COMPETITION AND TARIFF COMMISSION
versus
INNSCOR AFRICA LIMITED
and
GERIBRAN SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 30 June 2017, 5 & 26 July 2017

Trial

J P Mapuranga with J Mtizwa, for the plaintiff
Z Lunga, for the defendants

DUBE J: This is a competition law matter and concerns the definition of the term "merger", in terms of the Competition Act, [*Chapter 14:28*], [hereinafter referred to as the Act].

The parties brought this matter as a stated case in terms of Order 29 r 199 of the High Court Rules 1971 .The agreed facts of this matter are defined in terms of a statement of agreed facts as follows;

> "1. The first defendant and 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 section 2 of the Competition Act [*Chapter 14:28*]"

The issue the court was requested to determine is whether or not a conglomerate merger between the defendants is a notifiable merger in terms of s 2 of the Act. The determination of this matter rests solely on an interpretation of the phrase, 'or other person' as used in the definition of "merger". The plaintiff urged the court to apply the literal rule of

interpretation to discern the ambit of the word "merger" in the Act whilst the defendants urged the court to interpret the phrase 'or other person' *ejusdem generis* or *noscitor a sociis.* The word "merger" is defined in s 2 of the Act 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-
>
> (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person ;
>
> (b) the amalgamation or combination with a competitor or, supplier, customer or other person; or
>
> (c) Any means other than as specified in paragraph (a) or (b);''

Our Competition Act is moulded along the same lines as the South African Competition Act No 89 of 1998. The original definition of "merger" in this Act was similar to ours. The definition prior to it being amended in the year 2000 provided in s 12 as follows,

> "**Merger defined**
> (1)For the purposes 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 –
>
> (a) Purchase or lease of the shares, interest, or asserts of that competitor, supplier, customer or other person;
>
> (b) Amalgamation or combination with that competitor, supplier, customer or other person; or
>
> (c) Any other means''

The two definitions are clearly similar. In this respect, the definition given to the term "merger" in the South African Act will be considered in determining the meaning of the word "merger" in our own Act.

The new definition in the South African Competition Act has been improved and reads as follows,

> **"12. Merger defined**
> (1) (a) For purposes of *this Act*, a merger occurs when one or more *firms directly or indirectly* acquire or establish direct or indirect control over the whole or part of the business of another *firm.*
> (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through -
>
> (i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or
>
> (ii) Amalgamation or other combination with the other *firm* in question."

This definition is simple and all-inclusive of all mergers.

The approach to interpretation of statutes is to employ first the golden rule of interpretation which is the literal rule. In *Nyamande and Anor* v *Zuva Petroleum* SC 45/15,

the court remarked that the time honoured and golden rule of statutory interpretation is that you give the words of a statute their ordinary meaning. The rule entails giving the statute its ordinary grammatical meaning. This must be done unless if there is an ambiguity or absurdity ensuing from the interpretation, in which case other cannons of interpretation will require to be used. In the case of ambiguity in a provision, aids such as maxims may be resorted to in ascertaining the language and grammatical meaning of a provision.

The *ejusdem generis* rule is employed only where resort to the literal rule will result in an absurdity. In his book *Introduction to Zimbabwean Law (Weaver Press, Harare) 2010* @ p 154 Professor L Madhuku examines the meaning and application of the *ejusdem generis* rule and states that the rule literally means , "of the same kind ". He states that "where general words follow an enumeration of things or items of the same class or genus, the general word must be interpreted as restricted only to the things of that particular class."

He states further that for the maxim to apply, the items enumerated must constitute a genus. He relies on a similar approach by G Cockram (1987), *The Interpretation of Statutes,* 3rd ed , Cape Town; Juta and Co, at p153 where he states as follows,

> "where a list of items which form the genus or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *ejusdum generias* to include any other particular words."

He makes reference to the case of *Quazi* v *Quazi* 1980 AC 744 in which the court explained that when the word 'other' is used in a statute,

> "The presumption then is that the draughtsman's mind was directed only to the genius indicated by the specific words and that he did not, by his addition of the word 'other' to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genius but have been omitted from the preceding list either inadvertently in the interests of brevity"

The *jusdem generis* rule applies where,

1) The subject of enumeration constitutes a class or category
2) That class or category is not exhausted by the enumeration
3) The general term follows the enumeration
4) There is no indication of a different legislative intent.

The interpretation sought should not have the effect of rendering words in a statue redundant, superfluous or useless. See *Commissioner of Taxes* v *Edgars Stores Ltd* 2001(1) ZLR 147 (S). In *Musiwo* v *GMB* 2009 (1) ZLR 304 (S) the court remarked that the *ejusdem generis* rule is not a rule of general application and has to be applied with caution. The

tendency by the courts is to construe general words in their ordinary sense. See *Anderson* v *Anderson* 1 QB 752.

In order to get a full understanding of the definition of the word "merger" as given in the Act, it is pertinent to first have an understanding of what a merger is. Competition law recognises three types of mergers being, vertical, horizontal and conglomerate mergers. Horizontal mergers are mergers that take place between companies that are in direct competition with each other. An example of a horizontal merger is a merger of two businesses with similar products that are in competition to each other. An example of a horizontal merger is that between Daimler and Chrysler, two car manufacturing companies that merged. Vertical mergers are those mergers that take place between two related companies as in the case of a customer and a company or where a supplier and a company merge. An example of a vertical merger is one between a tyre manufacturing company and a retailer selling or marketing the tyres. A conglomerate merger is a term that is used to denote a merger between large 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. There is no economic relationship between the acquired company and the acquiring company. A conglomerate merger is able to diversify its activities and manage a wide range of activities through the merger. The merger may result in an increase of its market share and power. A conglomerate merger may create a monopoly resulting in it pushing other companies out of the market and may impair competition on the market. The Act specifically refers to acquisitions of a controlling interest in the business of a competitor, customer or supplier only and hence directly speaks to vertical and horizontal mergers only. There is no specific reference made in the Act to conglomerate mergers.

The respondents are engaged in two different industries. The two businesses do not pose competition to each other. Geribran is involved in the sale of motor spares and accessories whilst Innscor is in the food industry. What has transpired in this instance is that two companies involved in two unrelated businesses have merged. The parties are in agreement that this sort of merger constitutes a conglomerate merger.

The defendants relied on an opinion given by *Advocate de Bourbon* on the *Caledonia Holdings (Africa) Ltd Merger*, when the defendants merged, for the proposition that a conglomerate merger is not a merger as envisaged by the definition of a merger in the Act and is not a notifiable merger. The opinion concluded that conglomerate mergers are not covered in the Act. The defendants also rely on a report titled *UNCTAD Voluntary Peer*

Review of Competition Law and Policy: - Zimbabwe, An Overview. The paper states that the term "merger" as defined in our Act covers both horizontal and vertical mergers. It states that the definition of merger in the Act does not include pure conglomerate mergers and joint ventures resulting in the establishment of "green field" enterprises and that the general provision under s 2(1) cannot justify the omission of a specific provision to cover such mergers. The report suggests that the shortcoming be rectified.

The applicant initially accepted this position and accepted that the merger was a non-notifiable merger. The plaintiff now takes the view that conglomerate mergers are mergers in terms of the definition of "merger" given in our Act and require to be notified. The plaintiff insists on the defendants notifying it of the merger and paying the levies due to it.

The way in which s 12 (1) of the South African Competition Act has been interpreted by the South African Competition Tribunal before the amendment is relevant. The South African Competition Tribunal has interpreted the word "merger" and defined the phrase 'other person' in the context of their old s 12 which was identical to ours then. In *Bulmer SA (Pty) Ltd* v *Distillers Corporation (SA) Ltd* (1) [2001-2002] CPLR 448 (CT), the respondents purchased the business of another company. The Competition Tribunal was faced with a question regarding whether the transaction constituted a merger as defined in the South African Competition Act requiring the respondents to notify the Competition Commission of the merger. The respondents had argued that they had no duty to notify the Commission of the merger for the reason that the transaction did not lead to changes in the ultimate control of either company. It interpreted the definition of a merger to include all mergers. The court held as follows,

> "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"

The case highlights the need for a wide interpretation of the word "merger" in order to protect competition. Another very important case is *Imperial Holdings Ltd* v *Safair (Pty) Ltd* 908/lm /Jan 00 [2000] ZACT, where court evaluated a conglomerate merger which had been notified. The definition of merger in the South African Competition Act was amended in the aftermath of this decision.

There has been diverse opinion regarding the requirement for notification of a conglomerate merger. Commenting on the provisions of s12(1) (a) of the South African Competition Act, D Lewis in his speech, *The Competition Act 1998 –Merger Regulation,*

concludes that the definition in the South African Act which is identical to ours includes horizontal, vertical and conglomerate mergers. He states on p 2 of his speech as follows,

> "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''.

Commenting on the definition of a "merger" in our own Act, 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, states that s 2 is clear that it covers conglomerate mergers and are notifiable. He criticised the legal opinion by Advocate de Bourbon that suggests that the application of the *ejusdem generis* rule excludes conglomerate merger transactions from the scope of the definition of a merger. His views are that the phrase 'or other person' must be interpreted broadly to cover conglomerate mergers. He states as follows,

> "It is submitted that the application of the rule *(ejusdem 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 *ejusdem 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 *ejusdem generis* rule is only one of many rules of construction ;it is not to be invoked automatically whenever general words follow particular words''

What these authorities do is highlight is that there is a gap in the definition of "merger" as given in our Act and the old s12 of the South African Act .They propose a broad approach to the definition of ' merger '. The authorities also discount the use of the *ejusdem generis* rule as a tool of interpretation of the word on the premise that it creates an artificial

gap in the definition and leads to an absurdity. Their view is that a conglomerate merger falls within the definition of merger as defined in s 2 and is a notifiable merger.

Coming to the merits of the application, the Competition Act aims to promote and maintain competition in the economy by regulating acquisitions, anti-competitive business practices, and abuse of market power and anti- competitive mergers. Its focus is on control of restrictive trade practices, anti-competitive mergers and unfair trade practices. The intention of the legislature in enacting the current definition of a merger was to protect and regulate competition and have as wide a bracket as possible covering all mergers that have to be notified to the plaintiff, with those mergers which create serious competition challenges receiving extra attention by way of approval of the merger with conditions or complete prohibition of that merger. In this way, the Competition Commission is able to scrutinise all mergers and keep those mergers that create competition in check. Only mergers which need not be notified are those which do not meet the monetary threshold of 1, 2 million in terms of turnover, in terms of the regulations.

The determination of this matter rests on the court giving meaning to the phrase 'or other person' .Section two defines a "merger" as an acquisition or establishment of a controlling interest in the business of a competitor, supplier, customer 'or other person.' The classes of persons specified under s 2 cover horizontal and vertical mergers only. There is no clarity with regards conglomerate mergers. The definition includes a general provision including 'other person'. Reference to 'or other person', when used in its ordinary grammatical sense and meaning includes any 'other person' not specified in the definition of merger who acquires or establishes a controlling interest in the business of another. It becomes clear that the effect of the use of 'other person' is to extent the definition of merger to other classes of persons not previously specifically mentioned. It means that 'other person' refers to persons who are capable of merging. The word 'other person' has to be interpreted from the perspective that it becomes the only type of merger which is not either a horizontal or a vertical merger, that is, a conglomerate merger. 'Other person' includes all persons who are not competitors, suppliers or customers of a merging party. 'Other person' ought to be interpreted broadly. This approach allows the commission to examine '' a wide range of transactions which could result in an alteration of the market structure and in particular reduces the level of competition in the relevant market.'', see the *Distillers Corporation* case *(supra).* My view is that the definition does not limit the mergers to the list of persons

specified. The reference to 'other person' covers those mergers not covered in the definition and seeks to include other unspecified persons including conglomerate mergers.

Conglomerate mergers although not entered into by competitors, suppliers or customers, affect competition. When two companies come together in a conglomerate, although they may not be in the same trade, the effect is that their business is strengthened financially. In some cases the production capacity may increase. Once two entities merge to form a conglomerate, the joint business is strengthened financially and its production increased thereby controlling the market. This may result in other businesses being pushed out of the market by the merger thereby impairing competition. Conglomerate mergers therefore affect competition. The inclusion of the phrase 'or other person' must have been to ensure that every type of merger is covered by the definition. The legislature wanted to cover unforeseen mergers and ensure that all mergers that have an effect on competition are notified.

My conclusion is that the definition of merger in s 2 of the Act is all inclusive and covers all mergers. A conglomerate merger qualifies as a merger in terms of s 2 and is covered under the phrase, 'other person'. The inclusion of the words 'other person' widens the bracket to include all mergers. The merger between the defendants falls under the definition of merger as envisaged by s 2 of the Act. The defendants are required to notify the plaintiff of the merger and pay the prescribed notification fee in terms of s 34 A (2) of The Competition Act as read with the Competition (Notification of Mergers) Regulations, 2000. Once the meaning of the phrase is ascertainable using the grammatical approach, there is no need to apply the *ejusdem generis* rule. A literal interpretation of the phrase 'other person' does not lead to an absurdity. There is no justification in applying the *jusdem generis* rule.

The approach urged upon by the defendants that the enumerated words create a class of entities that are in the same market and further that a conglomerate merger does not fall under the definition of 'other person' is erroneous. This seems to be the reason why the defendants advocate for the *ejusdem generis* rule. If one applies the *ejusdem generis* rule, the general phrase must be interpreted to mean things of that particular class. This will mean that only vertical and horizontal mergers are covered under the definition. The interpretation ignores conglomerate mergers which although they involve non competitors, still create competition to other entities in that the merger will be in a stronger position than before. The problem with that interpretation is that it ends up exhausting the particular class or genus class, leaving the phrase, 'or other person' with no purpose in the definition. From a competition

perspective, if you can only have competitors, suppliers and customers, the end result will be that 'other person' has no meaning and the genus would have been exhausted. If the class is exhausted by the enumerated words, then the rule cannot be applied. The problem with the respondent's argument is that they don't identify who is covered under 'other person'. If the *ejusdem generis* rule is used, 'other person' becomes meaningless. I agree with the view expressed by I Nzenza that the use of the *ejusdem generis* rule would result in an absurdity as a conglomerate still has the same effect as vertical and horizontal mergers on the economy of this country. The merger will affect the balance of economic activity in Zimbabwe.

The court is being asked to interpret the law and set the record straight and correct the anomaly. In *Tregers Industries (Private) Limited* v *Commissioner General of the Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H) @ 70 the court remarked as follows,

> "The applicant argued that the respondent is "estopped" by the actions of his subordinates from denying that the applicant's interpretation of section of the Act is correct. I do not accept this submission. What the applicant is saying is that irrespective of the correct interpretation, the fact that the respondent's employees accepted that the goods in question were zero rated estops the respondent from arguing to the contrary. As a matter of law that cannot be correct. If an interpretation of the law is not correct, then that interpretation is not correct. The fact that respondent's employees may not have looked into the matter more carefully cannot estop the respondent from arguing that such interpretation is not correct".

See also *Delta Corporation Ltd* v *Zimbabwe Revenue Authority* HH 621/15.

A litigant who has relied on a wrong interpretation of the law is entitled to approach the courts seeking a correct interpretation of the law. Nothing stops the plaintiff from insisting on the correct legal position being followed. A statutory body cannot be estopped from changing its legal position in relation to its statutory obligations and rights. This is specially so where public monies are concerned. The plaintiff is not barred from seeking to correct the position and claiming the outstanding monies for levies due to it in terms of the Act.

The original crafters of the definition of 'merger' having seen a gap in the definition have improved it yet we still seem to want to hang onto the definition. Consequently, the definition of "merger" in the Act needs reconceptualization. In order to ensure effective control of mergers, the definition of "merger" in the Act requires being wide. A definition that is simple and all- inclusive is desirable. We are lagging behind South Africa. Our drafters have been caught flat footed. The legal drafters have a tendency of copying and pasting statutory provisions from other jurisdictions. They then sit and relax and do not follow up on

developments in those other jurisdictions and update their laws. The South Africans amended their own definition of "merger" way back in the year 2000 and we are still faced with an archaic definition of the term "merger".

In the result it is ordered as follows:-

a) It is declared that there is a notifiable merger between the first and the second defendants, in a manner obliging the defendants to notify the plaintiff thereof in terms of s 34A (2) of the Competition Act [*Chapter 14:28*] as read with the Competition (Notification of Mergers) Regulations, 2002 (S.I. 270 of 2002) (as amended).

b) The first and second defendants jointly and severally, the one paying the other to be absolved are to comply with s 34A (2) of the Competition Act [*Chapter 14:28*] as read with the Competition (Notification of Mergers) Regulations, 2002 (S.I 270 of 2002) (as amended) by notifying of this merger and paying the merger notification fee in the sum of $50 000.00 within seven (7) days from the date of this order;

c) Interest thereon at the prescribed rate of interest, currently 5% per annum, calculated from the date of issue of the summons to date of full payment, both dates inclusive; and

d) Costs of suit.

Chihambakwe, Mutizwa and Partners, plaintiff's legal practitioner
Lunga Gonese Attorney, for defendants' legal practitioner