COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

Case No: 22/X/Mar11

In the matter between:

MONSANTO SOUTH AFRICA (PTY) LTD	First Applicant
MONSANTO INTERNATIONAL, SARL	Second Applicant

and

BOWMAN GILFILLAN	First Respondent
PIONEER HI-BRED INTERNATIONAL INC	Second Respondent
PANNAR SEED (PTY) LTD	Third Respondent

Panel	:	Norman Manoim
	:	Yasmin Carrim
	:	Takalani Madima
Heard on	:	01 June 2011
Reasons and Order issued on	:	09 June 2011

REASONS FOR DECISION AND ORDER

Introduction

1] This is an application to stay merger proceedings presently before us, pending a High Court application to have the merging parties' firms of attorneys barred from acting for them in the merger, on the ground that they have a conflict of interest and that there is a risk of disclosure of confidential information. The application is brought by an erstwhile client of the firm of attorneys, a rival firm of the merging parties. The first and second respondent oppose the application, the third respondent will abide by the decision of the Tribunal.

Background

2] The applicants are Monsanto South Africa (Pty) Ltd and Monsanto International, SARL. For convenience, like everyone else in the proceedings we will refer to both from now on in the singular, as Monsanto; nothing turns on the distinction.

3] Monsanto is a large international chemical firm. In this decision the aspect of its business that is relevant is its involvement in the hybrid maize seed industry.

4] Monsanto conducts business in South Africa. For the past twelve years it has utilised the first respondent, the law firm Bowman Gilfillan ('Bowmans') as its attorneys. Bowmans has provided a range of legal advice over the time to Monsanto, including competition law and intellectual property. This according to Monsanto involved matters of a sensitive nature that have the potential to affect its business interests. During this period Monsanto also made use of other firms of attorneys. Despite this it says it considered Bowmans its "preferred counsel in South Africa".[1]

5] In January 2009 Natalia Voruz, Monsanto's associate general counsel wrote to Bowmans seeking advice on a certain matter. The issues on which the advice was sought were outlined in the letter which has been heavily redacted in our version in the record, but it appears to relate to legal issues involving both competition law and intellectual property.[2] Mentioned in the letter are the names of the second and third respondents. Llewellyn Parker, the attorney concerned at Bowmans to whom this was addressed, wrote back the same day to say that he had consulted his competition department partners and was advised the firm was unable to take on the instruction due to a potential conflict of

1 Applicants founding affidavit in the stay application, record page 15.

2 Record page 184, annexure NV 5.

interest. Voruz wrote back to him asking for details about the nature of the conflict. Parker wrote back to say that firm policy prevented him from divulging any further information.

6] We now know what that conflict was. Pioneer Hi-Bred International Inc. ('Pioneer') the second respondent, a large US corporation, also, inter alia, engaged in the hybrid maize seed industry in South Africa, had instructed Bowmans to represent it in a proposed merger with a South African firm called Pannar Seed (Pty) Ltd ('Pannar'), the third respondent. Pannar too, is a rival of Monsanto in the South African market. Pioneer had been referred to Bowmans by its US attorneys.

7] Bowmans commenced working on this instruction in mid-2008. Monsanto meanwhile, and apparently ignorant of this instruction from its rival, Pioneer, continued to instruct Bowmans on licencing and employment related matters, but not competition. Monsanto has never given its consent for Bowmans to act in the merger. This is not in dispute, but Bowmans contends that such consent was not required and that it was free to act as it did.

8] At some time in 2010, it is not clear exactly when, Monsanto instructed attorneys Nortons Inc to respond to questions from the Competition Commission who were now seized with the present merger between Pannar Seeds and Pioneer.[3]

9] In terms of the Competition Act, 89 of 1998, (the 'Act'), this was an intermediate merger. This means that the merger was notifiable to, and determined by, the Competition Commission in terms of its process.[4] In making its determination the Commission adopts administrative procedures as opposed to the adjudicative procedures adopted by the Tribunal for mergers. The Commission decided to prohibit the merger on 7 December 2010. The merging parties instructed Bowmans to lodge an appeal against this decision on 20 December 2010. In terms of the Act this appeal process is referred to as a consideration and it is wider than an appeal in the conventional sense. The relevance of this for present purposes is that the record before the Tribunal is not limited to what was before the Commission. As part of its case the merging parties have brought Monsanto's

3 It seems that this was not the first instruction that Nortons had received from Monsanto in respect of a competition law issue. Bowmans relies on this to suggest that Monsanto was not bringing it competition work at this time.

4 Sections 13A, 13B and 14.

activities in the market to the fore of their competition analysis, essentially arguing that the merger will serve as a useful antidote to Monsanto's alleged monopoly position. Monsanto objects to this characterisation which it maintains is untrue. However, Monsanto is not opposed to the merger and has declared that it does not intend to intervene in the Tribunal consideration proceedings.

10] Monsanto claims that whilst it was aware of the notification of the merger and subsequent application for a consideration, it only became aware that Bowmans was acting for the merging parties, when a candidate attorney who attended the first pre-hearing before the Tribunal, as an observer, noted this fact and informed Nortons, her firm.[5]

11] Thereafter discussions followed between Nortons attorneys, now representing Monsanto, and Bowmans, to discuss whether the latter should withdraw as attorneys in the merger. Bowmans refused to do so.

12] Bowmans maintains that no confidential information was imparted to the Commission and such information that was, came from the merging parties own market knowledge or public sources. Further, as Monsanto has not intervened in the process, no conflict of interest has emerged and that in any event since Monsanto wrote to them in April 2011 withdrawing all instructions from the firm, they can no longer be regarded as Monsanto's attorneys. Much is made in the papers by all the parties as to whether the Bowmans attorneys regularly doing Monsanto's work, were involved in working on the present merger to any great extent, and the efficacy of the firm's so called 'Chinese Walls'. We for reasons that follow do not need to consider these issues for the purpose of deciding the stay.

13] On 15 March 2011 Monsanto brought an application before the High Court (the 'main matter') in which it sought the following relief as its main prayer:

> *".. to interdict the first respondent [Bowmans] from continuing to act or advise or otherwise assist the second [Pioneer] and third respondents [Pannar], in connection with any merger or proposed merger between them, including but not limited to the proceedings before the Competition Tribunal under Case 81/AM/Dec10".*

14] The application was not brought on an urgent basis and filing of papers was only

5 The pre-hearing was convened to manage procedural issues that arose in the consideration process.

completed on 26 May 2011.[6] It has yet to be set down for hearing.

15] After the interdict application was launched, Bowmans instituted an internal investigation into the allegations, performed by partners of the firm and came to the conclusions that there had been no breach of confidentiality, there was no conflict of interest in the firm representing the merging parties and hence the firm could continue to represent them. This internal enquiry has remained confidential and does not form part of the record. Monsanto has criticised Bowmans for not having the inquiry conducted by an independent person.

16] The application for the stay of the Tribunal proceedings was brought on 28 March 2011.

17] The result of this choice of forum by Monsanto means that the main matter is to be heard in the High Court whilst the stay is to be heard in the Tribunal. This leads to undesirable complications that we refer to below.

18] Whilst Monsanto is concerned that its former attorneys now represent its rivals in a merger proceeding, the merging parties are concerned that if Bowmans withdraws as its attorneys their merger already set down by the Tribunal for hearing and completion in September 2011, will be delayed. They contend that it is not clear how long the merger hearing would be delayed if it is stayed pending the conclusion of this litigation. They assert they would be prejudiced in the merger hearing if Bowmans withdrew now as its attorneys, given the work carried out already in the matter, its complexity and the proximity of the hearing dates. For this reason both Bowmans and Pioneer vigorously opposed the granting of the stay.

19] The issues we have to decide in this matter are:

> 1) whether, as argued by the respondents, the matter is not properly before the High Court as the relief sought in that forum is within our exclusive jurisdiction;
>
> 2) what the nature of the relief sought in the stay is. It is argued by Monsanto that the stay constitutes a form of interim relief; the respondents contend that it constitutes final relief.

20] Our approach to the merits is thus determined by the answers to these two prior

6 Although there was correspondence with the Deputy Judge President to secure an expedited basis and this was explored further at the commencement of our hearing nothing has come of it.

questions.

Exclusive jurisdiction

21] The respondents have argued that the form of relief in this matter relates to merger proceedings and mergers and their procedures are matters reserved for the exclusive jurisdiction of the Competition Tribunal and the Competition Appeal Court (CAC) in terms of section 62(1) of the Act which states:

> *1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:*
>
> *a) Interpretation and application of Chapters 2, 3 and 5, other than –*
>
> *i) a question or matter referred to in subsection (2); or*
>
> *ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and*
>
> *b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).*

22] Chapter 3 regulates mergers and merger proceedings. Chapter 5 regulates proceedings more generally. It follows, the respondents argue, that if the matter falls within this exclusive jurisdiction, the main matter should have been brought to the Tribunal and not the High Court and thus is doomed to fail. If the High Court application is in the wrong forum then the stay on which its success is predicated should not be granted. Monsanto in turn argued that this was a matter on which both the Tribunal and the High Court enjoyed concurrent jurisdiction and that since the merits related to the proper conduct of officers of the court, the High Court, as their guardian, was the appropriate forum.[7]

23] We do not agree with the respondents on this point. Although the relief sought in this matter has an impact on our procedures it is an indirect one. The High Court is not being asked to determine our proceedings for us. To the extent that the resolution of this matter may have an impact on our processes it is incidental. Furthermore High Courts do not readily consider their jurisdiction ousted.[8]

7 Relying on *Paper, Printing, Wood and Allied Workers' Union v Pioneer NO and Others 1993 (4) SA 621 (A).*

8 See *PPWAWU* supra.

24] We therefore find that the Tribunal and High Court have concurrent jurisdiction in respect of the relief sought in the main matter and accordingly we have jurisdiction to consider the stay.

The appropriate test

25] The debate between the parties is whether the appropriate test is one for an interim or final interdict. It is easy to see why the different stance is taken. Monsanto argues for an interim interdict as it says a stay is akin to an interim interdict. In an interim interdict the test is proof of a *prima facie* right, even if open to some doubt, a consideration of the balance of convenience and the likely prejudice. That formulation is weaker than the clear right required in a final interdict. But Monsanto goes further. It argues that not only should we adopt the less stringent interim relief standard for the stay, but we should prefer to adopt it in its least stringent formulation that laid down in the well known *American Cyanamid* case that "*... the claim is not a frivolous and vexatious; in other words, that there is a serious question to be tried.*" [9]

26] Since the matters raised are not frivolous or vexatious Monsanto considers that it has crossed this first hurdle. Prejudice to them occurs as long as the matter is ongoing whilst the balance of convenience favours them as the matter can be determined without much inconvenience to the future management of the merger hearing.

27] It is on the latter point, the future management of the merger case, where the respective approaches of Monsanto and the respondents diverge. Not only do the respondents have a different view of this on the facts, but this factual difference leads a different conclusion on the appropriate legal test.

28] The respondents argue that it is unlikely that the main matter in the High Court will be resolved before the September 2011 dates allocated for hearing this merger in the Tribunal. No dates have been given for the main matter yet, nor is there certainty that even if determined prior to September, that Monsanto will not appeal an adverse decision. Mergers are generally time sensitive and there are reasons why on the facts of this case time is a particularly sensitive issue. The end result they say is that if the stay is granted the merging parties, in order to preserve their hearing dates, would be forced to hire new attorneys. Not only would this be prejudicial but would make the relief final in

9 The language of 'frivolous or vexatious' comes from *American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504* at page 510.

effect. If the relief has final effect then the stay amounts to a final interdict and must be judged according to that standard. On this test they argue that Monsanto fails at the first hurdle having failed to make out a clear right.

29] We have not been persuaded to depart from earlier decisions in which we set out the basis for a stay when the matter was proceeding in another forum. In *Novartis*[10] we held that the test comprised three requirements:

1) whether the applicant has reasonable prospects of success in the High Court; and

2) whether it is in the interests of justice to stay the proceedings; and

3) convenience.

30] Monsanto's prospects of success depend on how high the standard is set for the duty owed by a law firm to a former client. It is common cause that no breach of confidence by Bowmans is evident from the papers before us. It is also common cause that the adverse interest that Monsanto has is commercial not legal. Monsanto is not a party to the merger consideration and has no intention of becoming one. Monsanto relies on an English case where the question was whether a firm of attorneys with a longstanding history of representing a client could act for a consortium that was mounting a takeover bid for its client. Although at that stage it was not clear whether the takeover bid was going to be hostile, the court restrained the firm, Freshfields, from representing the consortium on the basis that its past history of representing the client, which was the target firm, had afforded it with access to its confidential information which could lead to an apprehension of a potential conflict.[11]

31] We have not however been referred to a South African decision in which the potential conflict of interest is a commercial rather than a legal one. Indeed Mr Gauntlett for Monsanto conceded that this matter raised issues of public policy because it seeks to determine how far a law firm must go to avoid a conflict of interest.

32] Given that the legal policy issues raised in this application will be novel for a South African court, prospects for success are by no means certain. This is not the familiar kind of conflict case where the legal representative crosses the floor to represent a party with

---

10 *Novartis SA (Pty) Ltd v Main Street 2 (Pty Ltd (2) [2001-2002] CPLR 470 (CT).*

11 *Marks & Spencer Group PLC v Freshfields Bruckhaus Deringer [2004] EWHC 1337 (Ch).*

an adverse legal interest to its former client. Monsanto may have commercial concerns for not liking the merger, if ultimately approved, but that is not an adverse legal interest of the sort our courts have in the past recognised. We have no view on whether the bar should be set higher – we only consider that the outcome of this debate is not a certainty and hence this aspect of our consideration does not weigh in favour of the applicant.

33] Nor do the requirements of justice favour Monsanto. No satisfactory explanation has been given for why the application, given its nature, was not brought to the High Court on an urgent basis. Monsanto would have been aware of the fact that the merger hearing had been set down for September 2011 and that merger cases, given their nature, require expedition. Even allowing for time for consultations between the respective attorneys to take place before commencing the main application, once that route had been embarked on it should have been done expeditiously; even more so when it was proceeded in a forum other than the one where the matter was being heard so that the latter institution was unable to control the timely resolution of the dispute. The Tribunal had set the hearing dates in February 2011 thus prior to the launch of the main matter.

34] The fact that an applicant in the position of Monsanto can choose to go to a forum other than the one in which the legal question arose does not mean that it is not under a duty to expedite the matter in the other forum so that the matter is not unduly delayed in the primary forum where the disputed matter is to be heard. Were the main matter brought to the Tribunal, we would be in a position to regulate its hearing, whilst having due regard for the respondents' rights to have the merger hearing dates respected should they prevail. The Tribunal has no right to tell the High Court when and how to hear this matter. For that reason Monsanto ought to have approached this application as one of urgency in that forum so as not to prejudice proceedings in this one. Had the High Court elected not to hear the matter on an urgent basis or stayed these proceedings until it could entertain the main application that would have been another matter. It was never given the choice.

35] Secondly, the harm likely to be apprehended is not made out strongly in the papers. Bowmans has already represented the merging parties throughout the intermediate merger process before the Commission. In intermediate mergers the Commission is the body tasked with clearing the merger. It is therefore highly probable that Bowmans made the fullest submissions on behalf of the merging parties during that process – there would have been no reason to hold back on any relevant information concerning Monsanto

because the Commission was also the arbiter, not just an investigator. To the extent that confidential information was improperly disclosed this would either already be apparent or be too late to protect and hence other remedies, not an interdict, would seem more appropriate. In relation to the former point there is no evidence that confidential information was disclosed during this Commission process. Monsanto has had access to the Commission's reasons for its decision.

36] On the other hand if the matter were stayed there would be substantial prejudice to Pioneer. It would be almost certain that the hearing would not continue on the present dates and no one has any certainty as to when the matter might proceed. Given that Monsanto might appeal an adverse decision to a higher court it is impossible to be certain when the merger could be heard. This would almost certainly force the merging parties to instruct a new firm of attorneys rendering the interdict academic. The parties have a right to be represented by legal representatives of their choice. Bowmans has represented the merging parties for some time in this matter, including throughout the Commission's process. A change of attorneys now, when the matter has reached this stage, would be prejudicial.

37] Although in *Agriwire* we granted a stay pending a matter being heard in the High Court that case can be distinguished. First, the matter had already been set down for hearing in the High Court in the week following the stay application. Second, the matter involved a prohibited practice case which does not involve as compelling considerations of urgency as does a merger case.[12]

38] In our view after considering the prospects of success of the case and the interests of justice and convenience , the case for a granting a stay has not been sufficiently made out. The case is accordingly dismissed.

39] The applicants jointly and severally must pay the respondents costs, including the costs of two counsel.

09 June 2011

Norman Manoim **DATE**

12 *Agri Wire (Pty) Ltd & Another v Competition Commission & Others, Case NO.:63/CR/Sep09.*

Tribunal Member

Yasmin Carrim and Takalani Madima concurring.

Tribunal Researcher	: I Selaledi
For Monsanto	: J Gauntlett (SC), M du Plessis and A Coutsoudis instructed by Nortons Inc.
For Bowman Gilfillan	: M. van der Nest (SC) and N.J. Graves (SC)
For Pioneer	: D.N. Unterhalter (SC), C.E. Watt-Pringle (SC) and M.M Le Roux instructed by Edward Nathan Sonnenbergs Inc.