REPORTABLE

**CASE NO.: A 61/2011**

1. **IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**WAL-MART STORES INCORPORATED**

**APPLICANT**

and

**THE CHAIRPERSON OF THE NAMIBIAN**

**COMPETITION COMMISSION** **1ST**

**RESPONDENT**

**THE NAMIBIAN COMPETITION COMMISSION** **2ND**

**RESPONDENT**

**THE MINISTER OF TRADE AND INDUSTRY** **3RD**

**RESPONDENT**

**MASSMART HOLDINGS LIMITED** **4TH**

**RESPONDENT**

**CORAM:** **SMUTS, J**

Heard on: 9 June 2011

Delivered on: 15 June 2011

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**JUDGMENT**

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2. **Smuts, J:** [1] This is an urgent application of an interlocutory nature seeking the execution of a judgment of the Full Bench of this Court, delivered on 28 April 2011, pending the final resolution of the appeal noted by the second and third respondents.

3. [2] This application was heard on 9 June 2011. Following an adjournment after argument, I granted an order in following terms on the same day, with reasons to follow:

3.1. 2.1 That condonation is granted for non-compliance by the applicant with the rules relating to forms, time periods and service in the Rule 6(12) of this Court and the matter is heard as one of urgency.

3.2. 2.2 That the operation and execution of the judgment delivered on 28 April 2011 in the above application is not suspended pending final resolution of the appeal noted by

the second and third respondents on 1 June 2011 against the judgment, and that the applicant is hereby granted leave that the judgment is implemented pending final determination of the appeal.

3.3. 2.3 That the second and third respondents are to pay the applicant's costs jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, such costs pursuant to the employment of one instructing and two instructed counsel.

4. [3] These are my reasons for that order.

**Background**

5. [4] This application arises in the following way. On 18 March 2011 the applicant launched an urgent application to declare Government Notice 75 in Government Gazette No. 460 of 29 March 2010 to be unauthorised and invalid and to declare as invalid the four conditions imposed by the second respondent (the Namibian Competition Commission) in its approval of the proposed merger between the applicant and the fourth respondent (Massmart Holdings Limited).

6. [5] The urgent application came before Muller, J and myself on
6 April 2011. Judgment was delivered on 28 April 2011. We found that paragraph (a) of Notice 75 to be unauthorised and invalid and we declared the conditions imposed by the Commission in its approval of the proposed merger to be invalid. The Commission and the third respondent (the Minister of Trade and Industry) were ordered to pay the applicant's costs.

7. [6] On the last day for the noting of appeals (1 June 2011), the second and third respondents noted an appeal against that judgment. Both notices indicate that the appeal is directed against the whole judgment and order. This application was then brought immediately afterwards. It was served later on
1 June 2011 under Rule 49(11) to implement the judgment of the Full Bench pending the appeal noted by the respondents to the Supreme Court. Appeals to a Full Bench of the High Court under Rule 49(11) have now been replaced by appeals to the Supreme Court. The position under Rule 49(11) and the common law is that a judgment of the High Court would be suspended pending the final resolution of the appeal.[1]

8. [7] As set out in the judgment appealed against, the merger

[1]Ondjava Construction CC v Haw Retailers t/a Ark Trading 2010 (1) NR 286 (SC) par 2 at 288

is between the applicant, Wal-Mart, a United States registered company, and the fourth respondent, a South African registered company. It involves a change of ownership and control at the ultimate holding company level in South Africa and not in Namibia where the fourth respondent operates through three active subsidiaries (and has two dormant subsidiaries).

9. [8] On 31 May 2011 the South African Competition Tribunal granted its approval of the merger – following the unconditional approval of the other competition authorities in other southern African states (except for Namibia) where the first respondents operates. Following the approval by the South African Competition Tribunal and the change in the shareholding in the holding companies, the implementation would automatically follow in Namibia._

10. **This application**

11. [9] Given the suspension of the judgment of the Full Court under Rule 49(11) and the common law, the applicant launched this application as a matter of urgency. The urgency was understandably not disputed – and was indeed acknowledged in correspondence exchanged between the Commission and the applicant.

12. [10] The urgency arises because the South African approval has triggered the implementation of the merger in respect of Namibia

(by virtue of the change of ownership of shares in the holding company in South Africa). It means that the merged entity would immediately upon the implementation of the merger be trading in conflict with the conditions imposed by the Commission. This would involve the consequence of potential illegality for the applicant of its operations as a consequence and even potential criminal liability. This quite apart from reputational damage.

13. [11] The respondents should reasonably have anticipated an application of this nature when noting their appeals by virtue of the obvious consequence of the appeal in suspending the operation of the judgment of the Full Court under Rule 49(11) and the common law.

14. [12] In its founding affidavit, the applicant reiterated that the merger promoted competition in Namibia. This was by virtue of the fact that there was no competitive overlap between the activities of the two merging parties within Namibia and no accretion in market shares and no increased concentration in any market within Namibia consequent upon the merger. The South African Tribunal in the summary of its ruling attached to the affidavit on behalf of the Commission also found that there were no adverse consequences for competition in South Africa.

15. [13] The background to the merger is set out in the judgment of the Full Court. It is accordingly not necessary for me to deal with

that background in any detail. In a nutshell, on 26 November 2011 the applicant and fourth respondent notified the Commission of its proposed merger in terms of s 44(1) of the Competition Act, 3 of 2003 ("the Act"). After early initial discussions with the Commission on the issue, the Commission indicated to the applicant that it considered that the Foreign Investment Act, 27 of 1990 ("FIA") and Government Notice 75 issued under it would apply to the proposed merger. As a result, the applicant addressed a letter to the Permanent Secretary of the Ministry of Trade and Industry on 15 December 2010 regarding s 3 of the FIA. The Ministry already then had notice of the merger. This approach was not addressed at the time. A reason given was the Minister's absence from office from 9 December 2010 to 1 February 2011.

16. [14] In the meantime, the Commission informed the parties that it had approved the proposed merger subject to four conditions in a letter dated 9 February 2011 in the form of a notice of determination contemplated by Form 41 to the Act. These four conditions are also set out in the judgment of the Full Court. They are as follows:

- **"the merger should allow for local participation in accordance with s 2(f) of the Act in order to promote a greater spread of ownership, in**

**particular to increase ownership stakes of historically disadvantaged persons;**

- **there should be no employment loses *(sic)* as a result of the merger;**

- **the merger should not create harmful effects on competition that may give rise to the risk of the market becoming foreclosed to competitors especially SME's (small and medium enterprises);**

- **that this being a retail business transaction, the approval of the Minister of Trade and Industry was required in terms of s 3(4) of the Foreign Investment Act, 1990 (Act 27 of 1990).**"

17. [15] It is common cause that after the receipt of this determination the applicant submitted a written request to the Minister in terms of s 49 of the Act on 8 March 2011, requesting him to review the Commission's decision to approve the merger subject to the conditions and to determine that the conditions are unenforceable and should be deleted. A deadline was provided to the Minister who was also informed that the approach to him was without prejudice to the right to proceed to Court. The Minister declined to deal with the application for statutory review within the short deadline referred to. The Minister however also did not propose any other timeframe.

When the application was heard on 6 April 2011, it would appear that he had not taken any further steps in relation to the approach for statutory review made by the applicant following its delivery on 8 March 2011. In this application it would also appear that no further step has been taken in respect of that review as no further action in respect of that review is disclosed by the Minister in his affidavit when referring to that review.

18. [16] The proposed merger was the subject of proceedings before the South African Competition Tribunal, originally set to hear the matter in March 2011. There was an unexpected postponement application which resulted in that hearing being shifted to 11 to 16 May 2011 by reason on an application to intervene by trade unions and two Government Departments for the purpose of placing expert evidence before that Tribunal and to cross-examine witnesses. That hearing has now been completed and the approved merger granted on 31 May 2011 was subject to certain conditions which the applicant had offered as undertakings. The ruling is, as I have said, attached to the affidavit of the Commission.

19. [17] The applicant approached this Court on 6 April 2011 to declare Notice 75 to be unauthorised and invalid and to declare the conditions imposed by the Commission to be invalid.

20. [18] As is clear from the judgment of the Full Court the

opposition by the Commission and the Minister was on procedural grounds. Unlike his South African counterpart, the Minister elected not to place any material before the Court in support of the conditions or other factual material relating to the merits of the merger. The Minister elected instead to confine his opposition to procedural (and technical) points in opposition to it. The Commission did likewise. Nor did any union apply to intervene to oppose the application and to place the matter before the Full Court. The Court is confined to the facts put before it by litigating parties and the elections they make in deciding whether or not to put material before Court and how they base their opposition.

21. [19] The Commission disputed the urgency of the application and also contended that the matter was not ripe for hearing by reason of the failure of the applicant to exhaust the internal remedy (of the review) provided by s 49 of the Act. The Minister's opposition was in similar respects. The Minister took a further procedural point of non-joinder of the fourth respondent's subsidiaries in Namibia. This point was not persisted with at the hearing. The Minister also contested the urgency of the application, raised another procedural defence of lack of authority in the answering affidavit which was also not persisted with in argument. The Minister also raised the failure on the part of the applicant to exhaust the internal remedy provided for in s 49 of the Act and contended that the application was premature for that

reason. Neither the Minister nor the Commission pleaded over on the merits. They thus did not provide any factual material or argument in support of the conditions imposed by the Commission. Written argument was however provided subsequent to the hearing on behalf of the Minister in support of the validity of Notice 75. This occurred at the invitation of the Full Court.

22. [20] The Full Court delivered its judgment on 28 April 2011. On

27 May 2011 the Secretary of the Commission sent a letter to the applicant referred to in the founding affidavit. In it, it was contended for the first time that the matter should ordinarily be referred back to the Commission to enable it to consider the matter afresh after the conditions had been set aside. It was proposed that the matter should be referred back to the Commission even though this had not been raised in the Commission's answering affidavits or in argument before the Full Bench. This letter required an answer by the next business day, 30 May 2011, failing which a notice of appeal would be given. In response to this letter, the applicant's legal practitioners proposed that a "without prejudice" meeting be held which occurred on Monday, 30 May 2011. But this failed to resolve the differences between the parties. A notice of appeal was then filed by the Commission on the last day for doing so, being 1 June 2011. The Minister also noted an appeal on 1 June 2011. This application was launched on the same day.

**This application**

23. [21] In the founding affidavit, it is contended that there would be no potential harm or prejudice to the respondents if leave to execute be granted. This was because the Massmart operations in Namibia would be allowed to continue without infringement of the conditions with the consequence of civil or criminal sanctions pending the appeal. It was recorded that no undertaking had been offered by the Minister or the Commission that the conditions would not be enforced pending the appeal. This was also confirmed by their representatives during the application.
Mr N Marcus, who appeared for the Commission, questioned whether such an undertaking would be competent in law and furthermore indicated that the Commission would decline to give such an undertaking. It was further pointed out in the founding affidavit that the Commission would have certain remedies in the event of the Supreme Court upholding the validity of the conditions and would under s 48 of the Act be able to revoke its approval.

24. [22] The prejudice thus stressed in the founding papers was that unless the order of the Full Bench were to be implemented pending the appeal, then the merged entity would be at risk of acting in contravention of the law of Namibia. It was also contended that there was no material potential or irreparable harm or prejudice to be

sustained by the respondents if leave to execute were to be granted and that there was thus no balance of hardship or convenience in their favour. The applicant also contended that there would be prospects of success on the appeal also favour the applicant. This is because the approach now taken by the Commission raised an issue which was neither sought in the papers before the Full Court nor argued for orally – namely a formal remittal of the matter to the Commission. The applicant further referred to the failure on the part of the Commission or the Minister to defend the merits of the conditions but instead deciding to devote their defence to procedural objections in respect of which the Full Bench would have exercised a discretion upon them, thus giving rise to a narrow ambit of appeal in respect of those decisions.

25. [23] In the founding affidavit and also in argument, it was contended that the proposed appeal is vexatious and not *bona fide*. Reference was made to the respondents waiting until the very last day to note their appeals and that the Commission had not sought to withdraw or amend its conditions and had done nothing to negotiate an agreed outcome which would have that effect. It was contended that its conduct was in the circumstances unreasonable and that the purpose of the appeal was merely tactical and lacking in good faith.

**The approaches to the application by the respondents**

26. [24] A notice of opposition was filed on behalf of the Minister on

3 June 2011. When no notice of opposition was filed on behalf of the Commission and no affidavit was filed on behalf of the Minister or the Commission by the day before the hearing, the applicant's attorney, Mr AM Stritter, filed a further affidavit, pointing out that he had received a letter from the Government Attorney on behalf of the Minister suggesting that there had been difficulties in obtaining instructions from the Minister as he had been out of the country. In response, it was stated that the applicant did not consider this to be an adequate basis for the late filing of affidavits. It was also stated in Mr Stritter's affidavit that it was not necessary for the decision makers themselves to be deponents. This is entirely correct. Mr Stritter had been the deponent to the applicant's founding affidavit in this application. Furthermore, the Minister had provided an instruction to oppose and opposition had been noted on his behalf already on 3 June 2011.

27. [25] The fact that they were "without prejudice" discussions also did not provide any proper reason for the failure to file a notice of opposition or an affidavit timeously, as was incorrectly contended on behalf of the Commission. Clearly, the two processes are separate and run parallel to each other. Parties are of course required to continue with preparation even if "without prejudice" discussions are in process.

28. [26] On the morning of the hearing of the application on 9 June 2009, a notice of opposition was filed on behalf of the Commission together with an answering affidavit. So too was an answering affidavit then filed by the Minister.

29. [27] The Secretary of the Commission, Mr HM Gaomab stated on its behalf that the second condition, relating to no employment losses consequent upon the merger, should remain in place pending the appeal. He did not propose that the other conditions remain in place or even address them in his affidavit. The Commission thus only sought that this single condition remain in place pending the appeal. Mr Gaomab submitted in his affidavit that there was no basis to assume that the merger approval would have been granted without the imposition of appropriate conditions relating to employment and that the imposed conditions could not be severed from the approval of the merger. He accepted this was a new point, not raised when the matter was heard on 6 April 2011 and contended that the Commission was not precluded from raising the issue for the first time on appeal.

30. [28] The Minister sought the dismissal of the application with costs. He did not confine his opposition to secure that single condition remaining in place and stated that his appeal remained against the whole judgment. The Minister also sketched his own

schedule which had meant that he had been out of the country when the application was served and only returned to Namibia on the afternoon of 7 June 2011. He also referred to the position of certain other senior ministry officials who were also out of the country at different stages. He accordingly requested a postponement of the matter to properly prepare an answer on the merits of the application but in the event of a postponement not being granted, he answered briefly on the merits with further reference in his affidavit to argument to be advanced on his behalf at the hearing. His affidavit did thus include answers to matters raised in Mr Stritter's affidavit.

31. [29] In his affidavit the Minister also contested that the requisites for relief of this nature set out in the applicant's affidavit had been established. He denied irreparable harm or prejudice to the applicant and contended that there would be irreparable harm to the national public interest issues represented by him if leave to execute the judgment pending the appeal were to be granted. He also contended that the balance of convenience rather favoured the interest of Government and not the applicant without elaborating. He further contended that there were reasonable prospects of success on appeal, stressing that the appeal was against the whole judgment of the Full Court. Whilst he pointed out that the basis for the appeal would be the refusal of the Full Court to refer the matter to him for exhaustion of the statutory review in terms of s 49 of the Act, he did not state what steps, if any at all, he had taken in respect of that

review. He also contended that another ground of appeal was the Full Bench's leave to hear the matter as one of the urgency.

**The application for postponement**

32. [30] When the matter was called, I indicated to the parties that I would receive the late affidavits and notice of opposition. I then enquired from Mr M Khupe, representing the Minister, whether the application for postponement was persisted with. Mr Khupe answered in the affirmative and submitted that a case for postponement had been made out. He stated that the application had been on short notice to the Minister and referred to the Minister's schedule and that of certain senior officials and to difficulties with regard to the non-availability of counsel who had argued the matter before the Full Bench.

33. [31] I asked Mr Khupe why a postponement was needed in the sense of enquiring what further aspects the Minister proposed to deal with in a further affidavit, as there was no reference to this in his affidavit. I specifically asked what issues of fact he would propose to address. Mr Khupe was not able to refer to any aspects which needed to be further addressed by the Minister in a further affidavit. I also referred to the fact that his office had already on 3 June 2011 obtained an instruction to oppose the application and enquired why preparation could not have proceeded whilst the

Minister was out of the country, following the green light given by him then to oppose it. Mr Khupe referred to difficulties with regard to the availability of lawyers in his office and of counsel referred to in Ms Koita's affidavit. But he was not able to provide any explanation why other counsel could not have been approached and engaged. I also asked him how much time was needed by the Minister for the proposed postponement. He replied that a few weeks would be necessary.

34. [32] Upon my enquiry, Mr Khupe accepted that the test for postponement applications is as set out by the Supreme Court in Myburgh Transport v Botha t/a SA Truck Bodies. [2] This judgment authoritatively summarises the applicable principles thus:

> **"The relevant legal principles of application in considering this appeal may be stated as follows:**
>
> **10. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 AD 505).**
>
> **2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey (supra); Madnitsky v Rosenberg 1949 (2)**

[2] 1991 NR 170 (SC) (per Mohamed AJA).

**SA 392 (A) at 398-9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.)**

**3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.**

**4. An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8E-G; Johannesburg Stock Exchange and Another v**

**Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152.)**

5. **A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. Madnitsky v Rosenberg (supra at 398-9).**

6. **An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Greyvenstein v Neethling 1952 (1) SA 463 (C). Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. Greyvenstein v Neethling (supra at 467F).**

7. **An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an**

**advantage to which the applicant is not legitimately entitled.**

**8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 453.)**

**9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.**

**10. Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a**

**case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. Van Dyk v Conradie Hand Another 1963 (2) SA 413 (C) at 418; Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137."**

35. [33] Mr Gauntlett on behalf of the applicant opposed the application for postponement. He pointed out that, although the Minister had been out of the country, the Deputy Minister was available until the Minister's return on 7 June 2011. He also pointed out that it would have been reasonable for the Minister to have anticipated an application of this nature when noticing an appeal. As I have already indicated, I agree with that submission.

36.

37. [34] Mr Gauntlett also referred to the fact that in opposition to the application before the Full Bench, the Minister confined his opposition to procedural challenges and that Mr Khupe was unable to refer to any factual area to be researched or addressed in a further affidavit. Mr Gauntlett also referred to the failure on the part of the

respondents to provide any undertaking pending the appeal. He correctly pointed out that once the opposition to the application had been instructed by the Minister on 3 June 2011, further preparation should have proceeded.

38. [35] As I have stressed, there was no evidence as to why the services of other counsel could not be obtained to prepare for opposition to the application. When I enquired from Mr Khupe as to whether an undertaking could be given, he indicated that he needed an instruction. But Mr Marcus for the Commission put paid to any brief adjournment to pursue this when he indicated that he did not consider that it would be competent to do so and also made it clear that his client was not prepared to give such an undertaking.

39. [36] In the exercise of my discretion and after carefully considering and weighing up the facts and arguments advanced, I declined to grant the postponement sought and proceeded to hear argument on the merits of the application. I did so by applying the principles set out by the Supreme Court in Myburgh Transport v Botha t/a SA Truck Bodies. [3] I weighed the prejudice of the parties which would arise by a proposed postponement of some weeks. Clearly, the prejudice to the applicant by a postponement of some weeks would be considerable, given the fact that the approval of the merger in South Africa had triggered the implementation of the merger in

[3] *supra*

Namibia with immediate effect. The legality of the applicant's operations in Namibia was in issue and the applicant was entitled in my view to have this issue determined as a matter of urgency. I also took into account that the regulatory body in question was not inclined to provide any undertaking.

40. [37] I also noted that the application for postponement had not been made timeously and, like noting the appeal, had been made at the very last moment and only on the morning of the hearing.

41. [38] The explanation provided for the need for a postponement was also lacking in several respects. Of crucial importance was the failure on the part of Mr Khupe to delineate any specific issue which needed to be canvassed or researched in a further affidavit during a postponement. He was thus not able to show that justice demanded that the Minister be afforded further time. There was also the failure to explain why other counsel were not approached and engaged when it appeared that counsel previously engaged was not available. Furthermore, no date is provided when it was established that counsel was not available. There is no mention of any effort to secure the services of other counsel. I also bear in mind that opposition was already instructed on or before 3 June 2011. No proper explanation is provided why preparation could not proceed after that.

42. [39] Weighing the factors and principles referred to in the Myburgh Transport judgment and applying them to facts of this matter, I resolved to decline the application for postponement and then proceeded to hear argument in respect of the application itself.

**Principles governing this application**

43.

44. [40] The principles applicable to an application of this nature were, with respect, succinctly summarised by the then Appellate Division in South Africa in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd [4] as follows:

> **"The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. V Estate Marks and Another, supra at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fismer v Thornton, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to**

[4] 1977(3) SA 434 (A) at 545 C-D (per Corbett JA, as he then was)

**the following factors:**

**(4) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;**

**(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;**

**(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and**

**(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."**

45.

46. [41] I accept that these principles also reflect the state of the law in Namibia, having been stated at a time when the then Appellate Division of South Africa was the highest court of appeal in respect of Namibia. The first, second and fourth requirements are inter-related and can be first dealt with together. I shall then turn to the question of prospects of success on appeal.

**Potentiality of irreparable harm or prejudice to the applicant (and fourth respondent) and the balance of prejudice**

47. [42] The two opposing respondents have not in my view established in their affidavits that they will suffer prejudice if the judgment and order is to be implemented pending an appeal. As I have indicated, the Commission has confined itself to only seek the operation of the condition with regard to no employment losses pending an appeal. The Minister merely referred to the public interest he serves without specifying the nature of that prejudice, except to refer to “times of high employment” but without stating how the merger would or could impact that.

48. [43] In its opposition to the main application, the Commission raised no factual matter whatsoever to found an apprehension that there would be employment losses as a consequence of the merger. Nor did the Minister for that matter.

49. [44] Because neither the Commission nor the Minster had placed factual matter in opposition to the main application in support of the conditions, Mr Marcus invited me to take judicial notice of the high unemployment rate in Namibia. I pointed out there would not appear to be consensus as to the level of unemployment but even if I were to accept that it is high as stated by the Minister, which I certainly do, neither the Commission nor the Minister had placed any factual matter before the Full Court in support of any apprehension that the merger would have any impact upon unemployment. On the contrary the applicants' statements of no loss of jobs and potential employment gains were not put in any issue in any proper sense.

50. [45] The condition in question reads:

> **"There should be no employment loses (sic) as a result of the merger."**

Its exceptionally poor formulation understandably attracted criticism. Mr Gauntlett referred to it as illiterate and incomprehensible. The reason provided for this condition by the Commission was as follows:

> **"In most instances, mergers result in some workers loosing their jobs. Commission encourages that retrenchments relating to this**

**transaction be minimized so as not exacerbate the already unacceptable unemployment situation in the country (sic).”**

51. [46] The purported reason provided by the Commission for this condition is a platitudinous generalisation about mergers without any specific reference to the applicant’s operations. Clearly the Commission cannot act on mere surmise or suspicion but would need to justify its decision with factual matter which it did not do so. [5]

52. [47] Furthermore, the manner in which the applicant dealt with employment issues in the main application was not placed in issue by either set of respondents in any proper sense. Neither the Commission nor the Minister placed any facts or any basis in their answering affidavits to properly challenge the applicant’s statements about the lack of employment losses and the prospect of further employment. It was of course open to them to do so. They elected not to do so.

53. [48] As far as the other conditions are concerned, the Minister likewise placed no factual basis in support of them. Nor was any argument advanced on his behalf at the hearing before the Full Bench, concerning or in support of the other conditions, except for the written argument subsequently provided on the legal question as to

[5]Kaulinge v Minister of Health and Social Services 2006(1) NR 377 (HC).

the validity of Government Notice 75.

54. [49] As was pointed out by Mr Gauntlett, in submitting that there had been no prejudice to the respondents, the *status quo* regarding the day to day trading by the fourth respondent's subsidiaries in Namibia, doing business and serving the public, employing staff and ordering of supplies, would continue without any material change. This he contends would not give rise to an adverse impact on the greater public interest if the order of the Full Bench were to be implemented forthwith.

55. [50] On the other hand, the prejudice to the applicant (and the fourth respondent) if the order were not to be implemented would be considerable. Upon the implementation of the merger, they would potentially be contravening the law of Namibia by trading in conflict with the conditions. Mr Gauntlett correctly pointed out that this would be a strong indicator for the granting of Rule 49(11) relief. [6] The risk of criminal or other sanctions which may be visited upon the applicant and the fourth respondent would indicate that the harm to the applicant (and fourth respondent) and the balance of harm to them would in my view be substantial.

56. [51] It would follow in my view that the balance of harm –

[6]Medical Association of Namibia Ltd v Minister of Health and Social Services (unreported, High Court) a 19/9/09, 8/9/2010 at paras 7.6-7.7.

should the order not be implemented pending appeal – would militate in favour of granting the relief sought. In exercising my discretion in this regard, I also take into account the undertaking made by Mr Gauntlett on behalf of the applicant that there would be no merger related retrenchments on the part of the applicant in its operations in Namibia for a period of two years from the implementation of the merger. This I considered in the context of the Commission's contention that the condition relating to no employment losses should remain in place. The concession by Mr Marcus that the condition itself was not defensible further demonstrates that the balance of harm would militate against finding that an admittedly invalid and unsustainable condition should remain in force pending appeal. I further deal with this aspect under prospects of success. I also take into account that the implementation of the Full Bench order would result in the *status quo* being maintained. Finally, I take into account the absence of any undertaking by the respondents that adverse consequences would not occur in respect of the applicant. In the exercise of my discretion, I found that these three requirements for the granting of this relief have been met by the applicant in this application. I now turn to the question of prospects of success.

**Prospect of success**

57. [52] The argument advanced by Mr Marcus on behalf of the Commission would appear to narrow the basis of its appeal against

the judgment as I have set out above. The Commission only sought to secure one condition remaining in place, namely that relating to no employment losses, pending the appeal.

58. [53] I have already quoted the condition and the reasons provided for it. Mr Marcus correctly accepted that there was a disjunct between the reason provided and the absolute ban set out in the condition. He accordingly accepted that the condition in its present formulation was not sustainable. But, he argued, the promotion of employment features prominently as an objective in the Act. He submitted that an inference must be drawn that the Commission would not have granted its approval in the absence of making a condition with regard to employment losses and that the condition relating to no employment losses pending the appeal should remain in force. This submission does not have any foundation in the facts placed before the Full Court. It would appear to be based upon a reading of the objectives and purposes of the Act. He submitted that this should be seen in the context of his overall submission of a referral back to the Commission, even though this had not been raised in the paper or in argument at the hearing before the Full Court.

59.

60. [54] Mr Marcus made no submissions concerning the validity of the other conditions. Nor did he submit that they should remain in place pending the appeal. In support of his contention concerning the

referral, he submitted that the Act contemplates an extricable link between employment issues and approval of mergers. There was thus the consequent need for a referral back to the Commission, so he argued and referred to the English authority of Hall & Co Ltd v Shoreham-By-Sea Urban District Council and Another. [7] During a brief adjournment I was able to briefly consider this judgment and pointed out to Mr Marcus that it was in the context of planning where a condition relating to the approval of a scheme was fundamental to the required planning permission. Mr Marcus contended that the condition relating to no employment losses was not trivial but central to the decision of the Commission and the purpose of the Act and should thus remain in place.

61. [55] Having conceded that the condition in question did not stand up to scrutiny I enquired from Mr Marcus why it should then be enforced pending the appeal. In response, he reiterated his submission about the centrality of employment in any approval under the Act.

62. [56] In reply, Mr Gauntlett pointed out that the English authority relied upon did not support the Commission's position as argued by Mr Marcus. He correctly pointed out that the holding of that decision in this context was the refusal to re-write a local authority's conditions for them when it had imposed conditions which

[7] [1964] 1 All ER 1 (CA) at p 10.

were *ultra vires*. He correctly contended that, given the concession that the condition in question which the Commission wanted to enforce pending the appeal was not sustainable in its present formulation, it would then not be for the Court to reformulate or re-write that condition for it to remain in place. Not only would that be entirely inappropriate on the strength of the English authority relied upon by Mr Marcus and upon general principle, but there was furthermore no evidential or factual basis for the Court to even commence such an exercise. This is compounded by the hopelessly unspecified generalisation raised in support of the condition.

63.

64. [57] I agree that it is not for the Court to formulate conditions which the Commission has not been able to properly make. It would have been inappropriate for the Full Court to have done so and even more so for me to do attempt to do so now in these proceedings so that it can operate pending the appeal.

65. [58] Importantly, the concession by Mr Marcus about the unsustainability of this condition (the single condition now relied upon) significantly undermines any argument on the prospects of success on appeal for the appellants. By not seeking to have the other conditions enforced, it would appear that the Commission would appear to accept that those would likewise be unsustainable.

66. [59] In his argument on the merits of this application, Mr

Khupe pointed out that the Minister had been prevented by the Commission from being able to address issues which should have formed part of conditions and that the Commission should have consulted with the Minister prior to making its determination. He conceded that the Minister could have done more in addressing opposition to the original application and this application. He associated himself with the submission that there should be a referral back to the Commission.

67.

68. [60] Mr Gauntlett in reply argued there was no basis in the affidavits and in argument before the Full Court for the referral point now taken. He also pointed out that the Minister's position was wider than the specialist regulatory body (the Commission) in not confining his appeal. He stressed that the argument that the statutory remedy should first be exhausted was unsustainable. He submitted that the Minister was not fitted out for the task to adjudicate the issue given the fact that he would need to adjudicate upon the validity of his own Government Notice in that process. He also pointed out that the Minister had done nothing in connection with the referral of the statutory review to him three months ago and that it would be a cynical exercise to refer the matter for the exhaustion of the internal remedy to the Minister to exercise the jurisdiction which he had never exercised.

69.

70. [61] Mr Gauntlett further submitted that by only seeking to

have one condition in place, the Commission accepted that the other conditions were not sustainable and that the Commission's representative was constrained to accept that the condition relating to employment was indefensible. He further argued that the Commission had established no case whatsoever of an apprehension of job losses as a consequence of the merger. It had not addressed this or any of the other conditions properly and argued that the attempt at a referral was to cover up for its own inadequacy.

71. [62] It follows from the above that an assessment of the prospects of success would not favour the respondents. There is the failure on the part of both the Minister and the Commission to have addressed the conditions in their application before the Full Bench in evidence or in argument. It would appear that the intention on the part of the Commission is not to reverse the judgment on appeal, but rather to raise the question of referral not foreshadowed on the papers before the Full Court or in argument. Once it is conceded by the Commission that its condition sought to be enforced is not sustainable and invalid, its opposition to this application is exposed as without merit at all.

72.

73. [63] Exercising my discretion, I accordingly find that the requisites for relief of this nature have been met and that the applicant should be granted leave to implement the judgment of the Full Court pending the appeal noted to the Supreme Court. There

remains the question of costs.

**Costs**

74. [64] The applicant sought a special order as to costs, contending that the opposition to this application on the part of both respondents was unreasonable and amounted to a tactical manoeuvre, seeking to extract concessions or imposing conditions after essentially conceding that the conditions imposed by the Commission were not sustainable. Mr Gauntlett referred to In re Alluvial Creek [8] and submitted that the conduct on the part of the respondents, viewed overall, was vexatious within the meaning of that term used in In re Alluvial Creek – thus being vexatious in effect even if not in intent. Gardiner JP in In re Alluvial Creek [9] referred to such parties in the following way:

75.

> **"There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet these proceedings may be regarded as vexatious when they put the other side to unnecessary trouble, expense which the other side**

[8] 1929 CPD 532 at 535.

[9] *Supra* at p 535

**ought not to bear."**

76.

77. [65] That judgment has been followed over the years. I find that the approach set out in it to be applicable in Namibia.

78.

79. [66] I also and in any event find that the opposition to this application was unreasonable and would justify a special cost order. [10]

80. [67] It would rather appear to be for the purpose of a tactical manoeuvre or to cause a delay. The respondents had opposed the application before the Full Court on procedural grounds only. No factual matter or argument was then raised in support of the conditions which they now say should apply pending the appeal. They delayed noting their appeal to the last day. Delay has also characterised the opposition to this application. I agree with Mr Gauntlett's submission that a State regulator litigating at public expense would involve a higher and not lower standard of conduct and responsibility in the conduct of its litigation.

81.

82. [68] The Commission, in an entirely unmeritorious argument, contended for only a single condition to remain in place which its counsel, Mr Marcus, conceded was itself unsustainable and invalid. Quite how this should be achieved was understandably not explained.

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[10] Engineering Management Services v South Cape Corporation (Pty) Ltd 1979 (3) SA 1341 (W) at 1344-5 (per Nicholas J, as he then was).

83.

84. [69] In the exercise of my discretion, I found that this is a case for granting costs on an attorney and client scale which is reflected in the order which I gave.

[70] It is thus for these reasons that I gave the order set out above.

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**SMUTS, J**

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| **ON BEHALF OF APPLICANT:** | Adv JJ Gauntlett SC |
| Assisted by: | Mr F Pelser |
| Instructed by | Engling Stritter & Partners |

**ON BEHALF OF THE 1ST RESPONDENT:**

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|---|---|
| | Mr N Marcus |
| Instructed by: | Namibia Competition Commission |

**ON BEHALF OF THE 3rd RESPONDENT:**

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|---|---|
| | Mr M Khupe |
| Instructed by: | The Government Attorney |