COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 81/LM/Jul08

In the matter between:

Altech Technologies Limited	Applicant
and	
Mobile Telephone Networks Holdings (Proprietary) Limited	First Respondent
Verizon SA (Proprietary) Limited	Second Respondent
The Competition Commission	Third Respondent

In re the large merger between:

Mobile Telephone Networks Holdings (Proprietary) Limited	Acquiring Firm
and	
Verizon SA (Proprietary) Limited	Target Firm

Panel	: N Manoim (Presiding Member), U Bhoola (Tribunal Member), and Y Carrim (Tribunal Member)
Heard on	: 07 November 2008 and 8 January 2009
Decided on	: 09 January 2009
Reasons Issued	: 09 February 2009

INTERVENTION COSTS REASONS

[1] In this decision we deal with our reasons for ordering Altech Technologies Limited ("Altech") to pay the costs of the merging parties, in respect of an intervention application brought by Altech.

[2] The merging parties in this matter are; the primary acquiring firm, Mobile Telephone Networks Holdings (Pty) Ltd ("MTN"), a wholly owned subsidiary of MTN Group Ltd ("MTN Ltd") and the primary target firm, Verizon South Africa (Pty) Ltd ("Verizon").[1]

[3] We made the cost award on 09 January 2009. Ordinarily, our reasons for this costs award would have accompanied our reasons for our approval of the merger, which are presently still being prepared by the panel. However due to the recent appeal and review brought against our costs award by Altech, we deem it appropriate to give our reasons in respect of the costs decision now.

[4] The Commission referred the above merger to us on 14 October 2008. On 1 December 2008 Altech applied to intervene in these proceedings and after the filing of papers the matter was argued before us on 9 December 2008.

[5] Altech applied for leave to intervene seeking to persuade us that the merger should be opposed. Although it does not state this specifically it states that:

> *"it opposes the proposed merger because it is of the view that it gives rise to substantial competition concerns."*

[6] It goes on to deny that there are any efficiency or other pro-competitive grounds to offset the anti-competitive effects of the merger. The obvious conclusion is that Altech considered the merger should be prohibited.

[7] A similar sentiment is later contained in the unsigned witness statement of Stephen Sidley, who was Altech's deponent in the intervention application, and is their chief technology officer. [2]

[8] In Altech's notice of motion the grounds for the scope of its intervention were open – ended. Whilst various theories of harm were contemplated in its papers, it did not purport to confine itself to these, and sought intervention without limitation. In his founding affidavit Sidley states:

> *"in the event that Altech is granted leave to intervene in the merger proceedings, I respectfully submit that the scope of its intervention should extend to all of the issues it wishes to raise."* [3]

[1] Verizon was previously known as UUNet (SA) (Pty) Ltd. UUNet changed its name on 23 January 2006 to Verizon South Africa (Pty) Ltd.
[2] See paragraphs 6.2 and 7.7 of the witness statement which caution of the harm that would be created by the approval of the merger.
[3] Founding affidavit paragraph 10.1

[9] The merging parties opposed the intervention and sought that it be dismissed with costs.[4] We decided to allow the intervention, but narrowed the scope of intervention as follows:

1. Those issues raised in Annexure "E" to the applicant's founding affidavit being a copy of a report prepared by RBB Economics dated 22 August 2008.(RBB are an economics consultancy who had been briefed by Altech to *"comment on the potential competition concerns raised by the vertical components of MTN's proposed acquisition of Verizon SA."* Notably RBB remark *"Although at this stage of the proceedings the theories of harm are necessarily somewhat speculative, we submit that the logic of the arguments is appealing and that a full and thorough investigation of the vertical aspects of the Proposed Transaction is merited."*[5]*)*

2. Those issues raised in consequence of Annexure "H" to the applicant's founding affidavit.[6] (Annexure H is a circular sent out by MTN to its service providers in July 2008 setting out post paid price plans. The portion of this circular which Altech sought to raise as an issue of concern, appears to be the pricing for a technology service where the internet is used to transmit voice data, known technically in the industry as Voice over Internet Protocol or VOIP. The suggestion was that the circular which contains pricing was a manifestation of MTN imposing punitive prices for VOIP.[7])

[10] The scope of intervention was limited to those theories of harm that we understood had been articulated in the papers and meant that the merging parties at least had some appreciation of the boundaries of the Altechs' concerns so that they would not be faced with a moving target.

[11] In our intervention order we reserved costs. The reason for doing so was whilst the intervenor had been successful in applying to intervene, it was premature then to award costs because until the hearing of the merger, its promise of its utility to the proceedings could not be tested, and hindsight might prove that the merging parties contention that Altechs' intervention was based on *"vague and unsubstantiated theories of harm"* was correct.[8] We have previously warned in *Naspers/Caxton* that in future costs may be awarded

[4] Affidavit of John Oxenham record page 301.
[5] Record page 226.
[6] See our intervention application order dated 10 December 2008
[7] Replying affidavit of Sidley paragraph 4.8.1 Record page 334
[8] Answering affidavit of John Oxenham paragraph 23.2 record page 301.

against intervenors in certain circumstances in respect of the merger proceedings themselves let alone the costs of the intervention procedure.[9]

> *"The panel has engaged in lengthy debate on the question of awarding the merging party the costs entailed in defending the foreclosure allegation. Although we have ultimately decided not to award costs on this occasion, we take this opportunity to signal our willingness, in principle, to make such awards in future."*[10]

[12] Various pre-hearing procedures followed, including discovery applications and the setting of dates for the production of witness statements prior to the hearing.

[13] In accordance with our direction the merging parties and Altech were required to file their witness statements on the 29th December 2008. This was done. However we also required that non-expert witnesses file their witness statements in the form of affidavits. The reason for this is that where we have not put such strictures on witness statements in advance, witnesses have in the hearing departed from their proposed statements, thus inconveniencing not only ourselves but also opposing parties.

[14] On the 29th December, although the merging parties filed witness statements in affidavit form, Altech did not. Despite a request from the merging parties that it comply, Altech did not. We were advised by counsel for the merging parties at the hearing that up that date no Altech witness statement had yet been filed in affidavit form. Our registry has also not received them in this form.

[15] On 7 January 2009, the day prior to the date set for the hearing, (note 5 days had been set aside to hear the matter on the grounds that the merger was being opposed by Altech) we received a notice of withdrawal from Altech. The notice of withdrawal contained no tender to pay the merging party's costs in respect of the intervention application or the merger itself.

[16] At the hearing we were advised by the merging parties that the withdrawal had come about as a result of a letter written by MTN to Altech. Having received this letter, so we were advised by the merging parties counsel, Altech was prepared to withdraw as an intervenor.

[17] There was no appearance for Altech at the hearing. We concluded our hearing into the merger on the same day and gave our order approving the merger on 8 January 2009

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[9] In this case, although we inquired, the merging parties did not seek the costs occasioned by the intervention in respect of the merger proceedings themselves and hence we did not consider marking such an award.

[10] See *Naspers Limited and Media Network Limited and SuperSport International Holdings Limited with Caxton and CTP Publishers and Printers Ltd intervening* Case No: 23/LM/Feb07 at paragraph 97.

[18] The merging parties argued that they should be entitled to the costs of the intervention which had been reserved in our previous application as Altech had withdrawn and the intervention had been unsuccessful. We agreed and awarded costs.

[19] We were advised by the merging parties that there had not been any agreement reached with Altech either about costs or whether the issues of costs should be argued at some later date.

[20] Altech therefore knew that the issue of costs for the intervention application had been reserved, and that it had no agreement with the merging parties on the issue of costs. It ought to have known that the issue of costs would as in the normal course, be disposed of at the hearing of the merger and that if it wanted to be heard on the issue it would need to appear at the hearing. It chose not to do so. Nor did its attorneys at the time of filing the notice of withdrawal request to be heard on this issue.

[21] The merging parties were thus fully entitled to ask for their costs at the time that they did, and would only have been prejudiced and incurred further costs, had we postponed this issue to another date on the possibility that Altech might (it had given no indication up till then that it did) want to address us on the issue of costs for the intervention.

[22] On the merits of the costs award there can be little doubt that the merging parties were entitled to their costs. Altechs' withdrawal the day prior to the commencement would, absent anything else, justify the award of costs to the merging parties on that ground alone.

[23] It could of course be argued that Altech having received the letter from MTN had achieved from the merging parties, all that it had originally sought or substantially what it had sought from them, and thus with the prize clutched in its hands, withdrew, since the proceedings served no further purpose to vindicate its interest.

[24] Nothing could be further from the truth. The original intervention application, as we noted, was open ended about its concerns and concluded with the pessimistic assumption that the merger would result in incurable harm. There was no inkling until the MTN letter that Altechs' chief concern was that it would face unfair discrimination and that a letter of comfort from MTN, let alone even a Tribunal imposed condition to the same effect, would suffice.

[25] Nor did a fear of discrimination figure amongst Altech's original concerns –nor did it rear its face when Altech in the course of filing its witness statements narrowed the scope of its concerns to a single issue - an issue that had not figured up till then, in that form, in its

intervention application.[11] In short what Altech has done is to seek intervention on an open ended basis to have the merger prohibited by establishing that it was, at the least, concerned about the following issues: removal of a potential entrant; foreclosure of access to a customer base; input foreclosure of rival ISPs and the VOIP issue that we referred to earlier. For the sake of simplicity let us refer to these as issues A, B and C. [12]

[26] Having got the right to intervene on those grounds, and putting the merging parties to the burden of dealing with those issues, it filed unsigned witness statements, dealing with the potential for MTN to use its post-merger control of Verizon's international gateway for data transmission into South Africa to impede the development of VoIP/LCR. Let us refer to this as issue D. The merging parties never dealt with issue D in their witness statements because they said the issue was not one raised in the intervention application. Thus although they addressed the VOIP problem as articulated by Altech in its founding papers, the VOIP theory of harm addressed by Altech in its witness statements on 29 December was an entirely novel one, so much so that the merging parties economists had to file a supplementary report to deal with this issue.

[27] Altech then withdrew on the day prior to the hearing,[13] having, we were advised by the merging parties, withdrawn because it had obtained a letter of comfort the material terms of which are encapsulated in the following paragraph in the letter:

> "… *MTN undertakes to Allied Technologies Limited and its subsidiaries ("Altech") that it will treat MTN NS and Verizon SA on an equivalent basis to any other firm of a similar nature and will not provide the above entities with preferential pricing or preferential incentives, whether directly or indirectly, in respect of products or services offered by MTN.*" [14]

[28] Let us refer to this concern above, as issue E. The concern over issue E is one that the merging parties would no doubt have furnished Altech with an undertaking on the same terms, *ab initio,* had this really been what it sought. It is transparent that Altech had intervened with far greater ambition than issue E – but at the 11th hour not having been able to secure anything more from the threat of intervention, withdrew, accepting the merest crumbs.

[11] When we say not figured, we mean given no prominence. Arguably every anticompetitive issue under the sun can be read into paragraph 9.3 of the founding affidavit where Altech lists thirteen areas that it can give evidence on. Record 29-30.
[12] Please see G:enesis Supplementary Report dated 29 December 2008.
[13] We received a notice of withdrawal from their attorneys on 7 January 2009 at 12h34 in the afternoon.
[14] See letter from MTN handed at the hearing on 8 January 2009 as Exhibit "A".

[29] The intervention neither offered the Tribunal what it promised, nor achieved what Altech originally sought. It had intervened on the basis of issues A, B and C, later filed witness statements confined to issue D and then settled, ostensibly having received satisfaction from the merging parties, on issue E. Instead the intervention has burdened the merging parties with costs, delay and inconvenience. Altech must pay the merging parties costs on a party and party scale, and such costs are to include costs of one counsel.

[30] We understand our jurisdiction to award costs to be limited to party and party costs.[15] Had we not suffered from this limitation we would have considered this an appropriate case to award punitive costs against Altech.

_____ **09 February 2009**

N Manoim **Date**
Presiding Member

Concurring: U Bhoola and Y Carrim

Tribunal Researcher	: J Ngobeni
For the merging parties	: Adv Mike Van Der Nest SC and Adv Anthony Gotz instructed by Edward Nathan Sonnenburgs and Webber Wentzel
For the Commission	: Rizia Buckas (Legal Services)

[15] See rule 58 of the Tribunal rules.