IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:	24/CAC/Oct02 25/CAC/Oct02 45/LM/Jun02 46/LM/Jun02
DATE:	15-11-2002

In the matter between:

ANGLO SOUTH AFRICA (PTY) LTD	First Applicant
ANGLOVAAL MINING LIMITED	Second Applicant
ANGLO AMERICAN HOLDING LTD	Third Applicant
KUMBA RESOURCES LIMITED	Fourth Applicant
and	
THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	First Respondent
MANOIM N.N.O.	Second Respondent
THE COMPETITION TRIBUNAL	Third Respondent
MERLE HOLDEN N.O.	Fourth Respondent
FREDERICK FOURIE N.O.	Fifth Respondent
THE COMPETITION COMMISSION	Sixth Respondent
SIMON ROBERTS	Seventh Respondent

JUDGEMENT

DAVIS, JP: On 20 June 2002 a merger notification was filed with the sixth respondent with respect to the proposed acquisition by first applicant of the controlling interest in the second applicant. At the same time, a separate merger notification was filed in respect of the proposed acquisition by the third applicant of the controlling interest in the fourth applicant. The transactions were considered together by the sixth respondent which, on 6 September 2002,

recommended to the third respondent that the proposed acquisitions be approved unconditionally. At three pre-hearing conferences held respectively on 19 September, 8 October and 15 October 2002, second respondent in his capacity as a member of third respondent, made certain rulings pertaining to first respondent's application to intervene, as well as ancillary matters.

The applicants have come before this Court on appeal and review to have these rulings set aside.
There are four contested rulings:

1. The decision of second respondent to permit first respondent to intervene ("the intervention decision").
2. The order of second respondent to define the scope of first respondent's intervention ("the decision as to scope").
3. The decision of second respondent to grant first respondent access to confidential documents ("the confidential information decision").
4. The decision of second respondent to appoint and instruct an expert ("the expert decision").

For the purposes of this judgement the intervention decision, the decisions as to the scope and confidential information can be classified separately from that of the expert decision.

It is common cause between the parties who appear before us that there are two sections of the Competition Act 1998 which are applicable to this dispute. The first relates to section 53(1)(c) of the Act which provides that if the hearing is in terms of Chapter 3 (a merger transaction) the following persons may participate:

i. any party to the merger;

ii. the Competition Commission;

iii. any person who is entitled to receive a notice in terms of section 13A(2) and who indicated to the Commission an intention to participate in the prescribed form;

iv. the Minister, if the Minister has indicated an intention to participate;

v. *any other person whom the Competition Tribunal recognizes as a participant"* (my emphasis)

Applicants contend that Rule 46 of the third respondent's Rules qualifies section 53(1)(c)(v) in that a person admitted under this subsection must have "a material interest" in the relevant matter. The essence of applicants' argument is that first respondent does not have a material interest of a kind which permits it to be regarded as a participant.

The other relevant position concerns the power of third respondent to hear matters, including decisions to be made in terms of section 53(1)(c)(v). Section 31(1) of the Act requires that the chairperson must assign each matter to the Tribunal to a panel composed of any three members of the Tribunal. In terms of section 31(2) at least one of the three must be a lawyer and the chairperson must also *" designate a member of the panel to preside over the panel's proceedings".*

Section 31 permits an order to be made by a single member of the panel only in one respect, namely extension or reduction of the period prescribed by the Act and condonation of late performance (sub-section (5)). Such a decision is deemed to be decision of the Tribunal (sub-section (6)).

Section 27 of the Act gives third respondent the authority to exercise certain functions, which include authority to adjudicate on any matter that may, in terms of the Act, be considered by it, as well as in terms of the section 27(1)(d), the power to make any ruling or order necessary or incidental to the performance of its functions in terms of the Act.

The key question in the present application concerns the power of second respondent to make the rulings to which I have already referred. Manifestly, the sections of the Act which I have cited contain no provisions which empower one member of the tribunal (who may not even be a member of the designated panel) to make the decisions which are the subject of this application.

The only possible source for second respondent's powers to so act is to be found, not in the Act, but in Rule 46(2) of the third respondent's Rules, which provides:

> *"No more than 10 business days after receiving a motion to intervene a member of the Tribunal assigned by the Chairperson must either:*
>
> *a) make an order allowing the applicant to intervene, subject to any limitations;*
>
> *i) necessary to ensure that the proceedings will be orderly and expeditious; or*
>
> *ii) on the matters with respect to which the person may participate or the form of their participation; or*
>
> *b) deny the application if the member concludes that the interests of the person are not within the scope of the Act or are already represented by another participant in the proceedings."*

Rule 46(2) cannot supplant the provisions in the Act; hence when an Act does not empower a single member of the tribunal, who may not be a member of the designated panel, to make these kind of determinations, the Rule itself cannot then empower the single member to do that which is not expressly or by necessary implication provided in terms of the Act.

On this basis, the three related determinations, being the intervention decision, the determination as to scope, and the decision as to confidential information, were made by second respondent in circumstances which are *ultra vires* the Act. In short, there is nothing in the Act which empowered second respondent to make these determinations and they therefore must stand to be declared invalid.

The question now arises as to the fourth ruling, that is regarding the expert. There are in essence two critical flaws in second respondent's decision to appoint the expert, being seventh respondent:

1. Applicants, who at that stage were participants in these proceedings, were not afforded any notification of the decision to appoint an expert, nor given any opportunity to be heard before it

was made.

2. The scope of the referral itself is unacceptably wide.

The brief which second respondent purported to give seventh respondent (Dr Roberts) reads as follows:

> *"We would like you to provide us with a report on whether in your opinion the merger is likely to substantially prevent or lessen competition in the relevant markets, having regard to the factors set out in section 12A(2) of the Act, focusing specifically on the Iron ore, the Zinc and the Manganese product markets.*

Should you come to the conclusion that it does you would then be asked to consider if the merger is likely to lead to any technological efficiency or other competitive gain which outweighs the anti-competitive effect as contemplated in section 12A(1)(a)(i) of the Act. Your brief is an open one and you are free to reach your own conclusions on any of these issues."

The wording of this particular ruling purports, in effect, to supplant third respondent's own decision-making powers and to abrogate its own powers to the expert. An expert, in this case seventh respondent, is being asked to make a determination of the kind which the Act mandates third respondent to so make.

In these circumstances the ruling is unacceptably wide by reason of the scope of instructions given to seventh respondent. This conclusion provides a second basis for the finding that the ruling must be set aside.

The appropriate relief

Until this point there was very little difference between the various parties who appeared this morning to argue the matter. None of the parties contended that second respondent was empowered to make the necessary rulings. The dispute turned on the nature of the relief. Mr Loxton, who together with Mr Unterhalter and Mr Gotz appeared on behalf of the first applicant, Mr Gauntlett and Mr Fagan who appeared on behalf of the second applicant, and Mr Coetzee, who appeared on behalf of the sixth respondent, all submitted that this Court should

make a decision to refuse the intervention of the first respondent, that is not to remit the matter to third respondent, but to dispose of the matter itself. Mr Loxton correctly referred to the powers granted to this Court to function in this fashion in terms of section 37(2) of the Act.

The ordinary course in such a dispute is to refer a matter such as this back to third respondent because a Court is slow to assume a discretion which has been granted by the Act to a tribunal (see Johannesburg City Council v Administrator, Transvaal & Another 1969 (2) SA 72 (T) at 76)

Case law supports the conclusion, however, that a reviewing court will itself correct a decision of a tribunal, notwithstanding the general approach where the result is a foregone conclusion, where further delay may cause undue prejudice, or where the Tribunal or functionary has exhibited bias or incompetence which would render it unfair to expose a party to the very same jurisdiction. This approach has been confirmed in Erf 167 Orchards CC v The Greater Johannesburg Metropolitan Council 1999(1) SA 104 (SCA) where Ngoepe, AJA held at 109C-F:

> *" In approving the plan in question, the first respondent was discharging its administrative functions. When setting aside such a decision, a court of law will be governed by certain principles in deciding whether to refer the matter back or substitute its own decision for that of the administrative organ. The principles governing such a decision have been set out as follows:*
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> 'From a survey… of the decisions it seems to me possible to state the basic principle as follows; namely, that the Court has a discretion to exercise judicially upon a consideration of facts of each case and that although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.' (*Livestock & Meat Industries Control Board v Garda 1961(1) SA 342 (A) at 349G…*

The general principle is, therefore, that the matter will be sent back unless there are special circumstances giving reason for not doing so. Thus, for example a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence, or when the outcome appears to be foregone."

I propose to deal with the three exceptions to the general rule as set out in the Erf 167 Orchards CC case. In my view, the result in this dispute is not a foregone conclusion. Questions arise as to the power of third respondent, acting in terms of section 53, to admit a party to merger proceedings of this kind. In particular, reference can be made to the various objectives of the Act in terms of section 2, including that small and medium size enterprises have an equitable opportunity to participate in the economy (52(e)); the promotion of a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (52(f)). The decision as to who should be appropriately admitted as a participant must be made with reference to the Act as a whole, including its purposes, two of which I have outlined.

In the circumstances of this dispute it cannot be said that it is a foregone conclusion that either first respondent should be refused rights of intervention, or admitted as a participant.

The second question turns on the question of further delay, which may cause undue prejudice. In my view, there is some measure of prejudice which would be caused by delay in remitting the matter back to the third respondent. However, to a substantial extent, the question of undue delay which causes prejudice, can be dealt with by an appropriately drafted order. The same conclusion applies to the further issue as to whether, if the tribunal has exhibited incompetence, it would be unfair to expose an applicant to the same jurisdiction.

This is a case which has sufficient complexity on the specific facts for it to be referred back to the appropriate body, namely third respondent, for an expeditious determination of the various disputes. The question arises as to costs. Having regard to the issues which I have outlined in this case, and the manner in which the parties have approached this appeal, it would not be appropriate to make any order as to costs.

For these reasons the following order is made:

1. The decision of second respondent made on 20 September 2002, that first respondent was entitled to intervene in the merger proceedings; the decision on 9 October 2002 by the second respondent to appoint and instruct an expert economist, the seventh respondent, to assess the

merger in terms of section 12A of the Act; the decision on 18 October 2002 by second respondent to make a decision regarding the scope of first respondent's intervention and on the same day the decision to grant access to first respondent to confidential documents contained in the hearing record, are hereby set aside.

2. The application of first respondent to intervene shall be heard by the Tribunal, in particular, by a panel to be appointed in terms of section 31 of the Act, such panel to be selected with a view to an urgent hearing and not to include second respondent.
3. The chairperson of the Tribunal is requested to ensure that the application of first respondent to intervene be heard as a matter of urgency.
4. There is no order as to costs.

DAVIS, JP

JALI & SELIKOWITZ, JJA agreed