IN THE COMPETITION APPEAL COURT

Case No. 44/CAC/Feb05

In the matter between:

COMMUNITY HEALTHCARE HOLDINGS (PTY) LTD	**First Appellant**
CORNUCOPIA (PTY) LTD	**Second Appellant**
And	
THE COMPETITION TRIBUNAL	**First Respondent**
THE COMPETITION COMMISSION	**Second Respondent**
BUSINESS VENTURE INVESTMENTS NO.790 (PTY) LTD.	**Third Respondent**
AFROX HEALTHCARE LIMITED	**Fourth Respondent**
BRIMSTONE INVESTMENTS CORPORATION LIMITED	**Fifth Respondent**
MVELAPHANDA STRATEGIC INVESTMENTS (PTY) LTD	**Sixth Respondent**
AFRICAN OXYGEN LIMITED	**Seventh Respondent**
THE MINISTER OF TRADE AND INDUSTRY	**Eighth Respondent**

JUDGMENT

DAVIS JP

Introduction.

[1] On 8 February 2005 the Competition Tribunal ('the Tribunal') dismissed applications that were brought by the first and second appellants in terms of the provisions of section 53(1)(c)(v) of the Competition Act No. 89 of 1998 ('the Act') for leave to be recognized as participants in a merger between the third and fourth respondents ('the merger').

[2] On the same day the Tribunal refused an application brought by appellants to postpone the hearing of the merger pending the determination of an appeal and or review against the Tribunal's decision in the intervention application. On 2 March 2005 the Tribunal approved the merger subject to certain conditions.

[3] On 21 February 2005 appellants noted an appeal against the decision of the Tribunal to refuse the intervention application. On 28 February 2005 appellants filed an application to review the decision of the Tribunal in the intervention application and in the postponement application. On 3 March 2005 appellants filed an application to review the Tribunal's decision to approve the merger.

[4] Appellants then made strenuous efforts for an expedited hearing before this Court on the basis of urgency. Upon consideration, the Judge President I came to the view that the appeal that had been launched on 18 February 2005 could be set down for hearing on 23 March 2005.

[5] When the further review applications were received by the Registrar of this Court on 3 March 2005, a letter was sent on 10 March 2005 to the parties in which the Registrar stated the following:

'The parties have indicated to the Registrar that it made sense to hear the remaining two review applications at the same time as the appeal set down for 23 March 2005. The Registrar has conveyed to the parties the direction from the Judge President that the court will only hear matters if parties submissions to the court, by agreement between them, are made timeously and the matter was ripe for hearing; else each application would run its course until it is ripe for hearing Further directions from the Judge-President are that the court will only hear the review application on 23 March 2005 if it receives a complete record and the appellants' heads of argument by Monday 14 March 2005; and respondents' heads of argument by Wednesday 16 March 2005. The court will not accept any further submissions from the parties beyond these dates.'

[6] On 18 March 2005 appellants served a notice for a consolidation of the appeal against the Tribunal's decision, as well as the two review appellants. Notwithstanding competing versions of events leading up to and subsequent to this consolidation application by the appellants and third to seventh respondents, it was common cause that there had been no proper compliance as to instructions contained in the Registrar's letter of 11 March 2005.

[7] The court was in no position to hear the two review applications on 23 March 2005. Mr Nelson, who appeared together with Mr Coetzee on behalf of appellants, contended that, given the clear overlapping of issues in the appeal and review applications, it was necessary to postpone the entire hearing for the various proceedings be properly consolidated and heard on an appropriate day. Mr Subel, who appeared on behalf of third to seventh respondents submitted that, although there was some overlap between the applications to review the Tribunal's decision to refuse the intervention application, and the appeal the latter was ripe for hearing. Appellants had been intent on providing an expedited hearing, initially in respect of the appeal alone. The instructions of the court with regard to the timetable had been known to the parties well in advance of the consolidated application. In his view, a consolidation of the application would not avoid a multiplicity of applications. In addition, a postponement would have important consequences for costs.

[8] After consideration of the arguments placed before this court by counsel, the court decided to hear the appeal separately and accordingly argument then proceeded in respect of the merits of the appeal alone.

The Tribunal's Reasoning.

[9] In dismissing the application for intervention, the Tribunal considered the three essential grounds upon which appellants based their case for intervention. Appellants submitted that

the proceedings before the Tribunal were essentially a continuation of an earlier merger proceeding, which hearing had commenced on 14 July 2004.

[10] At this hearing the Tribunal was enjoined to consider a large merger filed in terms of which a consortium of firms purchased the entire share capital are third respondent. Appellants had been recognized as intervenors in these proceedings. In these proceedings, the main issue for the intervenors appeared to be the role of Medi Clinic, which was a major competitor of third respondent and along with Nedcare, was one of the three major hospital groups in the country. In this transaction Medi Clinic was to hold a twenty five per cent. shareholding in Bidco, the purchaser of third respondent. Medi Clinic will be responsible for much of the financial risk in the transaction. Medi Clinic had entered into a related transaction with Bidco, in terms of which the latter agreed to sell 2500 of third respondent's beds to it. These proceedings were adjourned in August 2004.

During the period of adjournment various negotiations ensued. Eventually the relevant parties decide to reconstitute the shareholding in Bidco. Of particular significance was the removal of Medi Clinic as a shareholder in Bidco.

[11] The changes in the transaction notwithstanding, appellants contended that these proceedings were not fresh proceedings but a continuation of the earlier proceeding. The earlier proceeding had never been withdrawn and in terms thereof appellants had been admitted as intervenors.

[12] The Tribunal rejected this argument and found that there had been a new filing of a merger transaction, a fresh fee of R250 000 had been paid, and a new case number had been assigned to the matter. The Competition Commissioner investigated the filing and prepared a new recommendation for the Tribunal. The Tribunal held that the present filings were not a continuation of the prior merger and accordingly the appellants were required to apply afresh for intervention.

[13] The second ground from which appellants based their argument was a related submission, namely that, in respect of the first appellant, the proceedings were but a sequel to the prior proceedings. To this argument the Tribunal said 'The fact that the current proceedings have a history in the prior proceedings does not obviate the need for the first appellant to make out a case for intervention in terms of section 53(1)(c)(v). It would appear that it is precisely because the applicant's case for intervention is so weak that they have relied on the first applicant's alleged inherited right as laid out in these first two grounds for intervention'.

[14] The appellants argued, as a third ground for intervention, that they were entitled to be recognized as participants in terms of section 53(1)(c)(v) of the Act.

[15] Section 53(1)(c)(v) provides '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 –

(v) any other person whom the Tribunal recognized as a participant.

[16] After analyzing the case made out by appellants, the Tribunal in exercising its discretion to refuse intervention, concluded:

> 'The applicants have not made out a case why they should be recognized as participants. If we were to recognize them it would not be on the basis that they would prove of assistance but only that per chance they might discover some gem that has thus far eluded all others. This is not a sufficient basis to allow the application especially when weighed against the prejudice to the respondents who on the eve of their hearing have an expectation that it will proceed'.

Appellants' Case.

[17] Mr Nelson submitted that the Tribunal had ignored the history of the matter in the manner in which it exercised the discretion to recognize participants in terms of section 53(1)(c)(v) of the Act. In support of his submission that the prior proceedings and the present proceedings could not be separated into discrete transactions, Mr Nelson referred to Rule 34 of the Competition Commission Rules which provides 'The primary acquiring firm may notify the Commission in Form CC6 that it has abandoned the intended merger transaction and has no intention to implement it.'

Mr Nelson submitted that no evidence was placed before the Tribunal concerning the alleged withdrawal of the prior pleadings. There was also no evidence that a notice had ever been filed in terms of Form CT8. There was thus no basis from which the Tribunal could have found that the 'prior proceedings had been abandoned and with them any right of participation'.

[18] Mr Nelson then proceeded to attack the reasoning employed by the Tribunal in refusing to recognize appellants in terms of section 53(1)(c)(v) of the Act. He referred to the manner in which the Tribunal had interpreted this section in the light of Rule 46 of the Tribunal Rules and in particular Rule 46(1) which provides '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' (my emphasis).

[19] Mr Nelson submitted that the Tribunal should have held that Rule 46 cannot be employed to interpret or limit the clear wording of section 53(1)(c)(v) of the Act which does not require that a person, seeking the right to participate in large merger proceedings, must show 'a material interest in a relevant matter'. In this regard Mr Nelson referred to the judgment of **Jali JA** in **Anglo SA Capital (Pty) Ltd. Industrial Development Corporation of South Africa and Another** 2004 (6) SA 196(CAC) at 16: 'The language of the statute is clear. There is no reference to interest at all. The mere requirement is that the 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 express criteria for participation in the statute it had done so'.

[20] Mr Nelson contended that the overriding concern in the present case was whether a large merger could be justified on substantial public interest grounds. The Tribunal accordingly had to use every resource at its disposal to ensure that it arrived at an informed decision on this critical issue. In his view, appellants could have brought a unique and distinct prospective' to the proceedings in that, as black empowered businesses, appellants could

have provided the Tribunal with evidence which would have contributed to informed decision regarding the substantial public interest grounds in the present case. Accordingly, the Tribunal had failed to exercise a proper discretion in considering the basis for intervention by applicant.

Evaluation.

[21] **The Nature of the Proceedings.**

Mr Subel contended that appellant's arguments that the original merger filing endured and that they were already participants in the proceedings was in direct conflict with the uncontested evidence placed before this Court. In an answering affidavit on behalf of third to seventh respondent. Mr Hogben, the managing director of seventh respondent stated:

> 'The Commission adopted the view that the restructuring of the proposed transaction resulted in a new merger for competition law purposes. Without conceding the correctness of this view, the merging parties prepared a complete merger file in respect of the new arrangements….The new filing was lodged with the Commission on 11 December 2004. The second merger filing fee in the amount of R250 000 (+ VAT) was paid by the merging parties to the Commission. A new case number…. was allocated to the matter. When the Commission made its recommendation to the Tribunal on 20 January 2005 the Tribunal similarly allocated a new case number…to the matter.'

[22] Mr Hogben then continues:

> 'I am advised that, during its investigation of the new filing the Commission contacted the deponent to the applicants' founding affidavit to enquire whether he wished to make submissions regarding the new filing. Save for a request for access to the merger filing (which was denied on the basis that it comprised "restricted information" in terms of the Competition Act and its Rules) neither the deponent nor any other representative of either of the applicants availed himself or herself of the

opportunity too make submissions to the Commission as regards the new filing'.

[23] These averments remained uncontested. As Mr Subel correctly observed, the definition of party to a merger in section 1(1)(xviii) and acquiring firm in section 1(1)(i) of the Act required that there be a new filing, having regard to the change in the composition of the shareholders of Bidco. Respondents' evidence, which was uncontested by appellants, revealed that both, in terms of legal form and substance, a new application had been made to the Competition authorities based upon a significantly different shareholding in Bidco. There was no evidential basis for the submissions of appellants that the second proceedings were not a continuation of the first proceedings or that appellants were in any way led to believe by way of the conduct of the Tribunal that they had an expectation to be admitted (or remain) as intervenors in the new proceedings.

The Application of Section 53(1)(c)(v).

[24] The evaluation of appellants contentions with regard to the application of s 53(1)(c)(v) requires an examination of the section as well as the judgment which analysed the scope thereof, namely **Anglo SA**, supra. In his judgment in **Anglo SA Capital, supra** at 17, **Jali JA** said

> '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….In any event regulations or (rules in this case) which have 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….Thus, rule 46 cannot be used to interpret provisions of the Act and in particular, section 53(1) and to restrict express provision of section 53(1)(c)'.

[25] The Court held that the discretion given to the Tribunal in terms of section 53(1)(c)(v) could not be restricted to a decision as to whether an applicant had "a material interest' in the matter. The Court did not restrict its analysis to this point. It held further that the

granting of leave to a party to participate might be discretionary but that such discretion could not be unfettered. It had to be exercised in a judicial manner (at 21).

[26] In giving guidance to the Tribunal and the exercise of its discretion, the Court said the following:

> 'The Tribunal (and the Commission where applicable) are the critical bodies enjoined to regulate competition matters with a view to discouraging restrictive practices, abusive 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 consideration which the Tribunal can take into account in assessing whether a merger is justified on public interest grounds in terms of section 12 A (3) make it clear that the Tribunal might admit persons beyond those persons or bodies who are directly or indirectly involved in the merger'. at 17-18.

[27] In applying these considerations to the application by the **Industrial Development Corporation** to be admitted as an intervenor, the Court said

> '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 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 although they are not party to the merger proceedings. They may seek to participate even if they do not have a substantial material interest contemplated in the cases referred to above The purpose thereof is to ensure that the objectives of the Act are achieved'. at 18.

[28] The approach adopted by this Court in **Anglo SA** , supra can be summarized thus:

28.1. The requirement of material and substantial interest, which is manifestly the appropriate test for ordinary litigation, was too restrictive a test to be applied by the Tribunal in the exercise of its discretion in terms of section 53(1)(c)(v).

28.2 A party who is able to ensure a material and substantial interest would fall within the class of parties who may be admitted upon the exercise of their judicial discretion by the Tribunal.

28.3 A party who is unable to show a material substantial interest in the matter may well be admitted if it is able to provide evidence of its ability to assist the Tribunal in the latter's consideration of the application of the various purposes of the Act as contained in section 1 thereof to the relevant merger transaction.

[29] Significantly in both the **Anglo SA**, supra case as well as the decision of the Tribunal in **Healthbridge (Pty) Ltd**. v **Digital Health Care Solutions (Pty) Ltd**: in re **Digital Health Care Solutions (Pty) Ltd v Competition Commission and Another** 2003 [1] CTLR 187(CT)] at 192-193, the applicants for intervention set out in their founding affidavits the matters upon which they sought to make representations. They identified their interests and specified the scope and nature of their proposed participation. In **Anglo SA**, supra case, the applicant for intervention provided a report by expert economists aimed at disputing certain views expressed in an economists report furnished on behalf of the merging parties. The intervening applicants sought to highlight material inadequacies in this report.

[30] By contrast, in the present case, appellants failed to provide the Tribunal or this Court with any details as to the contribution it might make to proceedings before the Tribunal, were they to have been admitted as intervenors. In the founding affidavit deposed on behalf of appellants by Mr Dewald Dempers, chief executive officer of first appellant, he states with regard to first appellant that it was incorporated in 2000 as a subsidiary of Community Investment Holdings and that it is a significant black owned health care provider in the private hospital market. He then states that 'one of its guiding principles is to establish the biggest active operating BEE companies (sic) in the healthcare sector and therefore it is seeking to expand its infrastructure in the South African Healthcare arena.'.

[31] Mr Dempers averred that first appellant 'has a valuable perspective to present to the Tribunal being both a small participant in the private hospital market in South Africa as well as being a BEE participant in the market. Community Health Care therefore has a direct interest in the merger which, in its view amounts to the acquisition by another BEE entrant

with no prior expertise in the hospital industry of a shareholding in another of its competitors'. Turning to second applicant Mr Dempers stated that 'To the extent that it is also a shareholder within the healthcare industry [second appellant] shares the identical concerns with those of the First Applicant but as a shareholder, has certain further defined concerns which have been addressed by both to the First Respondent and to the attorneys who represent all the other Respondents…'

[32] An examination of the case made out by appellants reveals the following:

32.1. Appellants concrete concerns with the proposed merger, were set out in a letter of 12 March 2004 by Mr A Norton, acting on behalf of appellants. Indeed Mr Dempers claims that this letter summarized the 'preliminary concerns' of first appellant. An examination of this letter reveals that each and every concern specified therein is based on a transaction in which Medi-Clinic would participate as a shareholder in Bidco. As already noted, the restructured agreement provided for the acquisition by respondents from Medi-Clinic of all the shares in Bidco previously earmarked for Medi-Clinic with effect from 30 November 2004. Accordingly Medi-Clinic would not be a shareholder in Bidco. Thus, the basis, upon which the concerns set out in the letter of 12 March 2004 were predicated, were no longer relevant to appellants, application for intervention in the proceedings.

32.2. Mr Dempers asserts that the second appellant which was a quoted company was also a shareholder within the Health Care industry, that it shared the identical concerns with those of first appellant but 'as a shareholder, has certain further defined concerns.' An examination of the letter addressed to the first appellant and to the attorneys who represent respondents reveals no further indication as to what case second appellant sought to put before the Tribunal.

32.3 The Tribunal found appellants' papers wanting, in that no information was provided to the

Tribunal as to what contribution appellants could make to the proceedings. The Tribunal found the founding affidavit to be vague and the replying affidavit quite unsatisfactory, in that 'it did nothing to address the serious criticisms raised by the respondents in their answering affidavit'

32.4 Significantly, the Tribunal afforded Mr Dempers an opportunity to testify at the hearing. After an evaluation thereof, it concluded 'Mr Dempers' evidence in no way bolstered the application; rather it demonstrated that when sweeping claims were probed the applicants can offer no more than speculation'. The following passage of Mr Dempers own evidence is instructive. Mr Dempers was asked by Mr Subel, acting on behalf of the respondents 'And when you say that you have serious concerns that this would give rise to substantial prevention and lessening of competition in the market, in what way?' He replied 'the statement that I have just made, our concerns have been shown in the previous Tribunal hearing. That's why your clients have gone and re-engineered and restructured this whole transaction. (sic) But at this stage I still believe that it is exactly the same strategy as what was on the table during the course of the previous proceedings'.

32.5 Mr Dempers was then pressed further by Mr Subel to be more specific. He stated 'I would like to know and see what the terms and arrangements are as far as those rights are concerned. Because if those rights entitles the role players at the top structure of First Rand Bank to have a significant influence over the business of Bidco, the same players have got a significant influence over the business of Medi-Clinic. It lays the ground for possible working together'. Mr Subel then asked: 'Really what this is about is you want access to information so that you can personally access whether there is or isn't a threat to competition, to which Mr Dempers replied 'I would like access to information (sic) to be able to determine whether this transaction is going to influence us in a negative way, the way it could possibly do going forward. Yes, you are 100% correct.'

[33] Although invited to specify what contribution appellants could make to the proceedings, Mr Dempers' testimony before the Tribunal provided no indication as to how appellants sought to assist the Tribunal in discharging its statutory duties. Mr Dempers was also not able to provide evidence of any substantial material interest which the appellants might have had in the proceedings, which were designed with the objective of assessing whether the merger would substantially prevent or lessen competition. Rather, Mr Dempers conceded that the entire motivation for appellants application to intervene was to protect their own commercial interests. Mr Dempers said so specifically: 'Yes so my first consideration is definitely the competitiveness and the future of our organization and not necessarily the macro economics at play'.

[34] For these reasons, the Tribunal was correct to conclude that the set of considerations presented by appellants as the basis for their application were not concerns which represented a genuine interest in terms of the objectives of the Competition Act. Assertions about the first appellants own commercial interest were insufficient to bring the application within the scope of s 53(1)(c)(v) of the Act. Nowhere in the papers did appellants provide any indication of evidence it could or would lead before the Tribunal.

Conclusion.

[35] When appellants case is carefully analysed, it amounts to the following:

1. They wished to protect their own commercial interest, notwithstanding that there was no indication on their papers as to how the merger would affect any of the objectives sought to be promoted in terms of the Act.

2. Appellants sought to contend that as, black economic empowerment companies, they could make a contribution to the Tribunal's deliberations. Notwithstanding countless invitations made for them to elucidate thereon, they were unable to specify on what basis such a contribution could be made nor the content thereof.

[36] In my view, given the skeletal nature of their justification for intervention, the Tribunal was more than justified in refusing the application. In coming to this conclusion it carefully evaluated the evidence set out above and exercised its discretion in a judicial manner.

[37] There is a further matter with which I need to deal. On 29 March, 2005, 5 days after the hearing, a replying affidavit deposed to by Ms Lisa Campbell was received. It is a prolix document and whether it deserves consideration, having been filed in so extraordinary circumstances is doubtful. Suffice to say it seeks to justify appellants conduct in persisting with the consolidation application. The short response is that nowhere is a satisfactory reason given for why the appellants acted in a manner clearly contrary to the Registrar's letter of 11 March 2005. The dispute about whether the Registrar's letter was of 10 or 11 March 2005 plainly being irrelevant. Much of Ms Campbell's affidavit turns on allegations that third to seventh respondents were uncooperative. The point however, is that directions were given to the parties by the Registrar on behalf of the Judge President. There is an unacceptable practice among some who appear in this Court to treat these directions in a rather cavalier fashion. Private dealings which seek to circumvent directions are unacceptable and cannot be counternanced.

[38] For these reasons, the application is dismissed with costs, including the costs of two counsel where two counsel were employed.

[39] Given the finding of this Court that the consolidation application was brought prematurely and in violation of the specific instructions of the Registrar in terms of the letter 11 March 2005, the consolidation application is dismissed with costs which are to be paid by the applicants on an attorney and client scale, including the costs of two counsel where two counsel were employed.

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DAVIS J.P.

JALI J A & MALAN AJA concurred

Counsel for Appellants: AJ Nelson SC and RM Pearse

Instructed by: Rothbart Inc

Counsel for 3rd to 7th Respondents: A subel SC and Allan Coetzee
Instructed by: Edward Nathan