IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2589/11

In the matter between:

NGWANE MILLS (PTY) LTD **Applicant**

and

SWAZILAND COMPETITION COMMISSION **First Respondent**

THABISILE LANGA (nominee officio) **Second Respondent**

PREMIER SWAZI BAKERIES (PTY) LTD **Third Respondent**

SWAZILAND UNITED BAKERIES LIMITED **Fourth Respondent**

SINKHWA SEMASWATI LIMITED

T/A MISTER BREAD **Fifth Respondent**

Neutral citation: *Ngwane Mills (Pty) Ltd v Swaziland Competition Commission & Others* (2589/11) [2012] SZHC 2 (*10 February 2012*)

Coram: **MAPHALALA PJ**

Heard: **16 JANUARY 2012**

Delivered: **10 FEBRUARY 2012**

Summary: **Applicant filed an urgent Application – seeking that decision taken by First Respondent to conditionally approve a merger**

between Third to Fifth Respondents be stayed pending finalization of Applicant's appeal – Application fails – Applicant to pay costs including costs of Senior Counsel.

The Application

[1] On the 12 December, 2011 the Applicant filed before this court an Application under a Certificate of Urgency against the Respondents for an order in the following terms:

> "1. That the normal Rules pertaining to the bringing and enrolment of applications be dispensed with and that this application be disposed of an urgent basis in terms of the provisions of Rules 6 (12) (a) and (b) of the Rules of the above Honourable Court.
>
> 2. The implementation of the decision made by the first Respondent on 25 October 2011 and published in the Swazi Observer newspaper on 7 December 2011, be stayed pending the finalization of the Applicant's appeal.
>
> 3. That prayer 2 be operative with immediate effect, pending the return day.
>
> 4. The first to fifth Respondents be called upon to show cause on Friday, 20 January 2012, why the decision of the first Respondent, made on 25 October 2011, and published on 7 December 2011, should not be stayed pending the finalization of the Applicant's appeal and in the event of opposition, why such opposing party should not be ordered to pay the costs of this Application.

5. Costs of application, *alternatively*, the costs of this Application be costs in the appeal.

6. Further and/or alternative relief."

[2] The founding affidavit of one William McConville who is the Managing Director of the Applicant has been filed together with pertinent annexures.

[3] The Respondents oppose the granting of the above orders and have filed Answering Affidavits to this effect together with annexures.

[4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this court.

[5] I must mention for the record that by a Court Order dated 14 December, 2011, the parties were agreed as to the dates for filing of answering and replying papers, and the matter was assigned for hearing on the 16 January, 2012.

[6] Indeed on the 16 January, 1962 the matter was called where Applicant was represented by Senior Counsel D. Smith. The 1st and 2nd Respondents were represented by Mr. M. Magagula from Hlophe and Magagula and Associates. The 3rd to 5th Respondents were represented by Senior Counsel David Unterhalter instructed by Robinson Bertram's attorneys.

[7] At the commencement of the arguments of the parties Respondents' Counsel wished to argue points *in limine* from the bar. A tit-for-tat between the parties then ensured as to the proper procedure to be followed. I however, allowed Respondents to make submissions on the points *in limine* which took the whole morning. The rest of the afternoon Counsel for the Applicant advanced his arguments against the points *in limine*. During the course of the arguments of the Applicant against the points *in limine* it emerged that Counsel for the 3rd to 5th Respondents could not be available the following day on account of a prior engagement.

[8] All the legal representatives agreed that the court only hears the arguments on the points *in limine* which the Respondents were of the view would dispose off the matter once and for all. However, that remains to be seen.

[9] The points *in limine* are two fold firstly that the court has no jurisdiction to hear the matter and secondly that Applicant has no *locus standi in judicio* to make this Application.

The background

[10] On 6 October 2011, the merging parties' attorneys of record filed an Application under section 35(1) of the Competition Act No.8 of 2002 ("*The Competition Act"*) in respect of a transaction whereby Premier Ground (Pty) Ltd (*"Premier"*) a South African company, acquired the assets and liabilities of the Fourth and Fifth Respondents as growing concerns.

[11] The Fourth Respondent is Swaziland United Bakeries Limited (*"SUB"*) and the Fifth Respondent is Sinkhwa Semaswati Limited trading as (*"Mister Bread"*), SUB and Mister Bread are the target firms in the merger transaction. SUB and Mister Bread operate bakeries in the Kingdom of Swaziland.

[12] On 7th October 2011, and pursuant to a merger notification by the merging parties, namely, Premier Group (Pty) Ltd which acquired the controlling shares in Swaziland United Bakeries (Pty) Ltd and Sinkhwa Semaswati Limited, the 1st Respondent addressed a letter to the Applicant in which the Applicant was requested to:

> "assist the Competition Commission in its consideration of the application, it would be helpful to have as a wide range of use as possible as to the likely economic benefits and competitive effects of this transaction. The Commission's concern is whether the proposed transaction between the parties would, or is likely to have

the effect of substantially lessening competition in the market and consequently result in breach of section 30 read together with 31 of the Competition Act. In addition, whether the transaction would, through the abuse of market power, result in undue restriction of competition or have an adverse effect on trade or the economy as provided for under section 34 of the said Act.

In view of the fact that you are quite conversant with the operations of this industry, we shall be grateful if you could avail the office with –

- Information that would assist the commission at arriving at an informed decision in this matter;

- A comment on what prospects are likely to emerge in light of this transaction and how competition may be promoted in this sector, paying due regard to the existing procurement, supplying, and distribution structures; and/or

- Provide the Commission with your market share in this industry and that of your competitors."

A copy of the request is attached as annexure "TL 1" to the 1st and 2nd Respondents Answering Affidavit.

[13] Pursuant to the 1st Respondents request the Applicant made written submissions detailing its views on the merger. The Applicant's written submissions are attached as annexure "NM4" to the Founding Affidavit.

[14] On 25 October 2011 the 1st Respondent authorized the merger. The Applicant has noted an "appeal" against the decision of the 1st Respondent. In the present proceedings the Applicant seeks to restrain the implementation of the merger pending the outcome of the appeal.

[15] The Respondents have raised a point *in limine* which if upheld is terminal to these proceedings as well as the "appeal". The 1st and 2nd Respondents contend that the Applicant does not have *locus standi in judicio* to note an appeal against the decision of the 1st Respondent as it was not a party to the merger proceedings, and having no right of "appeal", the Applicant can similarly not institute proceedings predicated upon the "appeal".

The nature of horizontal mergers in competition law

[16] What is of central importance to a proper understanding to this merger is the fact that Premier does not have a presence in the Kingdom of Swaziland, and Premier Swazi once certain suspensive conditions have been met, will control the assets and liabilities of SUB and Mister Bread (which will be amalgamated into Premier Swazi). This means that SUB and Mister Bread will not be competitors of either Premier or Premier Swazi therefore, the merger cannot be categorized as being "horizontal" and leading to any genuine competition concerns.

[17] Competition authorities globally are generally more suspicious of horizontal mergers than non-horizontal mergers. In relation to European

Union and VIC merger control, for instance see: **Guideline on the assessment of non-horizontal mergers under the counsel regulation on the control of concentrations between undertakings (2008/c265/07)** dated 18 October 2008:

> "11.Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.
>
> 12. First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market (2). As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.
>
> 13. Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other (3). The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, as a result of the complementary, a decrease in mark-ups downstream will lead a higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the 'internalisation of double mark-ups'. Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a

greater reward for an integrated firm that will take into account the benefits accruing at other levels.

14. Integration may also decrease transaction costs and allow for a better coordination in terms of product design, the organization of the production process and the way in which the products are sold. Similarly, mergers which involve products belonging to a range or portfolio of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping. (2) Such a loss of direct competition can, nevertheless, arise where one of the merging firms is a potential competitor in the relevant market where the other merging firm operates. See paragraph 7 above. (3) In this document, products or services are called 'complementary' (or 'economic complements') when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into the final product. For instance, both production and distribution fulfil a complementary role in getting a product to the market. [18.10.2008 EN Official Journal of the European Union 265/7]"

[18] See also an article by *Professor Sutherland* titled *Competition Law of South Africa, Issue 12.*

The arguments on the points *in limine*

(i) For the 3rd to 5th Respondents

[19] The arguments of the parties on the 16th January 2012 centred mainly on the point *in limine* that the Applicant lacks *locus standi in judicio* to make this Application. Counsel for the 3rd to 5th Respondents presented before Court very comprehensive arguments in his detailed Heads of Arguments for which I am grateful.

[20] I must also mention that Counsel for the 1st and 2nd Respondents also advanced the same points *in limine* and aligned himself with the arguments of Counsel for the 3rd to 5th Respondents. He also filed very comprehensive Heads of Arguments.

[21] On the point of *locus standi in judicio* Counsel for the 3rd to 5th Respondents premised his arguments by stating that the legal principles relating to *locus standi in judicio* are well established. A party seeking relief as an Applicant (or a Plaintiff) bears the *onus* of alleging and proving that he has *locus*. The Applicant must have a "direct" and "substantial" interest in the subject – matter of the litigation (in the relief being sought): this interest must not be remote (or far-removed and must not be abstract or hypothetical in its nature.)

[22] Counsel for the 3rd to 5th Respondents cited the South African Appellate Division case of *Cabinet of Transitional Government of South West Africa vs Eins 1988(3) SA 369 A* at 388H to the following proposition:

> "… (B)y our law any person can bring an action to vindicate a right which he possess (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have."

[23] That the fundamental weakness of the Applicant's case is that its *locus* in the stay Application is contingent upon its alleged right to appeal the commission's decision: if the latter is a non-starter (which the Respondents say it is) then so is the former. That in any event, however, the Respondents contend that the Appellant lacks standing on independent basis in respect of both the stay Application and the appeal.

[24] In support of the above submissions Respondents state the following at paragraph [3] of their main Heads of Arguments:

> "3.1 The appellant does not have a legal interest in the Commission's decision to approve the merger – its attempts to intervene and to derail the merger are self-serving and devoid of any legal basis (let alone any genuine competition law concerns). It cannot even genuinely claim to have a hypothetical interest or claim to suffer any prejudice as a result of the implementation of the merger;

3.2 The appellant was never a party to the decision to approve the merger (at the invitation of the Commission it merely provided its comment on the proposed transaction). This cannot vest it with standing; and

3.3 Section 40 of the Competition Act clearly envisages conferring standing to appeal on parties who receive "notice" of a decision taken by the Commission – which the appellant clearly did not."

[25] At paragraph 32 to 38 the 3rd to 5th Respondents Counsel's Heads of Arguments it is contended that the Applicant has chosen only certain relevant facts from its papers placed before this Court.

[26] At paragraph 37 thereof the Respondents contend that in reply the real driver for the Appellant's Application is laid bare. In its own words: The Appellant has brought this Application because "Applicant *above else* (sic) must consider the commercial reality flowing from this merger be it absent the merger or post merger." It reiterates this point, and says "it is of the *lost concern* for a supplier when two of its customers merge especially where *in casu* they represent a nation part of the market share."

[27] The 3rd to 5th Respondents further contend that on its own version then the Appellant has exposed to the court that its commercial motivation is to hinder competition by the 3rd to 5th Respondents. To the extent that it has any interest in the Application, it is a purely commercial one, and incidental. However, the case law is replete with decisions affirming that

a commercial interest is insufficient to found standing. For example, in *Henri Viljoen (Pty) Ltd vs Amerbuch Brothers 1953(2) SA 151 O, Horwitz AJP* (with whom van Blerk concurred) analysed the concept of a "direct" and "substantial interest" and after an exhaustive review of the authorities come to the conclusion that connoted:

> "…an interest in the right which is the subject – matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation."

[28] That to the extent that the Appellant claims that its Application proceeds from its right of "intervention" (in any event a new argument raised for the first time in reply) the case law is singularly against it being granted *locus*. In this regard Counsel for the 3rd to 5th Respondents has cited the judgment of the Full Bench of the *Cape Provincial Division* in *Brauer vs Cape Liquor Licensing Board 1953(3) SA 752* © to this effect.

[29] That in any event, the mere fact that the Applicant was invited and then submitted its response to the Commission does not translate into a right to appeal the Commission's decision or stay its implementation pending such an appeal. The Applicant would have it that it is entitled to:

> "(i) Appeal a merger decision between parties in a matter that it was not formally a party to;

(ii) In the process, obtain the radical interim relief of interdicting those parties from doing that which the law (and the Commission) allows them;

(iii) Frustrate an approved merger, with all its beneficial consequences for the parties and the Swazi economy."

[30] Thus, in the case of *Ninian & Lester (Pty) Ltd vs Crouse N.O. and Others (2009)30 ILJ2889(LAC)* a person had a right to file objections to an Application, but that plus the fact that they actually did, did not qualify them as person aggrieved by the decision an issue in the Application.

[31] The 3rd to 5th Respondent's Counsel further referred to paragraph 49, 50, 51, 52, 53, 54, and 55 of Counsel's Heads of Arguments on the Applicant's legal right.

[32] The Respondents at paragraph 54.3 contend that if indeed the Applicant was an intervener under the Act, then it would have been recognized as such by the Commission, since Regulation 3(1)(1) of the Regulations (themselves quoted by the Applicant in its reply) stress that an intervener is defined as "a person who has submitted a complaint against a merger in terms of section 11(2) of the Act and who have been recognized by the Commission as an intervener."

[33] The Commission emphatically denies in answer that it ever recognized the Appellant as a formal intervener. That this is of no assistance for the

Appellant to rely, as it does in its Heads of Arguments on the *Anglo case* which dealt with the interpretation of section 53(1)(c)(v) of the South African Competition Act. That for the simple reason that the case affirms that section 53 of the South African Act, like section 11 of the Swazi Act stipulates that the party is "any other person whom the competition tribunal recognizes as a participant."

[34] All in all the 3rd to 5th Respondents contend that the Applicant has failed to discharge its *onus* to establish that it has standing to bring the appeal or the stay Application, and accordingly, both should be dismissed on this basis alone.

1st and 2nd Respondents arguments

[35] Counsel for the 1st and 2nd Respondents agreed *in toto* with the above submissions of the 3rd to 5th Respondent's arguments in court and those in their Counsel's Heads of Arguments and therefore I shall decline to outline them at length as I did with those of the 3rd to 5th Respondents Counsel. However, I shall repeat these submissions which tend to give the Respondent's case clarity.

[36] In paragraphs 5, 6 and 7 of 1st and 2nd Respondents' Counsel various legal authorities have been cited on the question of *locus standi.*

[37] At paragraph 8 thereof it is contended that in its founding papers the Applicant states the following at paragraph 4.3 to establish *locus standi*:

> "The Applicant, at the request of the Commission, alternatively at their own initiative, made submissions to the Commission opposing the sought after merger. Written submissions were made to the Commission in this regard and oral presentations made by the Applicants. By virtue of the aforegoing, the Applicant is an interest party in the merger deliberations and in the ultimate decision arrived at by the Commission."

[38] That the general rule in motion proceedings is that all necessary allegations must appear in the Founding Affidavit and that the Applicant will not (save in exceptional circumstances) supplement his case in a reply. An Applicant must generally speaking stand or fall by its Founding Affidavit and the facts alleged therein and cannot introduce for the first time in his Replying Affidavit facts or circumstances upon which he seeks to find a new cause of action. I must also mention for the record that this very point was also mentioned by Counsel for the 3rd to 5th Respondents' at paragraph 6 of his Heads of Arguments citing the case of *Swissborough Diamond Mines (Pty) and Others vs Government of the Republic of South Africa 1999 (2) SA 279* per *Toffe J* at 323 F et seg as follows:

> "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties. In so doing, the issues between the parties are identified. This is not only for the benefit of the court but also, and

primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D)* it was stated at 469 C-E that:

> 'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception would necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at the trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound'

An application must accordingly raise the issues which it would seek to rely on in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof…

The facts set out in the founding affidavit (and equally in the answering and replying affidavits) must be set out simply, clearly and in chronological sequence and without argumentative matter: see *Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W)* at 781."

[39] The argument further proceeds that moreover, the case cannot be implemented in reply. In *Director of Hospital Services vs Mistry 1979 (1) SA 626 (A)* at 635H – 636B *Diemont JA* pertinently stated the following:

> "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As we pointed out by Krause J in *Pountas' Trustee v Lahanas 1924 WLD 67* at 68 and as has been said in many other cases:
>
> > '… an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."
>
> Since it is clear that the applicant stands or falls by his petition and the facts therein alleged,
>
> > 'it is not permissible to make out new grounds of the application in the replying affidavit'
>
> (per van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953 (3) SA 256 (C)* at 260). It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar."

[40] Counsel for the 1st and 2nd Respondent further contends that *in casu*, the Applicant relies on a general statement that it opposed the merger at the request of the Commission alternatively at its own initiative to establish *locus standi*..

[41] Counsel for the 1st and 2nd Respondent contends that in its Replying Affidavit (at pages 6 to 13) Applicant seek to rely on the fact that it was an intervener as provided in the Regulations and that it lodged a complaint against the merger as contemplated in section 11(2)(b) of the Act, to establish *locus standi*. That this constitutes a different basis from the one relied upon in the Founding Affidavit.

[42] Counsel for the 1st and 2nd Respondent further made submissions regarding section 11(2)(b) and section 40 of the Act as shown in paragraph 17 to 30 of Counsel's Heads of Arguments.

[43] The final submission of the 1st and 2nd Respondents is found in paragraph [31] of his Heads of Arguments which state the principles of law to be applied in such cases as stated in the case of *Jan Sithole NO and Others vs the Prime Minister of the Kingdom of Swaziland Civil Case No.2792/200* on the proper approach to be adopted in such cases.

The Applicant's arguments

[44] Senior Counsel D. Smith also advanced detailed arguments in court and also in his Heads of Arguments for which I am also grateful to him. I shall also attempt to summarise Applicant's contentions in the following paragraphs. Thereafter I shall make my analysis and conclusions thereof.

[45] On the point *in limine* of *locus standi* the Applicant contends that the Competition Act does not set any criteria, for example, to limit access to persons to merger proceedings to those only who have a material or substantial interest in the matter. The common law test for participation in merger proceedings is not appropriate. Merger proceedings are not equated with ordinary litigation. There is no Plaintiff and no Defendant disputing competing rights and obligation, nor are the merging parties prosecuted. The tribunal does not act as an adjudicated between rivals. Large merger proceedings are not adversarial. The first Respondent's responsibility – is to evaluate the merger in terms of the Competition Act. To this proposition Counsel for the Applicant cited the case of *Anglo South Africa Capital (Pty) Ltd and Others vs Industrial Development Corporation of South Africa and Another 2003 (1) Butterworths Law Reports* at page 17h – 18h.

[46] That the Anglo case *supra* dealt with the interpretation of section 53(c)(v) of the South African Competition Act which refers to "any other person whom the competition tribunal recognize as a participant."

[47] Counsel for the Applicant cited the textbook titled *Principles of Legal Interpretation –Statutes, Contracts and Wills, Butterworths* page 14 to the following:

> "a statute had no elasticity: that is to say it may not be stretched to meet a case for which provision has clearly not been made. In other words, a case's omission cannot be remedied by a court."
>
> "were reliance is placed upon a statutory provision and it is contended that it has a more extensive meaning, such contention can be justified only if the language of the statute concluded in clear terms to that effect, or the clear purpose of the Act justifies an extended meaning."

[48] That the Respondents would want the court to read into section 40 of the Competition Act the following words after the words "any person" the following "who was a party to the merger, has a substantial interest therein" which words simply do not appear therein.

[49] That in any event the Competition Act has as its purpose the prevention of oppressive and/or unlawful business activities which affect the economy of the Kingdom of Swaziland and the public at large. That it is accordingly submitted that "any person" should be given its ordinary grammatical meaning which would place the Applicant in such a category and who has clearly stated that it is aggrieved by the decision of the first Respondent and the reasons therefor.

[50] In this regard the court was referred to annexure "TL1" to the First and Second Respondents' Answering Affidavit, paginated page 129 being a letter addressed to the Applicant dated 7 October, 2011 to the following averments:

> "In view of the fact that you are quite conversant with the operations of this industry, we shall be grateful if you could avail the office with –
>
> - information that would assist the Commission at arriving at an informed decision in this matter;
>
> - a comment on what prospects are likely to emerge in light of this transaction and how competition may be promoted in the sector, paying due regard to the existing procurement, supply and distribution structures; and/or
>
> - provide the Commission with your market share in this industry and that of your competitors…
>
> We shall be most grateful to get a written response before 19 October 2011."

[51] That written submissions were indeed submitted and oral submissions based on the written submissions were made to the first Respondent.

[52] In the written submissions (annexure NM4 to the Applicant's Founding Affidavit, paginated pp42 – 113) the Applicant specifically stated in paragraph 1.2, paginated 44 thereof, the following:

"These submissions set out the grounds for Ngwane Mills (Pty) Ltd ("Ngwane") opposition to the merger that relate to the competition issues. Ngwane contends that the SCC should prohibit the implementation of the merger in terms of section 35(1) of the Competition Act No.8 of 2007 ("The Act") on the grounds that:

1.2.1.1 the merger is likely to substantially prevent or lessen competition in the relevant markets (section 36);

1.2.1.2 the Commission is mandated to "…keep the structure of production of goods and services in the country under review to determine where concentrations of economic power and anticompetitive trade practices exist which has detrimental impact on competition and the economy outweighed the efficiency advantages, if any" (section 36); and

1.2.1.3 the merger can not be justified on substantial public interest grounds."

[53] In this regard the Applicant contends that it was not simply the providing of information that would constitute a request for information by the Commission or something that would merely assist the Commission in the merger analysis. In the document annexure "NM4", the Applicant took a strong position in opposition to the merger and there can not be any confusion that it was indeed a complaint against the merger as contemplated by section 11(2)(b) of the Competition Act.

[54] The Applicant contends that in terms of Regulation 26 of the Regulations promulgated in terms of section 43 of the Competition Act, the following provision is therein contained:

> "**Third party intervention in merger proceedings**
>
> 26(1) A third party may, at their own initiative or at the request of the Commission make submissions to the Commission in confidence or not, in relation to a merger application.
>
> (2) Third party comments to a merger application may be done orally or in writing to the Commission."

[55] That in terms of Regulation 3(1)(1) of the Competition Commission Regulations and Intervener is defined as "a person who has submitted a complaint against a merger in terms of section 11(2)(b) of the Act and who has been recognized by the Commission as an intervener."

[56] Counsel for the Applicant contends that the submission made by the Applicant in the written document, *annexure NM4* and the oral submissions made to the First Respondent, made it clear that the Applicant was intervening in the merger, objecting thereto and as such, to the knowledge of the First Respondent, was intervening in the merger proceedings and at First Respondent's invitation.

[57] That the formal written decision of the First Respondent therefore should have been served on the Applicant or at the very least, the Applicant notified thereof other than by way of publication in the newspaper.

[58] That in any event, the decision of the first Respondent is to be made public and the reasons therefore published for the benefit of the public at large and/or more especially by any person aggrieved thereby. Regulation 31 further provides that the first Respondent is obliged to furnish such information, and/or to supply such documentation as may be requested within seven days.

[59] Further, that Regulation 31 supports the view of the Applicant that reference to "any person" in section 41 of the Competition Act refers to the public at large and should not be interpreted in the restrictive manner as postulated by the Respondents.

[60] In support of the above argument Counsel for the Applicant has cited the case of *Jacobs vs Waks 1992 (1) SA 521* where the court held that issues of *locus standi* should be dealt with in a flexible and pragmatic manner rather than a formalistic or technical one. Pursuant to the *Jacobs* case it was held in *Kolbatschenko vs King NO 2001 (4) SA 336* © at 346 6 that:

> "(a) the Applicant for relief must have no interest (voipoende belang) in the subject matter of the litigation, which is not a

technical concept, it is usually described as a direct interest in the relief sought;

(b) it must not be too far removed;

(c) it must be actual, not subtract or academic;

(d) it must be a current interest, and not a hypothetical one.

[61] Applicant's Counsel further cited the case of *Roodepoort Maraisburg Town Council vs Eastern Properties (Prop) Ltd 1933 AD 87* to the following effect.

> "where it appears either from a reading of the indictment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an Act in the

[62] Counsel for the Applicant made further arguments at paragraph of his Heads of Arguments regarding the invalid administrative decision citing pertinent decided cases to support his contentions.

[63] Finally, Counsel for the Applicant dealt with the issue of the merger at paragraph 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7 of his Heads of Arguments.

[64] I must mention for the record that all the legal representatives of the parties filed additional Heads of Arguments supplementing their arguments in court. I will refer to these arguments as I proceed with this judgment.

The court's analysis and the conclusions thereon

[65] The gravamen of the present dispute between the parties in my view is whether the Applicant has *locus standi in judicio* to make this Application. The Applicant contests that it does. All the Respondents contest in tandem that Applicant has no *locus standi* advancing various arguments. This tug of war between the parties is the essence of this judgment. I shall endeavour to address these contentions under various headings as I proceed with this judgment in the following manner.

(i) The Applicant's replying affidavit

[66] In my assessment of the parties arguments to and fro I have come to the considered view that the Respondents are correct in this regard that the two central pillars of the Applicant's case are made in reply, in a manner that ought to have been (but was not) done in its founding papers.

[67] In the first place, the Applicant now seeks to suggest that it has standing on the basis that in truth it was an intervening party before the Commission. In the second place, the Applicant now introduces for the first time in reply evidence which it suggests is apparent is material to its case, but which ought obviously, on account of its alleged materiality, to have been disclosed at the outset.

[68] I have searched in vain in the founding affidavit of the Applicant for any contention that the Applicant was an intervening party or intervener before the Commission.

[69] Similarly, I have looked fruitlessly for any explanation by the Applicant why the evidence introduced in reply (particularly through Earl John Henwood, the Applicant's attorney) about the alleged difficulties in the Commission's constitution, is introduced only now, for the first time. In short, there is absolutely no basis laid for the impermissible attempt to introduce new issues in reply.

[70] Accordingly, in legal terms, the founding papers are bereft in material respects both the *facta probanda* and the *facta probantia* necessary to support the arguments raised by the Applicant vis-à-vis its purported standing on the basis of its "intervention" or in respect of the Commission's apparent lack of *vires.*

[71] I must also mention under this head that the Applicant requested from the court leave to file supplementary Heads of Arguments ostensibly to reply to a new matter raised by the 3rd to 5th Respondents' Counsel at the hearing of the matter. The Applicant's supplementary Heads of Arguments are undoubtedly not in response to any new argument, instead the Applicant raises new issues which were neither raised in its papers nor formed part of its arguments during the hearing. In my assessment of these arguments

the Applicant is attempting to establish a new basis for *locus standi* which is not contained in the founding papers and was not part of its case during the hearing.

(ii) *Locus standi*

[72] It is my view that Applicant sought to establish *locus standi* merely on the basis of the following statement in paragraph 4.3 of the Founding Affidavit:

> "The Applicant, at the request of the Commission, alternatively at their own initiative made written submissions to the Commission opposing the sought after merger, written submissions were made to the Commission in this regard and oral representations made by the Applicant. By virtue of the aforegoing, the Applicant is an interested party in the merger deliberations and in the ultimate decision arrived at by the Commission."

[73] It appears to me that Counsel for the 1st and 2nd Respondent is correct that in the Replying Affidavit and in response to the Commission's preliminary objection that the Applicant lacks *locus standi* to seek a stay of the merger or to appeal it in due course for the reason that it was not a party to the merger proceedings. The Applicant could have become a party by intervening in the merger proceedings in accordance with the provision of the Act and regulations.

[74] I further agree with Counsel for the 1st and 2nd Respondent that Applicant in its supplementary Heads of Arguments had sought to establish *locus standi* on the basis that it is protecting and enforcing a legal right that the Applicant has *"in the due process of a properly constituted competition Commission"* in that it has advanced a new ground in its Replying Affidavit. Furthermore, I agree with Counsel in this regard that the submission made by the Applicant with regards to section (33) of the Constitution is incomprehensible.

[75] It is trite law, that "the fact of *locus standi* must appear from the initiating process" which is to say the averments that establish *locus standi* must be contained in the Founding Affidavit.

[76] For the above proposition I find the legal authority of *Harms: Civil Procedure in the Supreme Court* at page 55 apposite.

[77] It is trite law that all essential averments must be established in the Founding Affidavit and it can hardly be contested by the Applicant that *locus standi* is an essential component of any case. It is thus trite that the facts of *locus standi* must be set out in the Founding Affidavit and/or summons. Thus in respect of affidavits, it was explained as follows in *Scott & Others v Hanekom and Others 1980 (3) SA (C) 1182* at 1188.

> "it is trite law that appropriate allegations to establish the *locus standi* of an applicant should be made in the launching affidavits

and not in the Replying Affidavits. Thus, if it is indeed so that the challenged passages in the Replying Affidavits are not legitimate responses to the First Respondent's allegations and have been included solely to remedy an omission in the launching affidavits, they are liable to be struck out."

[78] In *Nienaber vs Union Government 194791) SA (J)* in respect of summons.

[79] Furthermore, *Viljoen J* in the South African case of *Titty's Bar and Bottle Store (Pty) Ltd vs ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T)* at 368H held as follows:

"It has always been the practice of the courts in South African to strike out matter Replying Affidavits which should have appeared in petitions or Founding Affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. See *Herbstein and van Winsen, The Civil Practice of the Superior Courts in South Africa, 2nd edition* pages 75, 94. In my view this practice still prevails."

[80] In my assessment of these legal authorities I have cited above it is beyond doubt that the correct approach to the issue of *locus standi* is that the Applicant is under a duty to advance sufficient facts in its Founding Affidavit to establish its *locus standi*. If it fails to do so in its Founding Affidavit, the correct approach is for its case to be dismissed. And if it has failed to do so, and attempts to remedy its failure in reply, then that is impermissible and the averments in ought to be struck out.

[81] Furthermore, the Applicant's right of appeal (and its concomitant right to bring this stay Application) cannot be based on its disappointment that the Commission has approved the merger, or its apparent concern about the process. As the court in *Ninion & Lester (supra)* with reliance on the Supreme Court of Appeal's decision in *Oudekraal Estates (Pty) Ltd vs City of Cape Town 2004 (6) SA 222 (SCA)* at 245H – 247A stated the following principle:

> "And the meaning I have adopted of [aggrieved person] is one that shields the courts from those like the appellant who seek to engage the courts on academic exercises. As counsel for the Respondents submitted on the strength of ex parte *Sidebotham (1880) 14 ChD 458 (CA)* at 465 and the Francis George case at 99A-B, the right to appeal is not based upon disappointment of a benefit which a party may have received if some other decision had been made. Indeed, as it was said in *Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)* at 245H-246A, even if there is illegality, such illegality will be set aside 'if the right remedy is sought by the right person in the right proceedings."

[82] All in all I agree *in toto* with all the arguments of the Respondent regarding the issue of *locus standi in judicio* as shown in paragraph [15] to [25] of Counsel's Heads of Arguments. I agree that the Applicant has failed to prove that it has *locus standi* in this matter.

(iii) Complaints initiation procedure in relation to mergers/intervention in mergers

[83] According to the enabling statute the Competition Act No.8 of 2007 a person, other than the merging parties, may become a party to merger proceedings by lodging a complaint in terms of section 11(2)(b). In order to be a party to the merger proceedings the Applicant would have had to lodge a complaint against the merger in accordance with Regulation 12(2) of the Competition Commission Regulation which requires that complainant's (against anti-competitive trade practices and concentration of power in mergers be filed in terms of Form 2. It is common cause that the Applicant did not lodge a complaint against the merger in terms of Regulation 12(2) nor file it utilizing Form 2. A complaint must be initiated strictly in accordance with the provisions of the Act and Regulations for it to be a valid complaint initiation.

[84] All in all under this head the Applicant did not become a party to the merger and as such cannot stay the merger or appeal it because only a party to the merger proceedings can stay or appeal the merger.

(iv) Section 40 of the Act

[85] In my assessment of the parties arguments in this regard an interpretation of the section shows that the right of appeal is limited to aggrieved persons who are entitled to be served with the decision of the Commission by virtue of the fact that they are a party to proceedings culminating in that

decision. It would appear to me that the interpretation contended for by the Applicant would result in an absurdity in that it would give a right to appeal decisions of the Commission to any person even if they were not a party to proceedings that resulted in the decision.

[86] Section 40 only confers the right of appeal to persons who were parties to proceedings that resulted in the decision. Applicant does not have the right to stay the merger or appeal it and therefore lacks *locus standi* to bring the stay application or to appeal the merger.

(v) Applicants reliance on cases interpreting the South African Competition Act

[87] The Applicant has placed reliance on a number of South African Competition Law decision, including the case of *IDC vs Anglo American Limited.* Most decisions involve the interpretation of the South African Competition Act which is markedly different from the Swaziland Competition Act. Therefore the principles enunciated in these cases relate only to the South African Act are not to be taken or applied generally to a different context.

[88] In this regard if the Applicant was an intervening party under the Act, then it would have been recognized as such by the Commission, since Regulation 3(1)(1) of the Regulations stress that an intervener is defined

as "a person who has submitted a complaint against a merger in terms of section 11(2) of the Act *and who has been recognized by the Commission as an intervener."* The Commission emphatically denies in answer that it ever recognized the Applicant as a formal intervener. It appears to me and in this regard I agree with the Respondents' arguments that it is thus no assistance for the Applicant to rely, as it does in its Heads of Arguments on the *Anglo case* which dealt the interpretation of section 53(1)(c)(v) of the South African Competition Act. That is for the simple reason that the case affirms that section 53 of the South African Act, like section 11 of the Swaziland Act, stipulates that a party is *"any other person whom the competition tribunal recognizes as a participant."*

[89] All in all I am in total agreement with the Respondents arguments that Applicant has failed to satisfy the mandatory requirements for interdict relief in the form of granting a stay.

[90] In any event, if in truth the Applicant was seeking to vindicate its *right* (as opposed to what Applicant calls its *interest*) to complain about the administrative process before the Commission then it ought to have brought a review of the Commission's decision.

[91] I wish to comment *en passant* by citing a statement made by Chief Justice Banda in the Full Bench decision in the case of: *Jan Sithole and Another vs Prime Minister of the Kingdom of Swaziland and Others (supra)* that:

> "in any litigation, in order for justice not only to be seen to be done but to be manifestly seen to be done, the procedural rules which set in motion the wheels of justice must first be seen to have been fully satisfied. The procedural rules are prescribed to ensure that the wheels of justice have been properly set in motion to insist that this rules should be followed is not, in our judgment, to stifle or deny a party his right to justice. We would therefore find it difficult to accept any assertion that when courts insist that legal and procedural rules must be followed is to undermine the courts' own independence by excessive application of technical rules."

[92] The above sentiments by the learned former Chief Justice apply with equal force on the facts of this case.

[93] In the result, for the aforegoing reasons the Application is dismissed and on the issue of costs I agree with the Respondents that in the circumstances Applicant is to pay costs of this Application to include costs of senior counsel in accordance with the Rules of Court.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE

For the Applicant:	**Senior Counsel D. Smith instructed by Cloete/Henwood Associates**
For 1st and 2nd Respondents:	**Mr. M.B. Magagula from Magagula & Hlophe Attorneys**
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