IN THE HIGH COURT OF SWAZILAND

Case no. 1926/2013

In the matter between:-

UNIVERSAL MILLING (PTY) LTD	**Applicant**
And	
THE COMPETITION COMMISSION	**1st Respondent**
NGWANE MILLS (PTY) LTD PREMIER	**2nd Respondent**
SWAZI BAKERIES (PTY) LTD	**3rd Respondent**
In re:	
UNIVERSAL MILLING (PTY) LTD And	**Applicant**
NGWANE MILLS (PTY) LTD PREMIER	
SWAZI BAKERIES (PTY) LTD	**1st Respondent**
	2nd Respondent

Neutral citation: Universal Milling (PTY) Ltd *v* The Competition Commission & 2 others *(1926/13) [2013] SZHC284* (17th December 2013)

Coram: HLOPHE J

For the Applicant: Mr. M. J. Manzini

For the 1st Respondent: Mr. M. Magagula

For the 2nd & 3rd **Respondents:** Adv. Mr. D. A. Turner

Adv. L. C. Kelly (instructed by Robinson Bertram)

Heard: 09th December 2013

Delivered: 17th December 2013

Summary:

Application proceedings - Application for an order inter alia expediting the Hearing of an Appeal made to the High Court against a decision of the Competition Commission tribunal refusing the applicant access to documents filed by parties to a merger application - Another order sought interdicting the l'[I II] Respondent from adjudicating the proposed merger between the 2nd and 3[,d] Respondent pending finalization of the appeal —Whether case made for the interlocutory interdict sought - Requirements for such an interdict — Whether such requirements met - Where the applicant's right is clear and the other requisites are present, interdict will be granted -Prospects of success on appeal play a pivotal role on whether or not to grant an interim interdict.

JUDGMENT

IThe second and Third Respondents notified the 1st Respondent of a merger they intended embarking upon as required of them in terms of the Competition Act of 2007. Having received the said notification, the

IInd Respondent wrote to the Applicant asking for certain information as a player in the relevant market. Although some aspect of the information sought was provided, some aspect of it was not despite undertakings it was going to be provided. Scheduled meetings between the First Respondent and the Applicant over the required information were not successful.

[2] The Secretariat of the first Respondent then issued a summons against the Applicant calling it to a meeting, thereby prompting it to respond by asking for the information contained in the merger notification form and the accompanying documents -to be availed to it for it to "respond meaningfully". This request was turned down, it being contended by the first Respondent's Secretariat that the information on the merger notification was confidential.

[3] The First Respondent was meant to proceed with the adjudication when the Applicant filed a complaint with the Merger Tribunal of the first Respondent as envisaged in terms of the Act also known as the Board. There was filed as well by the Applicant an application in terms of which if sought an intervention in the proposed merger whilst it also sought an order giving it access to the Merger Notification and the accompanying documents. There was also an alternative to the latter prayer namely, that if the merger notification documents could not be released to it, then its attorneys had to be given access to the said Merger Notification documents without reproducing them.

[4] The Tribunal of the first Respondent, contrary to a recommendation by the Secretariat of the same body, and by means of a written ruling, allowed the intervention by the Applicant in the merger proposed by the second and third Respondents, while it refused giving the Applicant copies of the Merger Notification and related documents or even the requests access to the Merger Notification Documents. At paragraph 48 of the written decision the, the First Respondent's Tribunal expressed itself as follows on the requested merger notification information or even the access to the merger documents.

"The applicant argued in its papers that as an intervener, it should be furnished with the Merging Parties' Papers. If not, these papers should be made available to its legal advisers. Both the Secretariat and the Merging Parties have stated, quite correctly in our view, that there is no legal basis for this request. We therefore have no competence or basis to grant an order directing the Secretariat to grant the Applicant access to the Merging Parties documents. "

It was this decision that prompted Applicant to note an appeal against the aforesaid decision of the First Respondent's Tribunal to this Court as provided for in terms of,the Competition Act 2007. The decision of the First Respondent appealed against was made or communicated to the Applicant on the 4th December 2013. On the 5th December 2013, the Applicant received a notice calling upon it to attend a meeting by the First Respondent's Tribunal meant for the 9th December 2013 to *inter alia* adjudicate the merger. In fact the Applicant was informed it was to be given an opportunity to make oral representations on the Proposed Merger in that meeting. This meeting and the adjudication of the merger was meant to proceed despite the appeal to this Court noted by the Applicant; it being alleged that the Act provided that an appeal does not stay the operation of its decisions.

Fearing that the intended hearing was going to be prejudicial to it if proceeded with before the determination of its appeal particularly because in its view it felt it needed to have the information contained in the Notification documents, in order for it to make an informed decision

on the Merger, before appearing before the First Respondent's Tribunal, the Applicant instituted the current proceedings seeking the following verbatim orders

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and directing that this matter be heard as one of urgency,

2. Condoning Applicant's non-compliance with the Rules of this Court,

3. Enrolling Appeal case No. 1925/2013 as an urgent appeal on such terms as the above FLonourable Court may deem meet,

4. Pending final determination of the Appeal under case No. 1925/2013, the 1st Respondent be and is hereby interdicted and restrained from:-

    4.1 Adjudicating the proposed merger between the 2nd and 3 rd Respondents and/or,

    .

    4.2 Proceeding with the hearing scheduled for the 9 December 2013 at 2pm at the Royal Villas, Ezulwini.

5. Directing that prayers 3, 4, 4.1, 4.2 above should operate as a *Rule Nisi* with immediate effect returnable on a date to be determined by this Honourable Court.

6. The Respondents be ordered to pay costs in the event they oppose this application.

7. Granting such further and/or alternative relief as the Court may deem fit.

[7] In support of the application the Applicant contended *inter alia* that it had good prospects of success and a strong *prima facie* case in its appeal ----which it contended justified it to be granted the orders prayed for. This was because notwithstanding its having appealed, there was allegedly no automatic stay of the operation of the order concerned in terms of the Competition Act. In fact, the submission went, the staying of operation of an order of the first Respondent's Tribunal could only be pursuant to an interdict granted by this Court, hence this application.

[8] Supporting its contention that there were prospects of success in its appeal, the Applicant set out the grounds of appeal as follows:-

(i) The Board of Commissioners (The Tribunal of the first Respondent as opposed to the Secretariat) having recognized the Appellant as an intervener in the merger proceedings between Premier Swazi Bakeries (PTY) Ltd and Ngwane Mills (PTY) Ltd ("the Merging Parties")

erred in law and in fact in finding that there was no legal

basis, and therefore that the Commission had no competence or basis, to grant an order directing the Secretariat to grant the Appellant a copy of the Merger notification or access to the Merging Parties' document's (being the merger notification and supporting documents), in as much as section 23 (1) of the Competition Act 2007 vests the Commission with power to consent in writing to publication or disclosure of information filed with the Commission; and/or.

(ii) The Board of Commissioners erred in law and in fact in finding that there was no legal basis to grant the order in as much as the decision is not in accordance with the principle of fairness and natural justice; and/or.

(iii) The Board of Commissioners erred in law and in fact by finding that the interviewers participation is limited to the submission of information or documents relevant to the investigation, in as much as Regulation 28 (1) vests the Commission with power to direct that an oral hearing be held in relation to a proposed merger in accordance with the principles of fairness and natural justice. Limiting an intervener's participation to submission of information or documents relevant to the investigation violates and is contrary to the principles of fairness and natural justice, as contemplated by the common law and/or underpinned by the Constitution of Swaziland.

[9] It was contended by the Appellant that from the foregoing grounds it was clear that it had a clear right or alternatively a *prima facie* right so as to ground the relief it sought, in as much as the reliefs sought were of an interim nature. It was contended as well that the Applicant was bound to suffer an irreparable harm if it was not granted the interdict sought just as it was contended it had no alternative remedy and that the balance of convenience favoured the grant of the reliefs sought.

[10] Opposing the application, the second and third Respondents contended that the application had no merit because the Applicant *inter alia* had no right to the relief it sought and had not established this right in terms of its papers. It was contended the Applicant had no right or no *prima*

... .. *facie* right firstly because the matter was. not appealable as of right given that it was merely a procedural ruling which in terms of the law was not appealable without leave of Court. Secondly it was alleged that the decision concerned was not appealable at all because it was based on an alleged right of access by the Applicant to the merger notification documents when in law and in terms of the Competition Act 2007 and Regulations, there was no such a right. It was contended further that the Applicant had not set out any evidence establishing an irreparable harm being suffered by it. It was submitted as well that the balance of convenience favoured the merger adjudication scheduled for the 9th December 2013 being proceeded with and determined on the said date given the merger adjudication was in terms of the Act supposed to be determined within a specified period, and that it had to be through by end of the month.

[11] Substantiating why it claimed to be having a clear right or a *prima facie* one, the Applicant contended that in deciding the question whether or not to grant the Applicant a copy of the merger notification, the first Respondent's tribunal had claimed there was no legal basis for it to grant the relief of access to the Merger Notification Documents sought by Applicant as well as contending that it had no competence to grant the reliefs sought.

[12] In so far as the Tribunal of the first Applicant decided that there was no legal basis for the Applicant's request and in so far as it decided that it itself had no competence or basis to grant an order directing the Secretariat to grant Applicant access to the notification documents, the first Respondent had committed a misdirection. This it said was the case because firstly section 23 (1) of the Act contemplates the release of the notification documents or the merging parties' documents under the written consent of the first Respondent's Secretariat or the Tribunal to any person who applies for such a release of the documents sought. It was argued that it therefore a misdirection for the first Respondent to decide there was no legal basis for the Applicant's request as section 23 (1) covers such situations. It was argued further that if the provisions of section 23 (1) mean what the Applicant says it does, then the first Respondent was competent to decide whether or not to grant the information requested and had a basis to grant the request by the Applicant. The first Respondent allegedly misdirected itself according to the Applicant, which grounded its appeal and was indicative of its prospects on the appeal it had noted and by extension that it should be granted the interim reliefs herein sought.

[13] On the basis of this alleged misdirection, the Applicant contended that the first Respondent was effectively saying that it had no jurisdiction to decide the point when it allegedly did. If the first Respondent claimed « not to be having jurisdiction when it had in law, then that decision, like any jurisdictional point, was appealable as of right despite that it was otherwise interlocutory in form. On this point I was referred to what I was told is stated the book of ***Herbstein*** and ***Van Winsen, The Civil Practice of the Supreme Court of South Africa, Volume 2, Fifth Edition at page 1206*** as well as to an excerpt therefrom expressed as follows:-

> *"The following judgments, while interlocutory in form, were • — held'to be final in effect in terms of the Magistrates Court. "*

[14] It was argued that the point on jurisdiction was final and definitive and could not be revisited by the same body, which made it appealable as of right and the judgments referred to in the excerpt were said to be authority in this regard.

[15] Arguing further on section 23 (1) of the Act, Mr. Manzini drew the Court's attention to paragraph 7 of the notes to form 3, Joint Merger Application Form, annexed to the Regulations to the Act. The paragraph is marked confidentiality in bold letters and it reads as follows:-

> CONFIDENTIALITY:-
>
> *"If you believe that your interests would be harmed if any of the information you are asked to supply were to be published*

or otherwise divulged to other parties, submit this information separately with each page clearly marked "Business Secrets You should also give reasons why this information should not be divulged or published. " ,

[16] The point being made here was that in terms of the Act and the Regulations, confidentiality of the documents concerned was not automatic but had to be claimed and that there was no proof it was claimed by the merging parties in this matter. The Applicant was otherwise refused access to the Merger Notification documents on a misdirection as it was claimed that the notification documents could never be given to a third party when that was not the case when

--------- considering the Act and the Regulations. The Respondents themselves had not said that they could not grant Applicant the notification documents because of any claimed confidentiality than that they were in law not competent to grant same. As I understood it, this was also another emphasis on what the Applicant considered to be its prospects of success on appeal.

[17] Section 23 (1) of the Act on the other hand provided as follows; verbatim

> *"A person shall not, without the consent in writing given by or on behalf of the Commission, publish or disclose to any person, otherwise than in the course of the persons duties, contents of any document, communication or information which relates to, and which has come to his/her knowledge in the course of that person's duties under this Act. "*

[18] It was further submitted that the Applicant had prospects of success in its noted appeal considering that it had not been given a hearing before the determination of its application in so far as it was not given an opportunity to make oral submissions because in the Respondents belief, it had no right to be called for oral hearing as it was only limited to the written information submitted to First Respondent or its Secretariat. This it was contended was against section 33 of the Constitution which enjoined an administrative authority like the first Respondent to treat the party appearing before it fairly and justly. It was argued this had not been afforded the Applicant.

[19] The first Respondent filed a rather belated answering affidavit and mainly raised a point that whereas the Applicant had noted an appeal against its decision, it had however, not been cited in the notice of .appeal filed with this Court. This it was argued had the effect of rendering the noted appeal a nullity as the party against whom same was noted had not been cited. In argument Mr. Magagula sought to distinguish an appeal against a judgment of a lower Court from that of the Administrative Body of First Respondent's standing.

[20] In response thereto Mr. Manzini argued in the contrary. He contended that appeals are noted frequently against decisions of the lower Courts and Administrative Bodies to an appellate structure without the body against whom the appeal is made having to be cited in the notice of appeal as a party since no order is required of such body particularly where its reasons for the decision which become pivotal on appeal are already contained in the written decision. He stated the interest of such

a party was only limited to its written reasons as it was required to keep neutrality.

[21] Without prolonging this point, it seems to me that if the proceedings are in the nature of an appeal, then there is no need to cite the body that made the decision as a party. This is different from the case of review proceedings in which a reaction should be required from the chairperson of the body or from the decision making body itself.

[22] Even if I am wrong in this view, I still believe that the point is technical and does not occasion any of the parties prejudice as it can be understood that the appeal is against a decision of the First Respondent
as embodied in the reasons for the decision which are contained in the written decision. I therefore cannot uphold the point raised in this regard.

[23] Responding to the points raised by the Applicant as set out above, it was argued on behalf of the second and third Respondents that there was no prima facie right established by the Applicant because the matter was firstly not appealable as it was an interlocutory order, which is not appealable as of right given that it did not decide any of the central issues between the parties fully and definitely. Secondly it was argued that even if it was appealable as of right, there was no basis for the appeal because the Competition Act had no provisions entitling the Applicant to the parties' merger notification.

[24] It was argued as well that no evidence of irreparable harm had been set out by the Applicant. The same thing was contended as regards the balance of convenience.

[25] I cannot agree that no prima facie right has been established by the Applicant. At first the Applicant has in my view managed to show that the first Respondent misdirected itself by stating that it had no competence, and by extension that it had no jurisdiction to decide whether or not to give the Applicant access to the Merger Notification Documents. It seems to me that such a point is appealable as of right as it is a point on jurisdiction. Furthermore I cannot agree that the Act does not entitle a person in Applicant's position access to a merger notification or even to- merger documents when considering what is stated by section 23 (1) of the Act read together with the Regulations particularly paragraph 7 of the notes to Form 2 to the Regulations.

[26] Furthermore, if it were to be true that no section entitles a third party to Merger Notification, the converse is also true that there is no section of the Act or the Regulations which prohibits the giving of the Notification Documents to a person in the position of the Applicants as long as it is shown that the information can be given without prejudicing the other side, hence they claim that the information is confidential. The approach of the First Respondent in this matter was not because of any considered prejudice but because in its view, it was not competent to give such information to a person in the Applicant's position and that there was no legal basis for such a request. These assertions I cannot agree with which makes me conclude, if I am correct that the Applicant

has good prospects of success which would entitle it to the reliefs sought.

[27] I agree with Mr. Manzini that there is no general rule of the common law or even the Act which provides that a party in Applicant's position is not in law entitled to information by the parties to a merger. In this regard the case of ***The Competition Commission of South Africa v Unilever PLC and Others case No. 13/CAC/Jan 2002*** is instructive. If anything, it was stated in the said case that a person or party in Applicant's position is not expected to approach the Merger Adjudication under a veil of ignorance. He should make the application for the release of such information to him, with the Tribunal in the position-of First-Applicant having to consider the matter -fully so as to determine whether or not it can grant a third party the information concerned as opposed to it simply saying it lacks competence to grant the relief sought which is an indicator it may not applied itself as much as it should have. In the above cited case the position was put as follows in the unreported judgment, which although was dealing with the position with the position under the South African Act, I have no hesitation similar considerations should apply in this jurisdiction:"*... The Act does not place absolute bar upon disclosure of confidential information. The administration and enforcement of the Act is recognized as such a ground. This is significant in the context of appellants case, mainly that the information is required to ensure that the Respondents can exercise their rights in terms of S45.*

Where Mr. Pretorius ' submissions to be upheld, it would

mean that when an application in terms of S45 of the Act was made, all the parties to the hearing would have access to all the information in dispute save for the very party who brought the application. That party would be entirely reliant upon the Tribunal to come to a decision without having had the benefit of putting a proper case before the Tribunal. Fairness must require that the respondents be given a hearing as to whether there is any justification as to why they should be given access to the record. Not only is such a principle enshrined in our common law but it is to be found in the very principles of fairness and openness which underpin the Constitution. "

Commenting further on in the said Unilever PLC judgment the Court said the following which in my view is apposite in this matter:-

"As stated above, were respondents ' legal representatives to be denied all access to the impound information, it would render a hearing under S45 profoundly unfair:-, the applicant would come before the Tribunal in a veil of ignorance which would be incurable. For these reasons, any order that is granted must take account of both sets of rights to achieve a measure of balancing between these competing claims. "

I also cannot agree that the Applicant has not established irreparable harm. I agree that in its written decision per paragraph 43 the first Respondent, acknowledges that the Applicant is likely to be adversely

affected by the intended merger. I further cannot say that the balance of convenience favours the Respondents in this matter. In case there was going to be any delay, the Applicant has asked that its appeal be expedited and heard as one of urgency. This in my view seriously dents chances that the appeal is only being made for purposes of delay as it ameliorates unwarranted delays. It seems to me that the Applicant demonstrates a serious intent to pursue its appeal because it believes on same.

[29] Besides the position of our law is now settled that the stronger the right, as can be inferred from what I consider to be strong prospects of success on appeal, the more the Applicant does not have to establish as strong prospects on the other requirements of an interim interdict. In fact the position was put as follows in ***Stefanuti Stocks (PTY) Ltd v Government of Swaziland and 2 others 2013 SZHC 160,*** as quoted by the 2nd and 3rd Respondents counsel in his heads of argument:-

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression "prima facie established though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded*

apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience — the stronger the prospects of success, the lesser the need for such balance to favour the applicant*: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted". (My emphasis).*

[30] For the foregoing reasons and taking into account that the Applicant only had to establish a *prima facie* case, I am convinced I cannot say on the material before me that the Applicant has not made a *prima facie* case, which means that the application succeeds.

[31] There is a question of costs which merits a comment. Although the general rule is that costs follow the event, it is my considered view that such a rule should not apply against the First Respondent on account of it being an Adjudicatory Authority. It seems to me to be wrong in principle to require such a body to pay costs as it is required to be neutral. In my view its position is in a way not different from that of a Court. It could be argued that it entered the fray but I am of the view it

limited such entry to a question of law with which I however could not agree.

[32] Having come to the conclusion I have I now make the following order:-

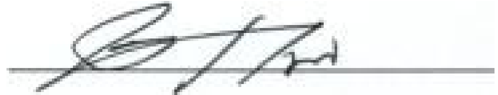
32.1 The Applicant's application succeeds

32.2 The Registrar of this Court is directed to place the appeal by the Applicant under case No. 1925/2013 before an available Judge to hear same as a matter of urgency.

32.3 Pending determination of the said appeal, the first Respondent be and is hereby interdicted and restrained from adjudicating the proposed merger between the 2nd and 3rd Respondents.

32.4 The 2nd and 3ul Respondents be and are hereby ordered to pay the costs of this application.

Delivered in open Court on this the 17th day of December 2013.

INCLUDEPICTURE "media/image1.jpeg" * MERGEFORMAT INCLUDEPICTURE "media/image1.jpeg" * MERGEFORMAT 

N. J. HLOPHE JUDGE - HIGH COURT