IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No.:
26/CAC/Dec02

Tribunal Case Nos.:
45/LM/Jun02 and
46/LM/Jun02.

In the matter between :

ANGLO SOUTH AFRICA CAPITAL [PTY] LTD. **1st Appellant**

ANGLOVAAL MINING LIMITED **2nd Appellant**

ANGLO AMERICAN HOLDINGS LIMITED **3rd Appellant**

KUMBA RESOURCES LIMITED **4th Appellant**

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA **1st Respondent**

THE COMPETITION COMMISSION OF SOUTH AFRICA LIMITED **2nd Respondent**

J U D G E M E N T

JALI J A.

INTRODUCTION :

This is an appeal against the decision of the Competition Tribunal ("the Tribunal") handed down on the 24th December 2002. The Competition Tribunal gave the First Respondent leave to participate in the two large merger proceedings between the First Appellant and the Second Appellant ("the Anglovaal merger")and also between the Third Appellant and the Fourth Appellant ("the Kumba merger"). The Tribunal also decided on the scope of the second respondent's participation, and granted access to all the confidential documents relating to these mergers. Costs were reserved for determination at the merger hearing or at a time agreed upon by the parties.

The Appellants have appealed against this Order. In their appeal, they have challenged the Tribunal's finding that the Respondents have shown "good cause" to participate in the aforesaid merger proceedings.

FACTUAL BACKGROUND:

On the 20th June 2002, the Appellants notified the Competition Commission ("the Commission") of the two large mergers. Notice was given of a proposed Anglovaal merger. On the same day another

merger notification was filed regarding the proposed Kumba merger. In both of these mergers, first and third appellants were to acquire a material interest over the second and fourth appellants respectively. The Commission conducted an investigation in accordance with its statutory duties in terms of section 12A of the Competition Act No. 89 of 1998, as amended. ("the Act"). The Commission concluded that both the Anglovaal merger and the Kumba merger should be approved unconditionally by the Tribunal.

On the 6th September 2002, the Commission submitted its written recommendations to the Tribunal in terms of section 14A(1)(b) of the Act.

On the 18th September 2002, the First Respondent filed an application for leave to participate in merger proceedings. On the 20th September 2002, the Tribunal granted the First Respondent leave to participate in these merger proceedings. On the 18th October 2002, the Tribunal made a decision in delineating the scope of the First Respondent's participation in the merger proceedings.

The Appellants appealed these decisions to this Court. On the 15th November 2002, this Court granted an order in which the two decisions of the 20th September and 18th October 2002, were set aside. This Court's order was to the effect that the aforesaid decisions should not have been granted by a single member of the Tribunal but by a full panel of the Tribunal. Accordingly, the matter was referred back to the Tribunal.

A full panel of the Tribunal was constituted. It considered the application to intervene by the First Respondent in the mergers. It is the decision of the newly constituted panel, which is the subject matter of this appeal.

APPLICATION TO AMEND:

The original application to intervene was lodged by the First Respondent in terms of Tribunal Rule 46(1)(a). However, after the hearing of the 15th November 2002, before this Court, the application was amended. On the 22nd November 2002, the First Respondent filed a new application under Rule 42 of the Tribunal Rules as well as an amendment of the original application. The original application was substituted in its entirety and the First Respondent applied to participate under Rule 42. In the alternative, and only in the event of the Tribunal finding that the Rule 42 was not the correct prescribed procedure, an application was brought in terms of Rule 46(1)(a).

At the Tribunal hearing, the Appellants objected to the amendment submitting that there was no proper basis for the amendment to be allowed. The amendment would have caused substantial prejudice to the Appellants. The Tribunal considered the submissions and exercised its discretion in favour of allowing the amendment. The Tribunal based its decision on the provisions of section 27(1)(d) and section 53(1)(c) of the Act.

Before this Court, Mr Gauntlett who appeared together with Messrs Unterhalter, Fagan and Gotz on behalf of the appellants, attacked the Tribunal's decision to grant the First Respondent's leave to amend its notice of motion, as set out above. In particular, the Appellants were of the view that the Tribunal misdirected itself in deciding that the "precise juristic niche" into which to place the application for such participation or a precise form of the application is not essential. In this regard, the Tribunal was of the view that the First Respondent showed good cause for such an amendment.

This Court cannot fault the Tribunal's finding with regards to the granting of the amendment. I am not aware and we have not been referred to any authority which suggests that once a matter has been referred back to a court a quo for hearing *de novo* by a court of appeal, a party cannot amend the pleadings in the matter. Indeed there is an authority that a party can amend its pleadings at any stage of the proceedings, subject to the normal considerations of prejudice and whether it would facilitate the proper ventilation of the dispute between the parties so that justice may be done (See Morgan and Ramsay v Cornelius and Hollis 1910 N.P.D. 262 at 264; Rishton v Rishton 1912 TPD 718 at 719 and Trans-Drakensberg Bank Ltd. (under judicial management) v Combined Engineering (Pty) Ltd. and Another 1967 (3) S.A. 632 (D) at 638 A and 642 H). On the general object of pleadings (see Robinson v Randfontein Estates G.M. Co. Ltd. 1925 A.D. 173 at 198); Shill v Milner 1937 A.D. 101 at 105 and Van Mentz v Provident Assurance Corporation of Africa Limited 1961(1) S.A. 115 (AD) at 122).

The Tribunal has the discretion to make the necessary Order as provided for in section 27(1)(d) of the Act, so long as it does so judicially. There has been no indication that the Tribunal did not exercise its discretion properly or that the First Respondent acted mala fide. The mere delay in bringing the application for leave to amend is not *per se* a ground for refusal of an application for amendment. (See also Commercial Union Assurance Co. Ltd. v Waymark N.O. 1995 (2) S.A. 73 (TK) at 77). The Tribunal correctly decided, that there was a good cause for the amendment. The amendment finds support in the First Respondent's founding affidavit to the notice of motion. Accordingly, the Tribunal's ruling in this regard is confirmed.

APPLICATION TO PARTICIPATE:

The Appellants case is that the First Respondent does not have the substantial or material interest for it to be granted leave to intervene in the merger proceedings. In the premises, the Tribunal erred in firstly, "reading down" the explicit requirement of material interest in Tribunal

Rule 46 and in finding that it had "unfettered discretion" to allow intervention under that rule. Secondly, it erred in determining the scope of the intervention in wide and vague terms. Thirdly, it erred in allowing the First Respondent to have access to confidential information.

On the other hand, the First Respondent 's case is that the Tribunal was correct in giving leave to participate in the merger proceedings and access to confidential information. In its submissions, it relied on section 53(c)(v) of the Act, read together with Tribunal Rule 42. In the alternative, it relied on Rule 46(1) of the Tribunal Rules. Furthermore, the first respondent submitted that it is entitled to fair administrative justice as anticipated in section 36 of the Promotion of Access to Information Act 2 of 2000 ("the Pai Act").

Section 53 of the Act, provides that:

"53. Right to participate in hearing

1) The following persons may participate in a hearing, in person or through a representative, or may put questions to witnesses and inspect any books, documents or items presented at the hearing;
    (a) If the hearings in terms of Part C –
        i) the Commissioner, or any person appointed by the Commissioner;
        ii) the *complainant*, if –
            (aa)the *complainant* referred the complaint to the Competition Tribunal; or
            (bb)in the opinion of the presiding member of

the Competition Tribunal, the *complainant's* interest is not adequately represented by another participant, and then only to the extent required for the *complainant's* interest to be adequately represented;

iii) the *respondent*; and

iv) any other person who has a *material interest* in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the *complainant's* interest to be adequately represented;

b) If the hearing is in terms of section 10 or Schedule 1-

(i) the applicant for an exemption;

(ii) the Competition Commission;

(iii) the appellant, if the appellant is not the applicant for an exemption;

(iv) an *interested person contemplated in section 10(8)* who submitted a representation to the Competition Commission, unless, in the opinion of the presiding member of the Competition Tribunal, that person's interest is adequately represented by another participant, but only to the extent required for the *person's interest* to be adequately represented; and

(v) the *Minister* or member of the Executive Council if consulted in terms of Schedule 1;

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 *recognized as a participant. (Own emphasis).*

Rule 42 of the Tribunal Rules stipulates that::

42. <u>Initiating other proceedings</u>

(1) Any proceedings not otherwise provided for in these Rules may be initiated only by filing a Notice of Motion in Form CT6 and supporting affidavit setting out the facts on which the application is based.

2) The applicant must serve a copy of the Notice of Motion and affidavit on each respondent named in the Notice within 5 business days after filing it.

3) A Notice of Motion in terms of this Rule must –

*(a)*indicate the basis of the application; or

(b) depending on the context –

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(iii) set out the Tribunal or Commission Rule in respect of which the applicant seeks condonation;

(iv) allege conduct referred to in –

(aa) section 59(1)(c) in respect of which the Commission seeks an administrative fine; or

(bb) section 60(1) in respect of which the Commission seeks an order of divestiture;

(c) indicate the order sought; and

(d) state the name and address of each person in respect of whom an order is sought.

Rule 46 of the Tribunal Rules also provides:

46. <u>Intervenors</u>

1) At any time that the initiating document is filed with the Tribunal, any person who has a *material interest* in the relevant matter may apply to intervene in the Tribunal proceedings by filing a notice of motion in form CT6, which must: -

(a) include a concise statement of the nature of the person's interest in the proceedings and the matters in respect of which the person will make representations; and

(b) be served on every other participant in the proceedings; (own emphasis).

Section 53 deals with three distinct circumstances in which a party may seek leave to participate in hearings. Section 53(1)(a) deals with hearings in terms of Part C of Chapter 5, that is, complaints against an alleged prohibited practice. Section 53(1)(b) deals with hearings in terms of Section 10 or Schedule 1, that is, application for exemptions from the application of Chapter 2 (Restrictive Practices) or exemption of professional rules. Section 53(1)(c) deals with merger hearings. (Chapter 3 Hearings). Section 53(1)(c) is the applicable or relevant sub-section in this matter.

In dealing with mergers, Section 53(1)(c)(v) makes no reference to interest, whether material or substantial. The reference to a person with a material interest is to be found in Section 53(1)(a)(iv) and Rule 46 of the Tribunal Rules. In Section 53(1)(b) the interested person must be as contemplated in Section 10(8). In other words, that interest is qualified or defined, by Section 10(8) which makes reference to a person with a "substantial financial interest."

Mr Gauntlett submitted that, whilst section 53(1)(c)(v) says nothing about interest, it does not mean that no interest at all is required for a party to be entitled to participate. In support of this submission, he contended that interventions and merger proceedings are hardly envisaged in terms of the Act. He also sought support from the common law test for standing; that is, for a party to intervene it must have a material interest in the proceedings.

I agree with Mr Gauntlett's submission with regard to the common law test for intervening in proceedings where the ground relied upon is an interest in the matter. Various authorities dealing with interventions under common law support the proposition that an intervening party must have a substantial and material interest in the subject matter of the litigation is the decisive criteria, and the granting of leave is discretionary. See Amalgamated Engineering Union v Minister of Labour 1949 (3) S.A. 637 (AD)at 659; Henri Viljoen (Pty) Ltd. v Awerbuch Brothers 1953(2) S.A.151(O); United Watch and Diamond Co. (Pty) Ltd. v Disa Hotels Limited 1972 (4) SA 409 (C) at 416; Wynne v Divisional Commissioner of Police and Others 1973 (2) SA 770 (E); Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In Re Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (TK) at 678 – 679 and Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape and Others 2000 (4) S.A. 681 (C) at 689 A).

However, these cases are distinguishable from this case. This Court cannot ignore the ordinary grammatical meaning of the provisions of section 53(1)(c)(v) of the Act and also the purpose of the Competition Act as set out in Section 1(2)(a) of the Act. (See Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd. 1990 (1) SA 925 (A) at 943C-944A and also Standard Bank Investment Corporation Ltd. v Competition Commission and Others 2000 (2) SA 797 (SCA) at 811I-812A.

The language of the statute is clear. There is no reference to interest at all. The mere requirement is that a party must be recognized by the Tribunal as a participant. The recognition could be on the basis of some other grounds, other than an interest in the matter as stipulated in the common law. Even if it were to be argued that the party must have an interest, such interest is not qualified. In other words, there is no threshold for the interest for a party to participate. In the absence of specified criteria for participation this court should be reluctant to read in a test such as "substantial and material interest". Where the legislature had sought to set out an express criteria for participation in the statute it had done so. For example, "material interest" is required in hearings in terms of Part C of Chapter 5 of the Act (see section 53(1)(a)(iv)) and a "substantial financial interest" is required in hearings in terms of Section 10 or Schedule 1 of the Act (see Section 53(1)(b)(iv) and Section 10(8)**)**. Clearly different criteria are set for participation in the different hearings. Yet no such qualifications appear in the case of Section 53(1)(c)(v).

Section 78 of the Act empowers the Minister of Trade and Industry ("the Minister"), by notice in the Gazette, to make regulations that are required to give effect to the purpose of the Act. Section 27(2) empowers the Minister to prescribe regulations for matters relating to the functions of the Tribunal, including manner and form of participation in the Tribunal procedures and other procedures.

On 1st February 2001, the Minister, in consultation with the Chairperson of the Tribunal, published the rules for the conduct of proceedings in the Tribunal. (see Government Notice No. 22025 in Government Gazette No. 428 dated 1st February 2001).

Mr Gauntlett submitted that Rule 42 is a general Rule which has nothing to do with the recognition of participants in merger proceedings, whilst Rule 46 is *lex specialis.* It deals with intervention and should be the applicable Rule. Rule 41 is analogous to Rule 18 of the Uniform Rules of Court (High Court Rules).

The respondents sought to rely upon Rule 42 and Rule 46 only in the alternative. The Tribunal was of the view that both Rules apply in this

matter.

It is common cause that Rule 42 does not specify criteria for the interest which must be there for one to be able to participate, whereas Rule 46 calls for a "material interest."

It is clear that Rule 46 sets out a higher threshold than the one which is required in terms of the Act for a party to be able to participate. The threshold is the common law test which is relied upon by the appellants.

I have some difficulties with the appellants' approach that Rule 46 is of application and that accordingly the test for intervention in the present dispute is the existence of material or substantial interest. Firstly, Rule 46 cannot introduce a threshold which the legislature never introduced in the Act. If Rule 46 is applicable in this case, the question arises as to its application in terms of the other sub-sections of Section 53(1) where a criteria has expressly been set for participation; for example, substantial financial interest in Section 53(1)(b) above. Furthermore, what if participation is being sought on the basis of "convenience"? Convenience has been recognized in our Courts as another ground on which joinder is competent. (See Rabinowitz and Another NNO v Ned-Equity Insurance Co. Limited and Another 1980 (3) S.A. 415 (W) at 419 D – F). Intervention is closely linked with joinder and is often treated as a particular facet of joinder (United Watch and Diamond Co. (Pty) Ltd. (Supra) at 415C).

In any event regulations (or Rules in this case) which have not been drafted by the legislature cannot be treated together with the Act as a single piece of legislation nor can these Regulations be employed as an aid to the interpretation of the Act. (See Moodley v Minister of Education and Culture, House of Delegates 1989 (3) SA 221 (AD) at 233 E – F). Thus, Rule 46 cannot be used to interpret the provisions of the Act and in particular, Section 53(1) and to restrict the express provision of Section 53(1)(c).

Furthermore,"manner", "form" and "procedures" of participation, referred to in Section 27(2) of the Act, do not include actual thresholds or grounds for participation.

Secondly, merger proceedings are not to be equated with ordinary litigation. Mr Gauntlett acknowledged that people do not participate in merger proceedings as litigants. There is no plaintiff and no defendant disputing competing rights and obligations, nor are the merging parties prosecuted. The Tribunal, for its part, does not act as an adjudicator between rivals. Large merger proceedings are not adversarial. The Tribunal's responsibility is to evaluate the merger in terms of section 12(A) of the Act.

The Tribunal (and the Commission where applicable) are the critical bodies enjoined to, regulate competition matters with the view to discouraging restrictive practices, abuse of dominance and controlling mergers and thus promote the purposes of the Act as set out in Section 2. In seeking to achieve this goal they might even institute their own investigation and call for their own evidence. In so doing, the Tribunal is not confined to submissions or evidence placed before it by the parties to the merger or people who have "an interest" in the merger. In particular, the various considerations which the Tribunal can take into account in assessing whether a merger is justified on public interest grounds in terms of Section 12A(3) make it clear that the Tribunal might admit persons beyond those persons or bodies who are directly or indirectly involved in the merger.

Thirdly, the shortcoming in the appellant's argument is best illustrated by the dictum in Henri Viljoen (Pty) Ltd. v Awerbuch Brothers (supra) 169 H :

> "The above authorities at least point in the same direction as the English cases referred to, namely, that "the direct interest" required by the Appellate Division decision must be an interest in the right which is the subject-matter of the litigation and is not

merely a *financial interest* which is only an indirect interest in such litigation."

Horwitz A J P went on to state at 170 H :

> "If I am correct in interpreting "direct and substantial interest" as used by the Appellate Division as a legal interest in the subject-matter of the litigation and as excluding an indirect, *commercial interest* only, then the order asked for could be granted without reference to Samba or any other buy-aid organization." (Own emphasis).

Clearly, the test propagated by the appellants is a test which is appropriate for litigation and it is not sufficient for the interest concerned to be merely a financial or commercial interest. This is contrary to the express provisions of the Competition Act where a substantial financial interest is the interest which, in certain circumstances, should be considered.

The requirement of "material and substantial interest" is manifestly the appropriate test for litigation matters because firstly, in litigation there may be an issue in dispute, which is not the case in mergers. The dispute may even be clearly defined and it may be easy for the Court to decide whether the applicant who seeks leave to intervene has an interest in the matter or not. Secondly, parties who are involved in litigation, would not want anybody to intervene and be party to the proceedings because by the very nature of litigation there are serious cost implications. Thus, a person cannot be party to litigation unless he has a material and substantial interest in the right, which is the subject matter of such proceedings. That is not the case with merger proceedings.

In the present dispute, the first respondent seeks the right to participate in the proceedings based on the provisions of the Act, which seems to set out criteria, which do not necessarily limit access to persons having a material or substantial interest in the matter. For example, it is apparent from the Act that the Minister or a trade union may be notified of a merger while they are not party to the merger proceedings. They may seek to participate even if they do not have a substantial and material interest, as contemplated in the cases referred to above. The purpose thereof is to ensure that the objectives of the Act are achieved.

In the light thereof, I cannot agree with appellants that the common law test for participation in merger proceedings is appropriate. There is no cogent reason for adopting a narrow approach as suggested by the appellants, to the issue of participation in merger proceedings.

Mr Nelson, who appeared together with Mr van Dorsten, for the first respondent, submitted that given the facts of this case, the uncertainty as to the precise nature of the test, that should be applied to determine the threshold for *locus standi* in large merger proceedings, is academic as the first respondent clearly has *locus standi* irrespective of which test is found to be applicable.

The first respondent has contended that it relies upon four grounds to seek the right to participate in these proceedings,being the first respondents statutory duties. Its involvement and current role in the industries in question, its role in the industry's future development; and its minority shareholding in the fourth appellant, Iscor Limited and Duferco Steel Processing (Pty) Limited.

I will firstly turn to deal with the first respondent's statutory duties. Mr Nelson submitted that because of its statutory duty, the first respondent has a direct interest in the merger proceedings. In this regard, he sought to rely upon the provisions of section 3 of the Industrial Development Corporation Act No. 22 of 1940, as amended

by Act 49 of 2001. Section 3 of the Industrial Development Corporation Act reads as follows:

"The objects of the Corporation shall be:

(a) with the approval of the Minister to establish and conduct any industrial undertaking;

(b) to facilitate, promote, guide and assist in the financing of-

(i) new industries and industrial, or ancillary or related economic, undertakings; and

(ii) schemes for the expansion, better organization and modernisation of and the more efficient carrying out of operations in existing industries and industrial, or ancillary or related economic, undertakings, to the end that the economic requirements of the Republic may be met and industrial development within the Republic, the Southern African region and the rest of Africa may be planned, expedited and conducted on sound business principles;

(c) to promote the economic empowerment of the historically disadvantaged communities and persons;

(d) to foster the development of small and medium enterprises and co-operatives;

(e) to promote employment-creating activities, particularly in underdeveloped areas;

(f) to leverage foreign direct investment in South Africa, the Southern African region and the rest of Africa through the use of its international network and presence;

(g) to encourage the creation of new knowledge-based industries and services and the establishment and growth of new technology-based firms; and

(h) to enhance corporate governance so as to achieve business excellence."

The first respondent has a responsibility to promote economic empowerment of previously disadvantaged people and to foster development of small and medium enterprises. The intention is to spread wealth so that it is not concentrated in the hands of a few South Africans.

The preamble to the Act recognizes that past laws and practices in South Africa resulted in, inter alia, excessive concentrations of ownership and control within the national economy and unjust restrictions on full and free participation in the economy by all South Africans. It also recognizes the need for the economy to be open to greater ownership by a greater number of South Africans.

In section 1 of the Competition Act, the purpose of the Act is stipulated as *"to promote and maintain competition in the Republic in order:*

a) to promote the efficiency, adaptability and development of the economy;

b) to provide consumers with competitive prices and product choices;

c) to promote employment and advance the social and economic quality of South Africans;

d) to expand opportunities for South African

participation in the world markets and recognize the role of foreign competition in the Republic;

e) *to ensure that small and medium size enterprises have an equitable opportunity to participate in the economy; and*

f) *to promote wide spread of ownership, in particular to increase the ownership stakes of the historically disadvantaged persons."*

The purpose of the Act as set out in section 2(f) is unique to the South African Competition regime. Such an objective is contained in neither the United States of America Anti-trust laws nor the European Union Competition Laws. This objective seeks to incorporate in Competition Act the constitutional principles as contained in the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution").

Section 9(2) of the Constitution recognizes that it might be necessary for legislation and other measures to be adopted to protect or advance persons or categories of persons, disadvantaged by unfair discrimination. Whilst the Competition Act is not such legislation, this provision seeks to recognize that there might be a need for corrective measures to be implemented to rectify previous discrimination or disadvantage, which was suffered by some of the people of South Africa. The discrimination or disadvantage includes financial subordination.

Accordingly, the preamble and the provision of Section 2(f) of the Act, which is a unique South African provision, falls within the spirit of the Constitution. In turn the objects of the first respondent as set out in Section 3 of the Industrial Development Corporation Act, are within the same spirit.

In considering whether a person may participate or not, the constitutional provisions as well as the provisions of the Competition

Act, should not be overlooked, particularly insofar as the mischief they seek to remedy, the people they seek to protect and the objects of the Act. Hence the scope of the South African Competition regime has been widened, beyond traditional anti-trust concerns.

It is clear, that insofar as the objects relate to the advancement of the previously disadvantaged people and the development of small and medium enterprises are concerned, the Industrial Development Corporation Act and the Commission Act have a number of similarities. They seek to achieve similar objectives.

In the circumstances, I agree with Mr Nelson's submissions that the statutory provisions of the Industrial Development Corporation Act give the first respondent a direct interest in this merger, which in turn affords it the necessary standing to participate in these proceedings. (See Grove Primary School v Minister of Education and Others 1997 (4) SA 982(C) at 996).

Mr Gauntlett submitted that the first respondent in this matter cannot seek to participate in the proceedings on public interest grounds because in terms of the Act it is the Minister of Trade and Industry who is empowered to intervene on public interest grounds.

Section 18 of the Act stipulates that, in order to make representations on any public interest grounds referred to in section 12A(3), the Minister may participate as a party in any intermediate or large merger proceedings before the Commission, Tribunal or the Competition Appeal Court in the prescribed manner.

Section 12A(3) provides that:

> "When determining whether a merger can or cannot be justified on public interest grounds the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on :
>
> a) particular industrial sector origin;

b) employment;
c) the ability of small business of firms controlled or owned by historically disadvantaged persons to become competitive; and
d) the ability of national industries to compete in the international markets."

Section 18 read together with section 12A(3) of the Act sets out the basis upon which the Minister may intervene on public interest grounds. However, the Act does not exclude any other party from intervening on public interest grounds. Furthermore, the interest which may be protected by the first respondent is not necessarily the same as that which the Minister may seek to protect on the basis of his intervention on public interest grounds. What if the Minister of Minerals and Energy Affairs had sought to participate on public interest grounds? Should she be refused leave even though mining falls directly under her Portfolio? A refusal per se could never have been the intention of the legislature. She may, in fact, shed light on some of the factors to be considered in terms of Section 12A(3) above.

Mr Nelson also emphasized that the first respondent had in its possession a report prepared by National Economic Research Associates (NERA) of London, regarding the proposed mergers between the appellants which complains that Lexecon, the appellant's consultants, presented insufficient economic evidence to rebut the presumption of anti-competitive effects arising from merger to monopoly and the serious danger of vertical foreclosure in the steel market arising from the iron ore monopoly created. Furthermore, it complained about the flaws in the Lexecon reasoning and evidence. In his view this report represented the kind of evidence that would be of value to the Tribunal in its deliberations.

Mr Gauntlett also argued that the first respondent is a self financing national development finance institution, which focuses on

contributing to economic growth, industry growth and economic empowerment through its financing activities. Furthermore, there was nothing that fundamentally distinguished the first respondent from other financial institutions such as banks or property organizations, which traditionally amass shareholdings in various companies in exchange for financial assistance.

This submission fails to recognize the role of the first respondent after the amendment of Section 3 of the Industrial Development Corporation Act in which additional objectives as set out in, inter alia, sub-sections (c) to (e) above were incorporated.

It is clear that by way of this amendment, the legislature sought to extend the ambit, duties and scope of the Industrial Development Corporation to include the "promotion" of black economic empowerment in the country and this is, amongst others, the very reason why the first respondent seeks to participate, namely to ensure the meaningful participation by the historically disadvantaged persons in the mining sector.

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 – 372B). If one considers the provisions of section 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.

For the reasons set out above, I am of the view that there is clear justification based on the Section, the functions of first respondent and the nature of the particular merger for the Tribunal to have so exercised its discretion in favour of the first respondent.

In short, the Tribunal has acted judicially when it exercised its discretion in favour of allowing a party who is in a position to show that the party's participation would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act.

THE SCOPE OF PARTICIPATION

Mr Gauntlett submitted that the appellants fully recognize the inquisitorial focus of the Tribunal's process. In this regard, they did not object to the submission to the Tribunal by the first respondent or any other person of material, which may assist the Tribunal in its investigation. They also did not object, within limits of materiality, to witnesses being tendered to the Tribunal to assist in its investigation.

Mr Nelson, submitted that the first respondent seeks a right to intervene so that it could call witnesses, to cross-examine and to adduce argument.

Whilst there is a difference in nature of the proceedings before the Tribunal and those before a Court, there is, in my view, no basis in law to refuse the first respondent the right to cross-examine witnesses and inspect documents presented at the hearing once the first respondent has been given the right to participate in the proceedings. Indeed, Section 53(1) envisages such a process.

The only issue remaining for this Court to decide is the issue of access to confidential documents, which have been tendered to the Tribunal or the Commission and the calling of respondents' witnesses.

Whilst the proceedings in the Tribunal are inquisitorial, it does not mean that the Tribunal would not benefit from the assistance from a party in adducing evidence, cross-examining witnesses and calling witnesses. The main focus of the hearing before the Tribunal is the truth finding process. The appellants have submitted that they have no objection within limits of materiality, to witnesses being called by the first respondent.

The appellants have also taken issue with the fact that the first respondent was given an order to participate as a party in the merger proceedings in respect of all factors that the Tribunal must take into account in terms of Section 12A(2) of the Act and those factors to be considered in terms Section 12A(3) of the Act.

The appellants have submitted that the first respondent has disclosed no interest in relation to the relevant market which is referred to in the draft order it sought. The relevant market is the market in which the four companies who seek to merge are involved, namely, zinc, manganese and iron ore. Mr Unterhalter submitted that the first respondent has shown absolutely no interest in the zinc and manganese market, except for the limited interest it shows through shareholding in Iscor.

The first respondent sought leave to intervene because of its concerns with the anti-competitive effects of the two larger mergers. Similarly, the NERA Report raises the same concerns. There is no reference to any one section or exclusion of any one sector in the concerns about the anti-competitive effects of the mergers.

Furthermore, the purpose of the participation in the hearings is to assist the Tribunal in its investigation. The Tribunal will consider all the factors listed in Section 12A(2) and 12A(3) of the Act. If that is the case, then I cannot see any logic in this Court limiting the basis upon which the first respondent may participate. It is for the Tribunal to decide as it deems fit. It is within the Tribunal's discretion.

In the founding affidavit of Mr N A M Tshivhase, who is the general counsel of the first respondent, he averred that the first respondent sought an order to intervene in accordance with the order which was annexed to the papers marked "NAMC".

The order which was sought by the First Respondent as referred to in annexure "NAMC", aimed at regulating the scope of the first respondent's participation in the proceedings and also the manner in which the first respondent would gain access to confidential documents.

However, there were problems with the order sought insofar as it sought to give the first respondent and its experts a blanket permission or access to confidential information. At the Tribunal hearing, it abandoned the request that its experts be afforded access to confidential information, and rightly so. This Court has previously had an opportunity to decide on the procedure in Section 45 application for access to confidential documents in the matter of Competition Commission of S.A. v Unilever (Pty) Ltd. and Others (Case No. 13/CAC/Jan 02).

This court does not see any reason why it should deviate from the procedure set out in the abovementioned matter and restrict access to the confidential information as it had previously done, save that the access to such information should be by the legal representatives.

In view of the conclusion I have reached herein, I will not deal with the other submissions which were made by the First Respondent's counsel in this matter.

ORDER:

Accordingly, the Order which this court will grant is that :

1. The appeal is dismissed;
2. The first respondent is recognized as a participant and is permitted to participate in the hearing in respect of the factors that the Competition Tribunal must take into account in terms of section 12A(2) of the Act read with Section 12A(1)(a)(i) and in terms of Section 12(A)(3);
3. The first respondent's participation shall be in respect of the iron

ore, manganese and zinc markets (the “relevant markets”);

4. The first respondent or its legal representatives shall be:

4.1 permitted to introduce the expert evidence of:

4.1.1 NERA; AND

4.1.2 Ms Trudi Hartzenberg.

4.1.3 in relation to the matters alluded to in 2 and 3 above;

4.2 required to provide the representatives of merging parties with copies of any documents upon which it intends to rely fourteen (14) days before the date of hearings;

4.3 permitted to ask questions of witnesses, after the witnesses of the merging parties or the Competition Commission have been led and/or questioned by the parties, the Competition Commission and the Competition Tribunal, but only to the extent that such questions relate to the matters in respect of which the first respondent may participate;

4.4 be permitted to inspect non-confidential documents contained in the hearing record;

4.5 be permitted to inspect confidential documents contained in the hearing record, to the extent that they relate to matters in respect of which the first respondent may participate, provided that such documents, be confined to the first respondent’s attorney and counsel and who must provide reasonable undertakings to protect such information;

4.6 be permitted to present oral and written argument in relation to the matters in respect of which the first respondent may participate.

5. The appellants are ordered to pay the costs of this appeal, such costs to include the cost of two Counsel.

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JALI J A

DAVIS J P and SELIKOWITZ J A concurred.

DATE OF HEARING	:	15TH FEBRUARY 2003
DATE OF JUDGMENT	:	28th MARCH 2003
COUNSEL FOR APPELLANTS	:	ADVOCATE J GAUNTLETT S C ADVOCATE UNTERHALTER S C ADVOCATE E FAGAN ADVOCATE A GOTZ
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COUNSEL FOR		

FIRST RESPONDENT:		ADV A J NELSON S C ADV J L VAN DORSTEN
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COUNSEL FOR SECOND RESPONDENT;		NO APPEARANCE.