**REPUBLIC OF SOUTH AFRICA**
**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**
**HELD IN CAPE TOWN**

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
(4)
**22 November 2022** .....
DATE SIGNATURE

Case NO: 211/CAC/Oct22

In the matter between

**SUNRISE ENERGY PROPRIETARY LIMITED** **Appellant**

and

**STRATEGIC FUEL FUND ASSOCIATION NPC** **First Respondent**

**AVEDIA ENERGY PROPRIERARY LIMITED**
**(IN BUSINESS RESCUE)** **Second Respondent**

**COMPETITION COMMISSION**
**OF SOUTH AFRICA** **Third respondent**

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on [22 November 2022]*

## JUDGMENT

**Nkosi AJA (Vally JA and Potterill AJA concurring)**

### Introduction

[1] This is an appeal by Sunrise Energy Proprietary Limited ('the appellant') against parts of the decision and order of the Competition Tribunal ('the Tribunal') that were issued on 20 September 2022, in terms of which the appellant was recognised as a participant in the large merger proceeding before the Tribunal involving the Strategic Fuel Fund Association NPC ('the first respondent') and Avedia Energy Proprietary Limited (In business rescue) ('the second respondent'). The parts of the decision and order appealed against are those in which the Tribunal denied the appellant the right to lead evidence on, question witnesses and make written and oral submissions in respect of, the public interest concerns raised by it in respect of the proposed merger between the first and second respondents. It also limited the right of access to the confidential merger record to the appellant's legal advisors, thus denying its economic advisors access thereto. The first and second respondents elected not to oppose the appeal. Instead, they filed a notice of cross-appeal against the part of the decision and order that granted the appellant leave to intervene.

### Factual background

[2] The factual background to the matter, briefly stated, is that the appellant is currently the only Liquid Petroleum Gas ('LPG') import terminal operator in the Western Cape. It contended that the Transnet National Ports Authority

('TNPA') gave it an exclusive right to operate as the only LPG terminal in Saldanha Bay in order to recoup its capital investment in the construction of the LPG import infrastructure, including a multi-buoy mooring ('MBM') system comprising a subsea and overland pipeline, as well as the storage and blending facilities. Apparently, an MBM system is more expensive to construct than some other terminal systems, such as the jetty offloading systems. The appellant's contention was that it favoured and requested permission to construct a jetty offloading system, but the TNPA insisted on the MBM system as the only acceptable system. It argued that the proposed merger would circumvent its exclusivity and prevent it from recouping its investment.

[3] The first respondent is a wholly owned subsidiary of the Central Energy Fund SOC Limited ('CEF'), which reports to the Department of Mineral Resources and Energy. All of the shares in the CEF are held by the State. The second respondent is an aggregator, importer, storer and wholesaler of LPG in the Western Cape. It is currently in business rescue pursuant to a court order that was granted on 25 February 2020. After being placed in business rescue it stopped importing bulk LPG and now procures its LPG supplies from the South African wholesalers. The first respondent intends to subscribe for an undisclosed number of shares in the second respondent that will result in it acquiring a controlling interest in the second respondent. The second respondent contends that its exit from business rescue is wholly dependent on the approval of the proposed merger between itself and the first respondent, and that the time is of the essence as it had been in business rescue for 22 months as at the date of the hearing of this appeal.

[4] The appellant's alleged right of exclusivity to operate the LPG terminal in the Western Cape was disputed by the first and second respondents, while the view expressed by the Competition Commission ('the Commission') in its

confidential report to the Tribunal was that such concern was not a competition concern. Instead, the Commission characterised the appellant's claim of exclusivity as a self-serving and self-preserving concern against the introduction of the much-needed competition in the LPG market, particularly, in the Western Cape and the neighbouring coastal areas. In conclusion, the Commission opined that the foreclosure theory of harm alleged by the appellant did not warrant any further investigation.

[5] Regarding the public interest concerns raised by the appellant, which included the effects of the merger on the LPG industrial sector or region, employment and the promotion of ownership by the historically disadvantaged persons (HDPs), the first and second respondents were dismissive of them as speculative and unsubstantiated. They argued that such concerns were premised on the appellant and the downstream rivals of the second respondent exiting the relevant market, which was not supported by any evidence. The view expressed by the Commission, on the other hand, was that the merger would result in the preservation of employment of the remaining employees of the second respondent. It concluded its report by recommending that the proposed transaction be approved with conditions.

[6] Taking into account the Commission's recommendations, the Tribunal granted the appellant a more limited scope of intervention rights than that which it sought in its intervention application. It ordered that the appellant could not make written and oral submissions on the public interest concerns it raised in its intervention application, and that access to the confidential parts of the merger record would be limited to the appellant's legal advisors. It also ordered that the intervention rights granted to the appellant would be subject to, *inter alia,* adherence by it to the timetable set by the Tribunal for the merger proceedings, a copy of which was attached to the relevant order marked Annexure 'A', and

any subsequent timetable determined by the Tribunal. Listed in the timetable were various procedural steps to be taken by the Commission and the parties leading up to the merger hearing on 24 and 25 November 2022, including the making of written submissions by the appellant on 13 October 2022.

[7] It is common cause that the appellant did not deliver its written submissions by 13 October 2022 as directed by the Tribunal in Annexure 'A' to the relevant order. Instead, it filed on the same date (13 October 2022) an application in terms of section 38(2A)(d) of the Competition Act ('the suspension application') for leave to suspend the operation of the Tribunal's order dated 20 September 2022, including the Annexure 'A' thereto. On 18 October 2022 the first and second respondents filed a notice to oppose the appellant's suspension application. By agreement between the parties, the suspension application was argued separately on 28 October 2022 before my brother, Vally JA, but was adjourned *sine die* on that date pending the hearing of this appeal on 1 November 2022.

**Grounds of appeal and cross-appeal**

[8] The appellant's appeal was based primarily on two grounds. The first ground was that the Tribunal denied the appellant the right to intervene on public interest grounds, but nonetheless accepted its submissions on public interest harm, stating that the 'facts are clear' in relation to both employment and the historic spread of ownership; that 'the Commission already represents these interests sufficiently'; and that 'the Tribunal may, if warranted, direct the Commission to investigate the impact on the region.' The appellant contended that the Tribunal had, in so doing, erred and failed to appreciate that: the Commission had failed to consider the public interest aspect of the proposed transaction and the deleterious spill over effects that the proposed transaction

would have on employment, the LPG industry and a greater spread of ownership, and enabling firms owned by the HDPs to become competitive; to the extent that the proposed transaction could result in the appellant and the second respondent's downstream competitors exiting the LPG market, the proposed transaction raised a number of public interest concerns, and; the appellant was better placed to assist the Tribunal in relation to a holistic public interest analysis.

[9] The second ground was that the Tribunal erred in denying the appellant's legal and economic advisors access to all of the relevant documents filed in the merger proceedings for the following reasons: Firstly, its reasons for this decision demonstrated an inherent irrationality and lack of sound legal justification because, having accepted that the appellant had an interest in the merger and could assist the Tribunal, it nonetheless denied the appellant the right to participate meaningfully in the merger proceedings by denying its economic advisors access to the confidential parts of the record. Secondly, the finding that the appellant's issues were factual did not justify the denial of the appellant's economic advisors access to the confidential parts of the record. On the contrary, such finding supported the position that full access should have been granted because it is through an analysis of those facts by the appellant's economic advisor that the appellant's theories of harm could be articulated to the Tribunal.

[10] The first and second respondents' cross-appeal was also based on two grounds. The first ground was that the Tribunal had erred in finding that the harm apprehended by the appellant was merger-specific. Their contention was that the foreclosure concerns raised by the appellant were premised on an unsubstantiated allegation that the appellant enjoyed an exclusive right to provide the LPG terminal and storage facilities in the Western Cape which, if

undermined by the proposed transaction, would force its foreclosure and give rise public interest concerns. They argued that such concerns did not arise from the merger and, therefore, were not merger specific because the first respondent, pre-merger, already enjoyed the right to handle the LPG and to construct an LPG pipeline at the Port of Saldanha in the Western Cape. Therefore, it could interconnect with the second respondent's LPG storage facilities if it chose to do so, either with or without the merger. The second ground of cross-appeal was that the appellant did not put up any evidence to support its alleged material interest and theory of harm.

**The legal principles**

[11] Against the factual background set out above, I proposed to adopt as a starting point the provisions of section 53(c) of the Competition Act (read with the relevant provisions of Chapter 3 of the same Act dealing with the control of mergers), which read as follows:

*'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 –*

*(i) any party to the merger;*
*(ii) the Competition Commission;*
*(iii) any person who was entitled to receive a notice in terms of section 13A (2), and who indicated to the Commission an intention to participate, in the prescribed form;*
*(iv) the Minister, if the Minister has indicated an intention to participate; and*

*(v) any other person whom the Tribunal recognises as a participant.'*

[12] In essence, the provisions of Section 53(c)(i) to (iv) of the Competition Act specify the parties who are entitled to participate in merger proceedings, while the provisions of Sub-Section 53(c)(v) grant the Tribunal the discretion to recognise any other person who is not a party to the merger to participate in the merger proceedings. While the discretion of the Tribunal is wide, it was authoritatively held by this court in *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another*[1] that such discretion is not unfettered, and must be exercised judicially in accordance with the rules of reason and justice[2].

[13] The legal principles enunciated in *Anglo South Africa Capital v IDC (supra)* were endorsed and applied by this court in *Community Health Holdings (Pty) Ltd and Another v Competition Tribunal*[3]. In the latter case the court held that although the intervention regime in mergers is more liberal than that provided for in Rule 46(1) of the Rules of the Tribunal, that does not mean that the Tribunal is obliged to allow any party to intervene. Instead, the Tribunal must enquire into the question as to whether the party applying to intervene will assist it in its enquiry in terms of Section 12A of the Act. This entails taking into account the likelihood of assistance promised by the prospective intervener, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener assisting the Tribunal's enquiry is doubtful, while the intervention is more than

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[1] [2003] 1 CPLR 10 (CAC).
[2] Anglo South Africa Capital (Pty) Ltd *(supra)* at p21 I – J.
[3] 2005 (5) SA 175 (CAC) at para 38.

likely to impact on the expedition of the proceedings, then the Tribunal should decline the intervention or curtail its extent[4].

[14] If there is no doubt that the participation of a party in the merger proceedings would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act, as was the case in *Anglo South Africa Capital v IDC (supra)*, one would expect the Tribunal to exercise its discretion in favour of allowing such party to intervene[5]. In essence, the applicant must demonstrate a genuine ability to assist the Tribunal in carrying out its statutory mandate[6]. Even then, the decision as to whether or not to allow a party to intervene rests entirely with the Tribunal, provided that it is exercised judicially and in accordance with the rules of reason and justice. By the same token, the Tribunal is not obliged to allow a party to intervene based solely on its unsubstantiated claim that it is better suited than the Commission to assist the Tribunal in carrying out its statutory mandate, without adducing any evidence to that effect. This would open the door for time-consuming fishing expeditions and only serve to delay and/or prolong the merger proceedings unnecessarily.

**Legal arguments**

[15] Coming to the facts of this case, I will first deal with the legal arguments advanced by Mr Ngcukaitobi SC, who appeared together with Ms Pudifin-Jones, on behalf of the appellant. Starting with the first ground of appeal, the gist of Mr Ngcukaitobi's argument was that in the light of an acknowledgement by the Tribunal that the evidence brought by the appellant thus far on the issues of public interest was useful, its decision to deny the appellant leave to bring further evidence in that regard was irrational, primarily, for two reasons. Firstly,

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[4] Community Healthcare Holdings *(supra)* para 39.
[5] Anglo South Africa Capital *(supra)* at p22 A – B.
[6] WeBuyCars (supra) para 27.

the Tribunal could not rely on the Commission to bring such further evidence because the Commission had already indicated in its report that the proposed transaction did not give rise to any public interest concerns. Secondly, it was clear that the merging parties were not planning to lead any evidence on that point either because they were of the same view as the Commission on the issue of the public interest concerns or it would not serve their interests to do so. For this reason, he submitted that unless the appellant was allowed an opportunity to present further evidence and arguments on this issue, it would not receive any further consideration by the Tribunal.

[16] In the absence of any indication to the contrary, I assume that the fact that the appellant's appeal was not opposed was indicative of a tacit admission by the respondents that the proposed transaction would, indeed, give rise to the public interest concerns raised by the appellant. These included the likely effects of the merger on, *inter alia,* employment, the LPG industrial sector or region, as well as the ability of firms owned by the HDP's to become competitive. In the circumstances, one would have expected the Tribunal to grant the appellant leave to intervene on the public interest concerns raised by it, particularly, with a view to allowing it an opportunity to make further submissions and present supporting evidence in relation thereto.

[17] Instead, the Tribunal denied the appellant leave to intervene because it believed that: firstly, there would be no benefit in allowing the appellant to make submissions regarding the effects of the merger on employment because the facts in relation thereto were clear, and; secondly, the appellant was unlikely to assist it further on the impact of the merger on the greater spread of ownership and the ability of the small and medium sized black-owned businesses to enter and/or expand the relevant market because the facts were

already on record[7]. Interestingly, no indication was given in the Tribunal's reasons for decision as to what use, if any, it intended to put the available facts on the public interest concerns raised by the appellant. It was argued by Mr Ngcukaitobi that in the absence of the appellant making the case for the prohibition of the merger on the public interest grounds, the arguments and evidence in support thereof would probably not be raised at all. In the absence of any indication to the contrary, that seems to be the only logical conclusion.

[18] For the purposes of the record, the available facts on the public interest concerns raised by the appellant were, *inter alia,* that the appellant is a majority black-owned firm (60%); the first respondent is a state-owned entity, and; the second respondent has no black ownership. Needless to say, it is apparent from these heavily skewed demographics of ownership that the merger is likely to have a significant impact on the greater spread of ownership in the Western Cape region and the other neighbouring coastal areas. In the circumstances, the Tribunal is required in terms of section 12A (1A) of the Competition Act to conduct a proper assessment of the effect that the merger would have on, at least, the promotion of a greater spread of ownership by HDPs in the relevant market in order to determine whether the merger can or cannot be justified on substantial public interest grounds. These public interest concerns should be carefully considered at the merger hearing. For that reason the appellant should be allowed to raise them. After all section 12A (1A) of the Competition Act specifically enjoins the Tribunal to have regard to them. The respondents have denied that the merger would give rise to any public interest concerns, which denial can be dealt with during the consideration of the evidence and argument that the appellant intends to bring to the hearing.

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[7] Paras 90 and 91 of reasons for decision.

[19] In the circumstances, I believe that it was necessary for the Tribunal to allow all sides an ample opportunity to present further evidence and/or arguments at the merger hearing in support of their respective contentions. The same applies to the Tribunal's denial of access to the appellant's economic expert/s to the confidential parts of the merger record. Bearing in mind that the Tribunal had admitted that the appellant could assist it in its determination of 'any potential greater harm to the market as a result of the change in the market structure, . . . and assist on the short and long-term effects of the merger on the structure of the market and competitive dynamics post-merger[8]', it follows that granting the appellant's economic advisors access to the confidential information is necessary. Additionally, granting the appellant's legal advisors access to the confidential information while denying the economic advisors access to the same information makes no rational sense.

[20] This brings me to the legal arguments advanced by Mr Marolen, who appeared for the first and second respondents, in support of their cross-appeal against the decision of the Tribunal to allow the appellant to intervene in the merger proceedings. The first part of Mr Marolen's legal arguments was dedicated to the appellant's suspension application. As indicated in the opening paragraphs of this judgment, the suspension application was argued separately before Vally JA prior to the hearing of this appeal. For this reason, I will leave the issue of the intervention application for final determination by Vally JA.

[21] Regarding the merits of the appeal, it was argued by Mr Marolen that the appellant had no prospects of success in the appeal for a variety of reasons, the most notable of which was that the appellant had lost its right of intervention due to its breach of the Tribunal's order setting out the time periods by which the parties were to file their respective papers. In my view, the issue of the

[8] Page 249 to 250 of the record par 86 of the reasons for decision.

appellant's failure to adhere to the Tribunal's order is a matter for the Tribunal. It is its order that was not complied with. That order was obviously designed to ensure that its proceedings were finalised as soon as is practically possible. The order of this court may (or may not) affect that timetable, but that is a matter for the Tribunal.

**Order**

[22] The following order is issued:

1. The appeal is upheld.

2. The cross-appeal is dismissed.

3. Paragraphs 2, 3 and 4 of the Tribunal's order are amended to read as follows:

*'[2] Sunrise's participation in the aforementioned merger proceedings shall be limited to making written and oral submissions on the following issues:*

*2.1 Market delineation, including whether or not there is a separate relevant market for the provision of LPG import terminal facilities in which the applicant is active and the merged entity will become active;*

*2.2 Market concentration;*

*2.3 The ability and incentives of the merged entity to engage in market foreclosure; and*

*2.4 Remedies, in particular –*

*2.4.1 Whether the transaction should be prohibited; or*

*2.4.2 Remedies that could address any competition concerns, including the adequacy of "open access" conditions.*

*2.5 The public interest effects of the proposed merger.*

*[3] The Commission must, subject to the provision of appropriate confidentiality undertakings, provide Sunrise's legal and expert economic advisors with the confidential merger record within five (5) business days of this order. To the extent that the Commission requires permission in respect of information that belongs to third parties, it must obtain such permission within five (5) business days of this order, which period shall run concurrently with the 5 business days within which the Commission must provide the confidential merger record to the applicant. The Commission shall provide the third parties' information to Sunrise within two business days after permission has been obtained, subject to the applicant providing confidentiality undertakings. In the event that third parties do not grant permission to their confidential information, Sunrise shall be limited to making submissions on the confidential record as made available to it.*

*[4] Sunrise's participation in the merger hearing before the Tribunal shall include the right:*

*4.1 to attend pre-hearing conferences, if any, that are held before the merger hearing;*

*4.2 to access the confidential version of the Commission's large merger record on the basis set out in paragraph 3 of this order;*

*4.3 to make written submissions within ten (10) business days of receipt of the confidential record including third parties' confidential record as set out in paragraph 3 of this order;*

*4.4 to make oral submissions, based on its written submissions at the merger hearing, subject to reasonable time limitations being imposed by the Tribunal';*

*4.5 to lead factual and expert witness/witnesses and to cross-examine the merger parties' witnesses, if any.'* (amendments are underlined).

4. There is no order as to costs.

M E NKOSI
ACTING JUDGE OF APPEAL

I concur

PP
VALLY
JUDGE OF APPEAL

I concur

PP
POTTERILL
ACTING JUDGE OF APPEAL

APPEARANCES

| | |
|---|---|
| For the Appellant: | Mr Ngcukaitobi SC |
| With him: | Ms Pudifin-Jones |
| Instructed by: | Edward Nathan Sonnenbergs Incorporated |
| For the First and Second Respondents: | Mr Marolen |
| Instructed by: | Werksmans Attorneys |
| Heard on: | 01 November 2022 |
| Delivered on: | 22 November 2022 |