

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Bytes Technology Group South Africa Pty Ltd ("Bytes") in relation to certain automated teller machines and their related sites owned by Bytes (018945) [2014] ZACT 53; [2015] 1 CPLR 225 (CT) (26 August 2014) [2014] ZACT 53

COURT

Competition Tribunal

BEFORE

Takalani Madima, Anton Roskam, Fiona Tregenna

CASE / FILE NUMBER

018945

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018945

In the matter between:

ABSA BANK LIMITED

Primary Acquiring Firm

And

BYTES TECHNOLOGY GROUP SOUTH AFRICA

PROPRIETARY LIMITED ("Bytes") in relation to certain

automated teller machines and their related sites

owned by Bytes

Primary Target Firm

Panel

: DrTakalani Madima (Presiding Member)

: Anton Roskam (Tribunal Member)

: Prof Fiona Tregenna (Tribunal Member)

Heard on :

30 July 2014

Order issued on :

30 July 2014

Reasons

Issued on : 26 August 2014

Reasons

for Decision

- [1] On 30 July 2014, the Competition Tribunal unconditionally approved the merger between ABSA Bank Ltd (“ABSA”) and Bytes Technology Group South Africa Proprietary Limited in relation to certain automated teller machines and their related sites (“the Assets”) owned by Bytes.
- [2] The reasons for approving the proposed transaction follow hereunder.

Parties to transaction

Primary acquiring firm

- [3] The primary acquiring firm is ABSA which is a wholly owned subsidiary of Barclays Africa Group Limited (“BAGL”) which is a public company listed on the Johannesburg Stock Exchange Limited (“JSE”). BAGL is controlled by Barclays Pic (“Barclays”). Barclays’ shareholding in BAGL is held through a wholly-owned UK-incorporated subsidiary, Barclays Africa Group Holdings Limited (“BAGHL”). Barclays is a public company listed on the London Stock Exchange, The Tokyo Stock Exchange and has listed its shares and the American Depository Shares representing such shares on the New York Stock Exchange. Barclays is not controlled by any undertaking but directly and indirectly controls a number of firms, who are collectively referred to hereinafter as the “Barclays Group”.

Primary target firm

- [4] The primary target firm comprises of 913 ABSA branded ATM’s and their related sites (collectively known as the “Assets”).

These Assets are owned by Bytes Managed Solutions (“Bytes MS”) which is an unincorporated division of Bytes Technology Group South Africa (Pty) Ltd (“Bytes”). Bytes Technology Group (Pty) Ltd (“BTG”) holds a 73% controlling interest in Bytes. BTG is a wholly owned subsidiary of Altron Finance (Pty) Ltd (“Alfin”). Alfin is in turn a wholly owned subsidiary of Allied Electronics Corporation Limited (“Altron”). Altron is a public company listed on the JSE. Apart from a controlling shareholding held by Dr. W.P Venter, the founder of Altron, the remainder of the stock is widely distributed.

Proposed Transaction and Rationale

- [5] In terms of the Asset Acquisition Agreement, ABSA intends to acquire the Assets from Bytes. Post-merger, ABSA will have sole control over the Assets.
- [6] The Assets are currently operated by Bytes on ABSA's behalf (the Assets are also ABSA branded) in exchange for a share of the revenue generated from cash withdrawal and transaction fees generated from the Assets.
- [7] The transaction merely contemplates the cessation of the current arrangement and a change of ownership over the Assets from Bytes to ABSA.
- [8] The Asset Acquisition Agreement entered into by the merging parties contains a restraint of trade, in terms of which Bytes agrees not to directly and indirectly use and share the information and share the information pertaining to the Assets which it has collected while acting on behalf of ABSA. This restraint is for a period of five years following the closing date and it covers an area of a 500m radius from each of the Assets. The issues surrounding the restraint of trade clauses are dealt with more fully below.
- [9] ABSA submits that the transaction will enable it to increase its revenue by virtue of no longer having to share the revenue. Bytes decided to exit this non-core business model and focus on its core competencies of managed services.

Relevant Market and Impact on Competition

- [10] ABSA provides banking products and services to both retail and corporate clients through the following divisions: retail banking,

ABSA private banking; flexi banking; commercial banking; wholesale banking and small business banking. As part of its retail banking

activities, ABSA maintains and operates a network of approximately 9600 ATM's across South Africa. Of this network of 9600, 6 300 are supplied and maintained by Bytes (including the Assets), 2 500 are supplied and maintained by a competitor of Bytes, leaving a balance of 800 ATMs which are owned and maintained by ABSA.

- [11] Bytes is the exclusive distributor of NCR[1] products (including ATM's and other point of sale devices) in South Africa and selected neighbouring countries. Bytes supplies and maintains over 11 000 ATM's to different retail banks in one of two ways, the first being through an ISO model in terms of which Bytes owns, maintains and operates ATM's on behalf of retail banks in exchange for a share of revenue. Secondly, Bytes only supplies and maintains ATM's for retail banks and thus the retail banks in this instance will own the ATM's and not Bytes.

- [12] An assessment of the merging parties' activities found that both ABSA and Bytes are active in the ownership and maintenance of ATM's. However, given that ABSA's ATM's are solely for its in-house retail banking activities and that it does not supply and maintain ATM's for any third party, the proposed transaction does not result in a competitive overlap in the activities of the merging parties.
- [13] The transaction has a vertical aspect to it in that Bytes supplies and maintains the Assets for ABSA. Relevant for purposes of this transaction is that the Assets, which are complimentary to ABSA's retail banking activities, are being acquired by ABSA and not Bytes itself. It was thus considered whether the proposed transaction could lead to any foreclosure concerns as Bytes offers these services to other retail banks. It was found however, that although Bytes supplies over 11 000 ATM's to different retail banks, only a fraction of these are supplied to ABSA and Nedbank through an ISO model (see paragraph 11 above). It was submitted that Bytes is in the process of exiting the ISO model and that it is currently in negotiations with Nedbank to exit its current arrangement. Thus it will continue post-merger to supply, install and maintain ATM's for other retail banks (including ABSA).
- [14] I am therefore of the view that the sale of the Assets would not have any impact on ABSA's competitors and as such the proposed transaction is unlikely to have any effect on competition within the market.

Restraint of Trade

- [15] As stated in paragraph 8 above, the Asset Acquisition Agreement contains a restraint of trade clause in terms of which Bytes agrees not to establish, be it through its direct or indirect involvement, a business which would compete with the Assets within South Africa for a period of 5 years following the closing date. Further, in terms of the restraint Bytes shall not procure that another party, place an ATM within a 500m radius of any of the Assets pursuant to this agreement.
- [16] It was found that the restraint only prevents Bytes from placing ATM's on behalf of other retail banks within a 500m radius of any site acquired by ABSA. Thus the undertaking does not preclude Bytes from continuing any of its other existing ATM activities namely supplying, maintaining and installing ATM's on behalf of the other banks that compete with ABSA. The rationale for the restraint of trade is merely to ensure that the value of the Assets is transferred to ABSA due to the commercially sensitive information possessed by Bytes and the duration of the return on investment period necessary to obtain break on the transaction.
- [17] I am therefore of the view that the restraint is reasonable, justifiable and necessary to protect the investment made by ABSA on

the Assets. I find further that the restraint is not unduly restrictive and the assessment is in line with the approach previously adopted by the Tribunal[2] and as such is unlikely to substantially prevent or lessen competition in the market.

Franchise Agreements

- [18] As part of the current relationship between ABSA and Bytes, Bytes has entered into franchise agreements with the site owners wherein the Assets are located. With regards to the franchise agreements, the Commission identified a concern relating to the exclusivity clauses contained in 3 of the 5 sample agreements between Bytes and the site owners wherein the Assets are located.
- [19] The Commission is concerned that the exclusivity clauses could prevent other retail banks from putting up and operating their ATM's within the identified sites and restrict competition with the Assets. In order to address these exclusivity concerns the Commission requested that the merging parties have the clauses removed upon the renewal of the agreements. The Commission is of the view that given that the franchise agreements will be ceded to ABSA on the same conditions and then they will also be due for renewal on the same conditions that currently govern the agreements.
- [20] Based on this, the Commission recommended a conditional approval in terms of which the merging parties or ABSA in this instance should, upon the renewal of the franchise agreements, after the approval date, undertake to use reasonable endeavours to negotiate with the site owners in their utmost good faith to remove the exclusivity clauses contained in the franchise agreements.
- [21] The merging parties opposed the condition on the basis that that the Commission has not identified any relevant market in which to assess any impact of the exclusivity clause. Secondly, that the Commission failed to demonstrate to the necessary evidential burden that the exclusivity clause leads to a substantial prevention or lessening of competition. Third, even in the plausible case, that it could give rise to a substantial prevention or lessening of competition, the exclusivity clause dates from a pre-existing agreement and as such is not merger specific and as such, falls outside of the scope of 12A of the Act.
- [22] The Tribunal agrees with the Commission in that exclusivity clauses have the effect of foreclosing and restricting entry by competing firms. However, as was argued by the merging parties, the mere existence of exclusivity does not, in and of itself, constitute a plausible theory of harm. An exclusive vertical agreement is not per se prohibited, but is subject to a rule of reason analysis contemplated in Section 5(1) of the Act, which obliges the Commission to undertake an analysis to establish whether or not, on a balance of probabilities, the agreement would have the effect of substantially preventing or lessening competition in the identified market. In this regard in its enquiry into the use of similar exclusivity clauses, the Commission acknowledged that other participants engage in similar exclusivity clauses in their contracts.[3]
- [23] We therefore find that it is unfair for the merging parties to be burdened by the condition impressing upon them to remove the exclusivity when their competitors are free to do as they so please. It is further inappropriate for antitrust issues to be implemented through the back door by means of merger control. Other avenues are available to the Commission to

investigate any concerns arising from the exclusivity clauses in question, especially in light of the wider usage of such clauses in the sector. Rather than safeguarding competition such selective implementation as imposed upon the merging parties could easily give rise to an unintended consequence of undermining competition between competitors.

Conclusion

[24] In light of the above I conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the provision of retail

banking services. In addition, no public interest issues arise from the proposed transactions. Accordingly we approve the proposed

transaction unconditionally.

26 August 2014

DATE

Dr Takalani Madima

Anton Roskam and Prof Fiona Tregenna concurring

Tribunal Researcher: Derrick Bowles

For the merging parties: Mark Griffiths - Norton Rose Fulbright on behalf of ABSA

and Gomolemo Kekesi - Bowman Gilfillan on behalf of Bytes

For the Commission: Reabetswe Molotsi and Nompucuko Nontombana

[1] NCR is a global technology corporation.

[2] See Replication Technology Group (Pty) Ltd and Gallo Africa Limited, Tribunal case number 92/IR/Sept07; Calulo Investments (Pty) Ltd, Investec Bank Ltd and FFS Refiners (Pty) Ltd, Tribunal case No.; 91/LM/Oct12.

[3] See page 532-533 of the Record.

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