream foreclosure by Astral in the event of the merger being approved. For this reason, Astral was required to conclude 5-year contracts, which complied with certain stipulated conditions, with each of their independent customers. The Tribunal has confirmed this in its Variation Application Decision and Reasons.

37. The concerns expressed by the Commission and the Tribunal did not necessitate the termination of existing long-term supply contracts with independent customers. Quite the contrary, as the Tribunal confirmed in the Variation Application Decision and Reasons, the Tribunal was desirous of ensuring that long-term contracts with existing independent *ad hoc*customers were put into place. Where such contracts were already in existence, it would have served no purpose to permit either party to end them; they merely had to be adapted, to the extent necessary, to comply with the standard conditions approved by the Commission.

38. Furthermore, the termination of all Natchix's long-term supply contracts on 2 April 2002 could well have been prejudicial to them. If all such contracts were to be brought to an end, Astral / Natchix would

have been entitled to have stopped supplying the independent customers with day-old chicks, or alternatively to have decreased their deliveries to whatever amount was most convenient to Natchix. Any independent customers that had negotiated special concessions or benefits (relating for example to payment or placement of orders) could also henceforth have been deprived of those advantages by Natchix, and have been forced to settle for the terms and conditions in the standard form contract, as well as whatever quantities of chicks Astral / Natchix chose to sell to them. What is more, the independent customers, who were not party to the merger proceedings, would have had no notice or warning of the possible impending cancellation of their contracts, and thus the uncertainty into which their businesses could be plunged. This would have been unfair and improper.

39. The termination of the existing long-term contracts with independent customers after 2 April 2002 would also have had significant financial and other consequences for Astral and Natchix. Three examples were submitted in argument:

First, the existing customer base of Natchix was an important asset of the company, and would clearly have been taken into account by Astral when assessing its value. A crucial component of this customer base was the larger purchasers with whom long-term contracts had been concluded. Long-term supply contracts accounted for over 60% of Natchix's South African order book pre-merger; Daybreak and Mike's made up almost half of the sales pursuant to such long-term supply contracts at the time of the merger; and orders from Daybreak and Mike's alone constituted as much as a third of Natchix's total sale of day-old chicks in South Africa. Accordingly,

were this customer base to have been thrown into jeopardy on 2 April 2002, and in particular were existing long-term customers then to have been at liberty to reduce their weekly orders drastically, or even discontinue purchases altogether, this would have affected the value of the entity being acquired (i.e. Natchix). This in turn would have led to Astral paying a considerably reduced purchase price for Natchix, or even perhaps not going through with the merger at all (Bundle II, Part 3 : 547-548 par 20-23, 556 par 53).

Secondly, the termination of contracts such as those with Daybreak and Mike's, which guaranteed the purchase of a total of 274 000 day-old chicks a week, would have significantly reduced Natchix's turnover and future profitability. The loss of the Daybreak and Mike's contracts alone would have a serious economic impact on the business of Natchix. It stands to reason that, when almost a third of a business disappears overnight, a portion of the workforce would have to be retrenched. Moreover, quite apart from the damages and lost profit, the loss of about one third of Natchix's business would result in it losing significant economies of scale (Bundle II, Part 3 : 556 par 52-53).

Thirdly, a sudden termination of the long-term supply contracts would also have left Natchix with a surfeit of parent stock. It would take Natchix at least 72 weeks, effectively the length of the poultry cycle, to reduce the number of parent stock to make allowance for the termination of the Daybreak and Mike's contracts (Bundle II Part 2 : 529; Bundle II, Part 3 : 556 par 52).

40. The order inadvertently given by the Tribunal on 2 April 2002 was accordingly not justified by the evidence or the concerns of the Commission or the customers that gave evidence, and, moreover, was unreasonable and excessive, devoid of commercial logic, and potentially deleterious for the independent customers that the Tribunal (and the Commission) were intending to protect.

41. In the circumstances, the following order is made:

(1) condonation for the late lodging of the appeal is granted;

(2) The appeal succeeds and the Merger Order is amended to read as follows:

2.1 by amending the opening clause of subparagraph 1.1 thereof (which currently reads "Subject to sub-paragraphs 1.3 and 1.4 below") to read as follows:

> "Subject to sub-paragraphs 1.3, 1.4 and 1.5 below, in terms of the standard form contract approved by the Competition Commission."

2.2 by inserting a new subparagraph 1.5 as follows:

> "1.5
>
> 1.5.1 The validity of any contract that was in existence between Natchix and/or Astral on the one hand and independent customers on the other hand at the time of the Order remains unaffected by the

Order, subject to amendments required to ensure consistency with sub-paragraph 1.4 of the Order, and independent customers who are party to such contracts shall remain bound thereby unless and until they conclude standard form contracts as envisaged in sub-paragraphs 1.5.2 and 1.5.3 below.

1.5.2 Subject to paragraph 1.5.3 hereof, independent customers who have concluded supply contracts must be afforded an opportunity to enter into the standard form contract approved by the Competition Commission.

1.5.3 In the event of any independent customer with an existing contract concluding a standard form contract, neither the volume of chicks ordered in terms of the existing contract, nor the notice period specified therein, can be varied in the standard contract."

Malan AJA

I agree and it so ordered

Jali JA

Hussain JA

Counsel for appellants: PB Hodes SC and PBJ Farlam

Date of appeal: 14 June 2004-06-18

Date of judgment: 25 June 2004