IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO 72/CAC/Aug 2007

In the matter between :

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED ("Caxton")	Applicant
and	
Naspers Limited ("Naspers")	First Respondent
ELECTRONIC MEDIA NETWORK LIMITED ("M-Net")	Second Respondent
SUPERSPORT INTERNATIONAL HOLDINGS LIMITED ("Supersport")	Third Respondent
THE COMPETITION COMMISSION	Fourth Respondent
THE COMPETITION TRIBUNAL	Fifth Respondent

Delivered
October 2007

LEVINSOHN AJA :

[1] For ease of reference I shall refer to the parties to these review proceedings by their abbreviated names.

[2] The salient background facts which have given rise to the review are in brief outline the following.

[3] Naspers proposes to take control of M-Net and Supersport. This is deemed to be a large merger and requires approval by the Tribunal. The latter is scheduled to hold hearings on 8th to 12th October 2007.

[4] Caxton has applied to the Tribunal to intervene in the said merger proceedings. In its founding affidavit Caxton averred that Naspers is the largest publisher of newspapers and magazines in South Africa which fall under the direct control of Media24.

[5] Caxton itself is a printer and publisher of books and magazines. It controls one regional daily newspaper and many regional and community newspapers.

[6] The applicant's deponent made the point that Naspers and Caxton are competitors in the print market inasmuch as they would be competing for subscribers to their respective publications and for advertisers. The deponent goes on to describe the powerful position exercised by the television networks, namely M-Net, Supersport and the various Multichoice satellite channels.

[7] According to the allegations made by Caxton's deponent Naspers's dominance in the market place would be considerably enhanced if the merger were

to take place.

[8] Caxton makes the following averment : -

> "The applicant apprehends that Naspers will use its new-found freedom of control to obtain an unfair advantage in the various print media markets in which it competes with the applicant. In particular, the applicant anticipates that post-merger Naspers will engage in cross-subsidisation, foreclosure and anti-competitive bundling. I explain each of these concerns in turn."

[9] The deponent then goes on to describe the manner in which the alleged anti-competitive behaviour will manifest itself following a merger. It is unnecessary to summarise these allegations in any detail save perhaps to mention that the deponent avers that the Commission has misdirected itself in regard to the issue of "foreclosure", "bundling" and "cross-subsidisation".

[10] The deponent makes the submission that Caxton has a material interest, alternatively even if it does not have such an interest, it possesses the ability to assist the Tribunal in its

consideration whether or not to permit the merger.

[11] Importantly Caxton submitted it should be given the "fullest possible rights" to participate in the proceedings as an intervening party.

[12] Naspers delivered an answering affidavit. At the outset it made the point that it did not oppose Caxton's application in terms of section 53(1)(c)(v) of the Competition Act, No 89 of 1998 ("the Act").

[13] However Naspers submitted that the Tribunal ought not to permit Caxton to raise any issue it chooses to do in the merger proceedings but rather that the issues which Caxton may raise be defined ; in short the ambit of the opposition to the merger be circumscribed.

[14] Accordingly Naspers averred that Caxton ought to be permitted to raise only the issues of "bundling" and "foreclosure" in the merger proceedings.

[15] After a hearing on 23rd July 2007 the Tribunal issued the following order : -

> "1. The applicant is granted leave to intervene and participate in the merger proceedings between the first, second and third respondents ("the merging parties"), in terms of s53(1)

(c)(v) of the Competition Act 89 of 1998 ("the Act"), read with rule 46 of the rules of the Competition Tribunal, subject to the scope of intervention being limited to the following matters :

1.1 Foreclosure, but limited to the concerns articulated in paragraph 29 of the Notice of Motion.

1.2 Bundling as contemplated in paragraph 27 of the Notice of Motion; save that bundling is not limited to issues of mixed bundling and may, if appropriate, include such matters as full line forcing.

2. Subject to paragraph 1 above, the applicant is entitled to participate in the merger hearing and the pre-hearing procedures, to the full extent of a party to such proceedings.

3. There is no order as to costs."

[16] On 7th August 2007 following upon the issue of

the aforesaid order Caxton launched urgent review proceedings before this Court. It claimed the following relief in its notice of motion : -

"1. Authorizing this application be heard as one of urgency and for the purpose dispensing with the rules governing forms and filing and disposing of the application at such time and place and in accordance with such procedure as to the Court seems meet.

2. Reviewing and setting aside the order of the Competition Tribunal dated 23 July 2007 to the extent that it qualifies the ambit and scope of intervention of the applicant.

3. Substituting for such order the following order :

a. 'The applicant is granted leave to intervene and participate in the merger proceedings between the first, second and third respondents in terms of s 53(1)(c)(v) of the Competition Act 89 of 1998 read with rule 46 of the

Rules of the Competition Tribunal.

b. There is no order as to costs.'

4. For costs of suit."

[17] In its founding affidavit in support of the review Caxton's deponent submitted that the Tribunal had committed a reviewable irregularity by placing limits on the scope and ambit of the intervention. The submission is that in doing so it strayed beyond the scope of the powers conferred upon it by the Act.

[18] Caxton in paragraph 16.2 of the said founding affidavit makes the following submission : -

> "In raising this objection, Caxton in no sense contends that it would not be precluded from raising or traversing issues in the hearing that, by reason of their content, would fall beyond the scope of legal relevance. Before such a question can arise, however, Caxton must, through the conventional processes of discovery and interrogatory, be given the opportunity to consider, examine and explore whatever issues might appear to be relevant to the grant or refusal of the merger approval. At present

> Caxton is severely curtailed in this respect, as is evidenced by the fact that the legal representatives for the merging parties have instructed the Commission to supply Caxton's legal representatives with a significantly expurgated version of the record, and their discovery has been similarly limited."

[19] Counsel for Caxton in amplification of the foregoing submission submitted principally that ,once the Tribunal recognises the right of a party to intervene, it is not entitled to curtail in any way the scope of the intervention by limiting the issues such intervening party is entitled to raise.

[20] At the outset counsel for Caxton focused on the provisions of section 53 of the Act. This section regulates the rights of persons to participate in various categories of matters which come before the Tribunal. For example, complaints which are regulated by part C of the Act which relate to complaints in regard to prohibited practices. Then there are hearings constituted in terms of section 10 of the Act where an applicant seeks an exemption within the meaning of that section. Finally there are Chapter 3 proceedings which concern us herein.

[21] The subsection reads as follows : -

> "53(1) The following persons may participate in a hearing, in person or through a

representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing : -

…….

c) if the hearing is in terms of Chapter 3 –

(i) any party to the merger;

(ii) the Competition Commission;

(iii) any person who was 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; and

(v) any other person whom the Competition Tribunal recognised as a participant."

[22] It is self-evident that subsection (c) gives the

Tribunal a discretion to "recognise" a person as a participant in merger proceedings. This discretionary power has been affirmed by this Court in ***Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another*** 2004 (6) SA 196 (CAC) where Jali JA at 208 E said the following : -

> "I agree with Mr *Gauntlett's* submission that the Tribunal misdirected itself on the nature of the applicable discretion. The granting of leave to a party to participate is discretionary. However, such discretion cannot be unfettered. The discretion must be exercised judiciously or according to rules of reason and justice. (See *Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 371H - D372.) If one considers the provisions of s 53(1)(c)(v) which does not set any grounds for participation, the Tribunal has a wide discretion, albeit to be exercised in a judicial manner."

[23] That is in stark contrast to, for example, the complaint procedure where the test for *locus* to

participate is the complainant's interest. In the case of an intervenor, it is said to be a "material interest".

[24] This Court has also affirmed the principle that the right to participate in merger proceedings is not based solely on the criterion of interest or material interest. See the ***Anglo South Capital (Pty) Ltd*** case, *supra*.

[25] I think it is important to emphasise that subsection (c) uses the phrase "whom the Competition Tribunal recognised". In this context "recognises" means to acknowledge; to treat as valid; as having existence or is entitled to consideration; to take notice (a thing or person) in some way. (See the Shorter Oxford English Dictionary, Third Edition, page 1764.)

[26] In the instant case Caxton and Naspers placed information before the Tribunal by way of affidavit and that is of course a necessary preparatory ingredient to the proper exercise of the Tribunal's discretion. The Tribunal ,after assessing that information, accorded recognition to Caxton. It could now participate in the merger proceedings, and it was permitted to canvass the issues which are set forth in the Tribunal's order. It is evident that in doing so the Tribunal took the view that the defined issues were of importance and would assist it in making the determination whether the merger is likely to substantially prevent or lessen competition within the meaning of section 12A.

[27] Counsel for Caxton contends that in making the aforesaid determination the Tribunal is enjoined to consider all the factors which appear in section 12A. This in effect means that there may well be a whole array of factors which fall to be considered beyond those that were raised in the affidavits.

Therefore to the extent that Rule 46 of the Tribunal rules requires a proposed intervenor to set forth the matters in respect of which such intervenor will make

representations, it is contended by Caxton that this requirement is *ultra vires* the Act.

[28] Now section 52 of the Act provides that the Tribunal must conduct a hearing into every matter which is referred to it and, importantly, in terms of section 52(2)(b) it "may conduct its hearings informally or in an inquisitorial manner". It seems to me therefore that the Tribunal is not simply a passive decision-maker waiting upon the parties in an adversarial-like manner to place evidence before it and then arrive at a decision. The Act intends that it play an active and if necessary an interventionist rôle and I think, more importantly, it ought to control and regulate its own proceedings. To my mind that is a necessary incident of section 52(2)(a) and (b).

[29] In my view rule 46 of the rules of the Tribunal have been framed to achieve the objectives to which I have alluded above.

[30] If Caxton's contentions are correct and it would, as it were, have "open season" at the hearing, that in my view, would not be in the interests of an orderly and expeditious hearing. The parties to the merger it seems to me as a matter of common sense must at least be apprised of what is said to be the anti-competitive implications of the merger. In that regard it would be able to marshal its witnesses, particularly its experts, and produce documents. If it were otherwise, in my view, far from promoting an expeditious hearing there would be delays resulting I believe in a cumbersome and chaotic hearing.

[31] Thinking my way through Caxton's argument there is yet another very undesirable consequence that flows therefrom. If the matters to be raised are not circumscribed Caxton would presumably be entitled to a wide-ranging discovery of documents from the merging parties. There would be no limit on which documents, confidential or otherwise, are to be produced. In ordinary High Court litigation the right to obtain documents from one's opponent is in general limited by relevance arising from the defined

issues. **Notwithstanding that merger proceedings take place without pleadings , it remains of the utmost importance that the Tribunal exercise control over the proceedings to ensure that the evidence led is relevant to the issues raised as to the approval of the merger**. This is yet another reason why the Tribunal ought to be entitled to control and rein in what may turn out to be a very unruly horse.

[32] Of course if it turns out during the course of the hearing that an issue arises which falls outside the ambit of the Tribunal's order and the Tribunal considers that such issue to be of substance and importance and therefore should be weighed in its assessment, there appears to me to be no reason why the Tribunal cannot at that stage permit Caxton to canvass such matters. As I have suggested above that would be part and parcel of the Tribunal's inherent right to control its own proceedings.

[33] It follows that in my opinion Caxton has not shown that the Tribunal in making the aforesaid order acted *ultra vires,* exceeded its jurisdiction or improperly exercised its discretion. The review must accordingly be dismissed with costs such costs to include the costs consequent upon the employment of two counsel.

DAVIS JP :

MAILULA AJA :

DATE OF JUDGMENT :	OCTOBER 2007
DATE OF HEARING :	10 SEPTEMBER 2007
COUNSEL FOR THE APPLICANT: MR M WESLEY	MR S. SYMONS SC with him
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