

SOUTH AFRICA / JUDGMENT

AECI Limited v Much Asphalt (Pty) Ltd (LM234Nov17) [2018] ZACT 36 (20 April 2018) [2018] ZACT 36

COURT

Competition Tribunal

BEFORE

Y Carrim, I Valodia, A Wessels

CASE / FILE NUMBER

LM234Nov17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM234Nov17

In the matter between

AECI Limited

Primary Acquiring Firm

And

Much Asphalt (Pty) Ltd

Primary Target Firm

Panel

: Yasmin Carrim (Presiding Member)

: Imraan Valodia (Tribunal Member)

: Andreas Wessels (Tribunal Member)

Heard on : 28 March 2018

Order Issued on : 28 March 2018 Reasons Issued on : 20 April 2018

REASONS

FOR DECISION

Approval

- [1] On 28 March 2018, the Competition Tribunal ("Tribunal") unconditionally approved the proposed transaction in terms of which AECI Limited ("AECI") is acquiring control over Much Asphalt (Pty) Ltd ("Much Asphalt").
- [2] The reasons for the approval of the proposed transaction follow.

Primary Acquiring Firm

- [3] AECI is a company listed on the JSE, and is not controlled by any single firm. AECI controls a number of firms including AECI Mining Solutions Limited and African Explosives International Limited. AECI and its subsidiaries are hereafter referred to as the "AECI group".
- [4] The AECI group is primarily focused OQ explosives and specialty chemicals. The AECI group comprises of five primary business units,

inter alia, mining solutions, specialty chemicals and agrochemicals. The specialty chemicals businesses remains core for AECI and comprises numerous firms, including Crest Chemicals (Pty) Ltd ("Crest Chemicals") and Industrial Oleochemical Products (Pty) Ltd ("IOP").

Primary Target Firm

- [5] Much Asphalt is collectively controlled by Capitalworks Funds and Mineworkers Investment Company (Pty) Ltd.[1] Much Asphalt controls a number of firms including SprayPave (Pty) Ltd ("Spraypave") and East Coast Asphalt (Pty) Ltd ("ECA"). Much Asphalt and its subsidiaries are hereafter referred to as the "Much Asphalt group". The Much Asphalt group manufactures and supplies hot and cold mix asphalt products, modified and unmodified bituminous emulsions and binders.

Proposed transaction and rationale

- [6] The proposed transaction entails the acquisition of the entire issued shares, and the shareholder claims in Much Asphalt. Upon implementation of the proposed transaction, AECJ will exercise sole control over Much Asphalt.
- [7] The Competition Commission ("Commission") found that there is no horizontal overlap between the activities of the merging parties because the Much Asphalt group is a manufacturer and supplier of asphalt and bitumen products and none of the firms in the AECI group supply any asphalt or bitumen products, nor do they supply or manufacture any products that can be regarded as substitutes for such products.

- [8] After the Commission had completed its investigation and recommended an approval to the Tribunal the representatives of the merging parties became aware of and advised the Commission that a vertical relationship existed between the merging parties. As a result, the approval of the proposed transaction was delayed. The merging parties had to make submissions in order to facilitate further investigations by the Commission.
- [9] The merging parties submitted that Crest Chemicals, a subsidiary of AECl, supplied caustic soda and hydrochloric acid to Spraypave. Another subsidiary of AECl namely IOP sold bitumen emulsifiers and fluxing agents to ECA.[2] The merging parties further submitted that the vertical relationship is limited as the sales are negligible as they constitute less than 0.01% of AECl's turnover and 0.05% of its Chemical unit.[3] The Commission perused the merging parties' submissions and found that IOP and Crest Chemicals have relatively high market shares in the upstream market for the supply of bitumen emulsifiers. However, the Commission is of the view that due to the target group's low market shares in the downstream market, the AECl group's capacity to supply bitumen emulsifiers would not be absorbed and that they could still supply other firms in the downstream market. The Commission submitted that the vertical relationship will not result in foreclosures or facilitate coordination in the markets, therefore it is unlikely to substantially prevent or lessen competition.
- [10] The Tribunal notes that Much Asphalt has been implicated in two complaints by the Commission relating to market allocation/division, collusive tendering and price fixing.[4] The merging parties submitted that the underlying complaints date back to when Much Asphalt was owned by Murray & Roberts and they have since been acquired by the consortium led by Capital Works, with the legal entity remaining under the ownership of Murray & Roberts.[5] In the Robin Frank v Much Asphalt complaint, Much Asphalt (old Much Asphalt) is the leniency applicant, and the merging parties were not in a position to comment on the second complaint because they do not represent the old Much Asphalt. They nevertheless assured the Tribunal that they have a competition law compliance programme in place to assuage any concerns about future conduct.

Public interest

- [11] The merging parties confirmed that the proposed transaction will not result in any retrenchments, and due to the lack of overlapping

activities, there will be no duplications of jobs as a result of the proposed transaction. The proposed transaction raises no other public interest concerns.

- [12] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction unconditionally.

Prof . Imraan Valodia

Ms Yasmin Carrim and Mr Andreas Wessels concurring.

20 April 2018

Tribunal Case Manager: Aneesa Ravat

Kgothatso Kgobe

For the Merging Parties : R van Rensburg of ENS Africa

D Dingley of Webber Wentzel

For the Commission : B Ntshingila and G Mutiza

- [1] The remaining shareholding is held by the members of Much Asphalt management.
- [2] Merging parties' submissions marked as "Annexure A", at page 3.
- [3] Merging parties' submissions marked as "Annexure A", at page 2.
- [4] The cases were referred in 2014 and 2016 respectively and are awaiting adjudication (Robin Frank v Much Asphalt and More Asphalt 2009FEB4277/ CC v Much Asphalt, Roadspan and Roadmac 2011NOV0376.)
- [5] Transcript, page 10.

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