

REPORTABLE (39)

(1) INNSCOR AFRICA LIMITED
(2) GERIBRAN SERVICES (PRIVATE) LIMITED

v

COMPETITION AND TARIFF COMMISSION

SUPREME COURT OF ZIMBABWE
MALABA CJ, HLATSHWAYO JA & PATEL JA
HARARE, JANUARY 25, 2018

S M Hashiti, for the appellants

T L Mapuranga, for the respondent

MALABA CJ: This is an appeal against the judgment of the High Court holding that a conglomerate is a “merger” as defined in terms of s 2 of the Competition Act [*Chapter 14:28*] (“the Act”) and, therefore, notifiable to the respondent in terms of s 3A of the Act if its value exceeded the statutory threshold.

On the date of hearing, a concession was made to the effect that the appeal lacked merit. The parties advanced argument on costs. The Court made the order that the appeal be dismissed with costs.

It became necessary for the Court to give a full judgment on the meaning of s 2 of the Act.

Factual background

The first appellant is a limited liability company incorporated in terms of law, trading in the food industry. The second appellant is also a limited liability company incorporated in terms of law, trading in motor spares and accessories. The respondent is a body corporate established in terms of s 4 of the Act.

Sometime in 2015 the first appellant acquired a controlling interest in the second appellant. In terms of s 34 of the Act, as read with the Competition (Notifiable Merger Thresholds) Regulations 2002 (SI 195 of 2002) (“the Regulations”), all mergers in terms of the Act with a value above the threshold value of US\$1.2 million had to be notified to the respondent. The appellants’ conglomerate had a value above the prescribed threshold. The appellants took the view that their union was not notifiable in terms of the Act as read with the Regulations because it was a conglomerate. A conglomerate is a corporation formed by merging unrelated firms. They alleged that a conglomerate was not a merger in terms of the Act. The appellants based their view on an opinion given by an advocate.

The respondent had initially agreed to the position that the appellants’ union, being a conglomerate, did not fall within the statutory definition of “merger” and was thus not notifiable. It later took the view that conglomerates were covered by the definition of “merger” in the Act and were required to be notified if their value exceeded the statutory threshold. The respondent instituted proceedings in the court *a quo*, seeking an order declaring the conglomerate formed by the appellants notifiable and compelling them to pay fees in terms of s 34A of the Act as read with the Regulations.

The parties proceeded by way of a case stated in terms of r 199 of the High Court Rules, 1971. The statement of agreed facts presented by the parties was as follows:

- “1. The first defendant and the second defendant entered into a conglomerate merger in 2015, through the acquisition by the first defendant of a controlling interest in the second defendant.
2. The first and second defendants are not competitors nor are they customer and supplier.
3. The plaintiff has insisted on notification of the merger between the defendants on the basis that it is covered by the definition of a merger in s 2 of the Competition Act [*Chapter 14:28*].
4. The defendants insist that a conglomerate merger is not a notifiable merger in terms of s 2 of the Competition Act [*Chapter 14:28*]”

The legal issue which the parties placed before the court *a quo* for determination was whether or not the conglomerate formed by the appellants was a merger in terms of the Act.

The determination of the issue depended on the interpretation of the words “or other person” in the definition of “merger” by s 2 of the Act. The respondent urged the court *a quo* to apply the literal rule of interpretation in ascertaining the meaning of “merger”, as used in the Act. It contended that the words “or other person” referred to a person falling outside the categories of persons specifically mentioned in the definition. The appellants urged the court *a quo* to apply the *eiusdem generis* or *noscitur a sociis* rule to ascertain the meaning of the words “or other person”. According to this interpretation, the words “or other person” would refer to a person who shared qualities similar to those falling within the classes of the persons referred to in the definition of “merger”.

The court *a quo* held that the conglomerate formed by the appellants was a merger in terms of s 2 of the Act. That meant that it was notifiable to the respondent.

The appellants appealed against the decision of the court *a quo* on the following grounds:

- "1. The court *a quo* erred in law and misdirected itself by holding that the term ‘or other person’ in the definition of a ‘merger’ when used in its ordinary grammatical meaning includes any other person not specified in that definition who acquires a controlling interest in the business of another.
2. The court *a quo* erred in law and misdirected itself in holding that the effect of the use of the term ‘or other person’ in the definition of a merger is to extend the definition of a merger to other classes of persons not previously specifically mentioned.
3. The court *a quo* erred in law and misdirected itself by holding that the term ‘or other person’ in the definition of merger ought to be interpreted broadly.
4. The court *a quo* erred in law and misdirected itself in holding that the term ‘or other person’ in the definition of merger ought not to be interpreted *eiusdem generis* and *noscitur a sociis*.
5. The court *a quo* erred in law and misdirected itself in holding that the application of the *eiusdem generis* rule would render the term ‘or other person’ meaningless or result in an absurdity.
6. The court *a quo* erred in law and misdirected itself in holding that the transaction between the appellants, commonly known as conglomerate merger, was a merger as envisaged by section 2 of the Competition Act.”

The issue for determination was whether or not the court *a quo* was correct in its interpretation of the definition of “merger” in s 2 of the Act to include a conglomerate. The Court held that the court *a quo* adopted the correct interpretation of s 2 of the Act. The following are the reasons for the decision.

The appellants’ argument

Mr Hashiti had submitted that a conglomerate did not fall within the definition of a merger in s 2 of the Act. He had argued that in interpreting the words “or other person”, the *eiusdem generis* rule ought to have been applied by the court *a quo*. His argument was

basically that the words “or other person” could not be interpreted widely to mean persons outside the class of those mentioned specifically in the definition. He contended that the words “or other person” were intended to extend the definition to cover “persons” in business relationships at the time they merged.

Mr Hashiti further submitted that the Legislature’s insertion of the words “or other person” in the definition of merger in s 2 of the Act was not intended to include a conglomerate or any mergers other than those formed between persons who were in some form of a business relationship. The basis of his argument was that had it been the Legislature’s intention to include conglomerates and other unforeseen mergers in the definition, it would have simply defined a merger as the “acquiring of a controlling interest” without specifically mentioning the categories of customer, competitor and supplier.

Whether or not a conglomerate is included in the definition of merger in terms of section 2 of the Act

Competition in any marketplace for the production or supply of goods or services is necessary for achieving economic growth and development. Competition policy is formulated to encourage, improve and protect the competition process for the benefit of consumers through monitoring and regulating business conduct that is actually or potentially anti-competitive and capable of depriving consumers of the benefits associated with a competitive market.

One of the forms of business conduct which competition policy seeks to monitor and regulate is corporate merger. Corporate mergers are an important tool for effecting corporate restructuring transactions that are necessary for enhancing general efficiency in the market

and ensuring business survival especially in harsh economic environments. However, corporate mergers can sometimes be harmful or potentially harmful to the competitive structure of the market, thereby negating the gains of competition. An effective merger regulatory framework is necessary for the achievement and maintenance of the balance between the promotion of beneficial corporate restructuring transactions on one hand and protection of the competitive process on the other.

There are three types of mergers recognised under competition law - vertical, horizontal and conglomerate. Vertical mergers are those mergers that take place between two related companies as in the case of a customer merging with its supplier. Horizontal mergers are those that take place between companies that are in direct competition with each other. Conglomerate mergers are those between two or more firms that engage in unrelated business activities with different customer bases. Such entities are not competitors and do not have a customer and supplier relationship.

All the three types of mergers are potentially harmful to competition notwithstanding the fact that conglomerates are not entered into by competitors, suppliers and customers. Mergers may cause the elimination of effective competition, thereby creating dominant companies that have the capacity and potential of engaging in anti-competitive practices detrimental to consumer welfare, such as price increases and poor service delivery.

For the reason that all mergers recognised under competition law have the potential to negatively affect competition in the market, special laws have been designed to regulate mergers.

The Competition Act [*Chapter 14:28*] Act No 7 of 1996 came into force in 1998.

Section 2 of the Act defined a merger as follows:

“merger’ means –

- (a) the acquisition of a controlling interest in -
 - (i) an undertaking involved in the production or distribution of any commodity or service; or
 - (ii) an asset which is or may be utilised for or in connection with the production or distribution of any commodity;

where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same commodity or service; or

- (b) the acquisition of a controlling interest in an undertaking whose business consists wholly or substantially in –
 - (i) supplying a commodity or service to the person who acquires the controlling interest; or
 - (ii) distributing a commodity or service produced by the person who acquires the controlling interest;”.

This definition was clear as to the types of mergers it covered. Part (a) covered situations where a person acquired a controlling interest in an undertaking producing the same commodity or service (competitors). That was a horizontal merger. Part (b) covered situations where a person acquired a controlling interest in a supplier of commodities or distributor of services. That was a vertical merger.

The definition was amended in 2001 by Act 29 of 2001. Section 2 of the Act as amended now defines a merger as follows:

“merger’ means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of — ...”. (the emphasis is mine)

The Legislature's intention in amending the definition of merger could not have been to cover the vertical and horizontal mergers only, as originally provided for under the 1996 Act. The addition of the words "or other person" to the substance of the definition was intended to broaden the definition to include mergers between parties who did not fall within or were not sharing any characteristics with those in the categories of competitor, supplier and customer. The meaning of "merger" was broadened to cover a situation where one or more persons acquired or established a controlling interest in an undertaking not falling within the categories of a competitor, supplier or customer.

What determines the applicability of the definition of "merger" for purposes of the Act is the existence of a controlling interest by one or more persons in the whole or part of the business of another person. The definition is inclusive. In other words, the definition was deliberately widened to include all types of mergers. Without the words "or other person", the definition of "merger" would have been exhaustive as it would apply only to businesses or undertakings falling within each of the categories specifically stated. The word "other" describes a person who would not belong to any of the categories of persons specifically mentioned.

The definition of a merger in s 2 of the Act is similar to the definition of merger in the South African Competition Act 89 of 1998 which reads as follows:

"12. (1) For the purpose of this Chapter, 'merger' means the direct or indirect acquisition or direct or indirect establishment of control by one or more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or other person whether that control is achieved as a result of - ...".

Commenting on the definition of merger in the South African Competition Act, David Lewis - the then Chairperson of the Competition Tribunal - in a speech titled *The Competition Act 1998 – Merger Regulation*, said:

“There are a number of key features of merger regulation under the Act that you should appreciate upfront - firstly, it incorporates vertical, horizontal and conglomerate mergers; secondly, it is about acquisition of control and the mechanisms for acquiring control are broadly defined; thirdly control itself is broadly construed. In short, the merger definition is inclusive – there are few business combinations that would fall outside of the definition of merger. This contrasts markedly with the previous Act that dealt with horizontal mergers only - that is, mergers between competitors only.” (My emphasis)

In interpreting the same provision of the South African Competition Act of 1998, the South African Competition Tribunal in the case of *Bulmer SA (Pty) Ltd v Distillers Corporation (SA) Ltd* (1) [2001-2002] CPLR 448 (CT), 464 said the following:

“Section 12 refers to a competitor, supplier, customer or ‘other person’. The inclusion of the category of ‘other person’ considerably widens the ambit beyond the more obvious concerns about horizontal and vertical mergers to include all mergers.”

From the above, it is clear that the South African definition of a merger, similar to the definition of a merger in s 2 of the Act, was held to include other mergers outside the horizontal and vertical mergers mentioned. In the same vein, the respondent’s argument that the definition of a merger in the Act is inclusive of mergers other than horizontal and vertical mergers cannot be faulted.

For clarity, however, the South African Competition Act of 1998 has since been amended by Act No. 39 of 2000 to specifically include all mergers, but it is clear from the above authorities that even before that amendment the words “or other person” in the former definition of “merger” were held to include conglomerate mergers.

Commenting on the interpretation of the words “or other person”, Ignatious Nzero, in an article titled “*Is there a gap in the definition of corporate mergers in Zimbabwe’s Competition Act? Revisiting the Caledonia Holdings (Africa) Limited/Blanket Mine (1983) (Private) Limited Merger*” 2015 78.4 THRHR 589 at p 600, stated that:

“The phrase ‘or other person’ can be construed as a catch all phrase that is meant to capture all other forms of mergers outside those specified as between competitors, suppliers and customers. If the legislature really intended to maintain a same line of persons, it is submitted that it would have used the word ‘and’, not ‘or’. ‘And’ means in addition to the list provided, suggesting in addition to competitor, supplier and customer whereas ‘or’ suggests a diversion from the list. Thus, the use of ‘or’ entails that the legislature intended to expand the list to include even those persons outside the specified list. There is nothing in the statute or anywhere else to suggest that such a construction is wrong...”.

The words “or other person” in this context cannot be interpreted *eiusdem generis* as advocated by the appellants. The *eiusdem generis* rule was defined by the learned author Gail-Maryse Cockram, *The Interpretation of Statutes* 3 ed p 153, as follows:

“Where a list of items which form a genus or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words.”

The *eiusdem generis* rule is not a rule of general application to be applied every time general words follow particular words. The rule would be applicable where a general expression follows a list of items that form a *genus*. The categories of “customer, supplier and competitor” do not constitute a list of items that form a *genus*.

In *S v Makandigona* 1981 (4) SA 439 (ZAD) at 443H-444A the court reiterated that:

“It must be remembered that the *eiusdem generis* rule is only one of many rules of construction; it is not to be invoked automatically whenever general words follow particular words. Thus *Craies on Statute Law* 7 ed says at 181:

‘The *eiusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being what it is, a mere presumption, in the absence of other indications of the intention of the legislature.’”

At p 601 of the article referred to above, Nzero makes the observation that the application of the *eiusdem generis* rule to the words “or other person” would be a misinterpretation of the provisions of s 2 of the Act. He criticised the legal opinion that suggested that the application of the *eiusdem generis* rule in the interpretation of s 2 of the Act was appropriate. He stated:

“It is submitted that the application of the rule (*eiusdem generis*) in determining the meaning of the phrase ‘or other person’ as used in the statutory definition of a merger results in absurdity, as it would mean that only economic activities having an effect on the economy of Zimbabwe in the same class as competitor, supplier and customer would constitute a merger whereas other economic activities with similar effect on the economy of Zimbabwe, but which are not in the same genus or class as ‘competitor, supplier, customer’, would not constitute a merger. It is submitted that there is enough ammunition provided in the statute to determine the extent to which the legislature intended the statute to apply in general and the types of mergers covered in particular. As such, the application of the *eiusdem generis* rule was not necessary as it had the effect of creating an artificial gap in the statutory merger definition. The rule should not be applied as a general rule of application, but rather cautiously to avoid misinterpretation of statutory provisions. In particular, in constructing the meaning of ‘or other person’ used in section 2, it must be remembered that the *eiusdem generis* rule is only one of many rules of construction; it is not to be invoked automatically whenever general words follow particular words.”

Interpreting words in their context requires the courts to pay due regard not only to the meaning assigned to the grammatical use of language but also the context, which requires consideration of the rest of the statute as well as its subject matter and its content. This position was affirmed in the case of *Stellenbosch Farmers’ Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (AD) 476, as quoted by G M Cockram, p 41 of *The Interpretation of Statutes* 3rd ed, as follows:

“It is the duty of the court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the hand, to the meaning which permitted grammatical usage assigns to the words used in the section in question, and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and, within limits, its background.”

To determine the context in which the words “or other person” have been used, the scope and purpose of the provision in question and the Act at large must be determined first.

The scope and purpose of the Act, as provided for in the Act’s long title, reads as follows:

“AN ACT to promote and maintain competition in the economy of Zimbabwe; to establish an Industry and Trade Competition Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.”

It is clear from this title that, among other things, the Act aims to promote and maintain competition in the economy by regulating anti-competitive mergers. Merger regulation is at the core of competition law and in the spirit of regulating anti- competitive mergers, the Legislature enacted the current wide definition which covers all mergers which must be notified to the respondent. In terms of the Act, when a merger is notified the respondent decides if the merger undermines competition. Conglomerate mergers, although not entered into with competitors, suppliers or customers, just like horizontal and vertical mergers, affect competition. All mergers have the capacity to undermine competition.

The contention by the appellants was that if the Legislature had intended to cover all types of mergers because of their potential negative effects on competition it would have said so without specifying the categories of customer, supplier and competitor. The Legislature has a discretion on how it chooses to express its intention in the enactment of laws. The

question of whether the intention behind a statutory provision is inelegantly expressed should not concern a court. The duty of a court is to ascertain the intention of the Legislature however it is expressed.

In *Van Heerden v Queen's Hotel (Pty) Ltd* 1973 (2) SA 14 (RAD), 21, the court explained that:

“In interpreting statutes, courts are not concerned with the elegance of the language used. Statutory instruments are not usually remarkable for the elegance of their language. The court must interpret the words in a statutory instrument so as to give effect to the true intention of the legislature, and once that intention is clear, the fact that the language used in expressing it may not be as elegant as some would like, is not a matter of consequence, especially if the language is grammatical and easily understood.”

Disposition

It was for these reasons that the Court was satisfied that the concession by counsel for the appellant that the appeal lacked merit was well-founded and, accordingly, dismissed the appeal with costs.

HLATSHWAYO JA: I agree

PATEL JA: I agree

Lunga Attorneys, appellants' legal practitioners

Chihambakwe, Mutizwa & Partners, respondent's legal practitioners