

SOUTH AFRICA / JUDGMENT

**Bytes People Solutions a divisions of Bytes
Technology Group South Africa (Proprietary)
Limited v Inter-Active Technologies (Proprietary)
Limited (020123) [2015] ZACT 13 (20 February 2015)
[2015] ZACT 13**

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Andreas Wessels

CASE / FILE NUMBER

020123

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020123

In the matter between:

Bytes Peoples Solutions a division of

Bytes Technology Group South Africa (Proprietary) Limited.....Primary Acquiring
Firm

And

Inter- Active Technologies (Proprietary) Limited.....Primary
Target Firm

Panel: Norman Manoim (Presiding Member)

: Yasmin Carrim (Tribunal Member)

: Andreas Wessels (Tribunal Member)

Heard on : 28 January 2015

Order Issued on : 30 January 2015

Reasons Issued on : 20 February 2015

Reasons for Decision

Approval

- [1] On 30 January 2015 the Competition Tribunal (“Tribunal”) conditionally approved the merger between Bytes Peoples Solutions a division of Bytes Technology Group South Africa (Proprietary) Limited (“Bytes Peoples Solutions”) and Inter-Active Technologies (Proprietary) Limited (“IAT”).
- [2] The reasons for approving the proposed transaction follow.

Background

- [3] On the 28 January 2015 the Tribunal heard a proposed transaction between Bytes Peoples Solutions and IAT.
- [4] Prior to the hearing the Tribunal received information relating to employment concerns raised by a third party intervener which was not contained in the Commissions record. The third party intervener alleged that retrenchments made by IAT prior to the proposed transaction had not been disclosed to the Commission. The third party further alleged that the motivation behind these retrenchments was IAT’s effort to improve its position in merger negotiations with Bytes Peoples Solutions.
- [5] However no interveners were present to make submissions at the hearing. The Commission was instructed by the Tribunal to further investigate the allegations made by the third party intervener and to establish the number of retrenchments that were not disclosed.
- [6] The hearing was accordingly postponed to the 30 January 2015.

Parties to transaction

Primary acquiring firm

- [7] The primary acquiring firm is Bytes Peoples Solutions, a division of Bytes Technology Group South Africa (Pty) Ltd, a private company, which is ultimately a wholly-owned subsidiary of Allied Electronics Corporation Limited (“Altron”).
- [8] Altron is a public investment holding company incorporated in South Africa and listed on the Johannesburg Stock Exchange. Altron, in addition to controlling Bytes Technology, similarly controls Power Technology Limited and Allied Technology limited.

Primary target firm

- [9] The primary target firm, IAT is a private company incorporated in accordance with the laws of South Africa and controlled by three shareholders, Brendan James van Staaden, Jacqueline van Staaden and Mukhunde Bhikha.

Proposed transaction and rationale

- [10] The proposed transaction results in Bytes People Solutions acquiring !AT as a going concern. Bytes, post-merger, will have sole control over IAT

[11] Bytes People Solutions stated that the acquisition of IAT is in order to "expand its service offering, achieve economies of scale and establish itself as a 'one stop shop' as regards the provision of BPO services."¹

[12] IAT's rationale is motivated by its current difficult financial position.

Relevant Market

[13] For purposes of this assessment the Commission considered the market to be the provision of Business Process Outsourcing ("BPO")

services. This is not particularly specific market definition nor should it be considered useful in analysing such a merger in future if the acquisition was more significant. BPO services are services customer firms could do in house but elect to outsource them to a supplier to save costs and drive efficiencies. The services cover a range of activities ranging from call centres to financial and accounting and some legal services, data processing and debt collection.² Thus the services individually are not substitutes for one another but BPO providers bundle the provision of these services and offer them to customers which want to outsource them.

[14] In respect of the merging parties BPO offering IAT and Bytes People Solutions both provide help desk services in the form of call centres. The merging parties provided the technology, personnel and related infrastructure required for the provision of call centres.

[15] The Commission assessed the likely effect of the proposed transaction on a national geographic scope to which the merging parties similarly concur.

Impact on competition

[16] According to the Commission's findings the proposed transaction results in a horizontal overlap of the merging parties' activities in the provision of BPO services.

[17] The market share accretion of the merging parties is minimal according to the estimation of market shares in the provision of BPO services provided by the merging parties. Business Process enabling South Africa ("BPeSA") stated that market share comparisons are difficult and the success of a company should be calculated by the density of employees.

[18] The Commission utilizing this test found the merging party's employee density constitutes 0.8% of the total estimated size of the market. The Commission further found several other competitors in the BPO market and concluded that the market is fragmented. The conclusion made by the Commission in respect of the overlap is that the proposed transaction will unlikely substantially prevent or lessen competition.

[19] The proposed transaction raises no vertical competition issues.

[20] We concur with the Commission's competition assessment, i.e. that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market given the small market share accretion if one applies the Commission's employee density metric. However even if this methodology is not considered definitive the parlous state of

the target firm its declining market share, the lack of customer objection and the countervailing power many of them can exercise suggest that the Commission's conclusion is well-founded.

Public interest

[21] As outlined earlier, the case raises a public interest issue around employment. The Commission in its initial report recommended that the merger be approved subject to a condition which limits merger specific retrenchments to a maximum of 70 employees of which a bias in favour of semi- skilled employees requires not more than 20 of the maximum number of retrenched shall comprise of semi- skilled employees. The merging parties agreed to the imposition of this condition.

[22] As noted earlier, when the matter first came before us we asked the Commission to investigate the allegation by a former employee that IAT had embarked on retrenchments prior to the merger which had not been disclosed to the Commission. The Commission conducted this investigation by requiring further information from the merging parties including board minutes and correspondence and consulting

with retrenched employees. On the basis of what was admittedly a hurried investigation it appears that IAT had not disclosed to the Commission that 43 employees had been retrenched during the periods of 7 March 2014 to 14 December 2014. This period coincides with the period in which the current merger was being considered between the merging parties. The merging parties do not dispute the number of retrenchments or when they took place but they deny that they had any connection to the merger negotiations.

[23] Section 12(3) of the Act requires the Tribunal to consider whether a merger can or cannot be justified on substantial public interest grounds. One of these grounds is the effect on employment.

[24] The Tribunal has in several decisions in the past considered that if a merger leads to retrenchments which would otherwise not occur but for the nexus of the merger these can be considered merger specific and hence relevant to consider as part of its section 12(3) enquiry. On the other hand if the retrenchments would have occurred regardless of the merger these are considered operational and matters for labour law not the public interest enquiry under section 12A(3). We have referred in the past to the distinction then between merger specific and operational retrenchments.³ In the Walmart case⁴ the Competition Appeal Court ordered the reinstatement of employees who had been retrenched prior to the merger when these had occurred at time when the parties were negotiating the merger and these retrenchments were considered part of the act of consummating the merger.

[25] In this case the first factual enquiry we have to perform is to ascertain whether the 43 pre-merger retrenchments had a nexus to the transition, If not the enquiry ends if they did we must enquire further.

Factual Issues

- [26] The factual issues are common cause. At the end of its 2014 financial year IAT suffered a loss⁵.
- [27] In June 2014 internal minutes of IAT show that it was considering various merger proposals including one from Bytes. Pursuant to this a further meeting took place between representatives of the respective firms on 25 July when “synergies” were explored.
- [28] It is not clear what came of these initial discussions, but minutes of an IAT meeting in September 2014 indicate that its board had decided not to pursue any of the merger proposals. On 8 October 2014 Bytes sent an unsolicited offer to purchase IAT which the latter declined. However on 17 October 2014, IAT was advised by its banker First National Bank that its funding facility had been withdrawn on the grounds that it had not complied with several of the conditions attached to the facility.
- [29] Immediately thereafter IAT re-commenced negotiations with Bytes and an agreement of sale was entered into which underpins the current transaction. However as part of the sale agreement the parties also agreed that the now beleaguered IAT would be given a funding facility by Bytes to allow it to continue trading until the deal, which was notified to the Commission on 21 November 2014, had been approved.
- [30] It is not clear from the record when discussions with potential buyers for IAT commenced; we only know from minutes that they were in existence at least from June 2014. On the assumption that they may have been contemplated earlier, possibly after the bad set of results in the financial year ending in February 2014, we considered the number of retrenchments that took place since then.
- [31] During this period 28 retrenchments took place associated with the direct loss of business of a call centre operation for a particular client which had cancelled its contract with IAT. All parties were agreed that such retrenchments were clearly operational given the nexus between the contract cancellation and the loss of employment. Some of these employees were indeed offered re-employment elsewhere. We therefore do not need to consider these retrenchments further as their lack of merger specificity is self-evident.
- [32] However 15 employees were retrenched in the latter part of 2014 as part of a series of ‘non-client specific’ set of retrenchments referred to by IAT as the phase 1 and phase 2 retrenchments.
- [33] The phase 1 and 2 retrenchments were effected at various stages - the first at the end of September, the next at two dates in November and the last at the end of December.

- [34] Two former employees of IAT who made impressive oral submissions during our hearings argued that the coincidence between the timing of the negotiations and the retrenchments was sufficiently close in time as to suggest that they were merger specific⁶. They were also of the view that from their perspective, prior to their own retrenchments IAT's prospects were good and there was hence no reason for the retrenchments other than the advent of the merger.
- [35] The merging parties denied the linkage. According to Mr Van Staaden of IAT although the phase 1 and 2 retrenchments (bar the one in September) had been effected after the transaction with Bytes had been finalised in October, the decision to retrench this number of employees had already taken place at a meeting of the board in August and he was able to show the relevant entry in the minutes to support his contention.
- [36] He was asked why if the firm needed to retrench in August it had turned down an offer to merge with Bytes in September. The explanation was that although trading times were difficult, the firm at that time thought that future prospects were good until the bank facility was withdrawn.
- [37] There is however, bar this possible anomaly, insufficient evidence to suggest that the phase 1 and 2 retrenchments were not merger specific. There is no indication in the minutes of either company or the correspondence produced, to suggest that there was a link to the present transaction, although the contemplation of a merger more generally and the one with Bytes more specifically, had coincided with the period of the retrenchments.
- [38] The two employees and the Commission all fairly conceded this fact.
- [39] We are therefore on the current record, bolstered by the oral evidence of both parties at the hearing, unable to find that the phase 1 and phase 2 retrenchments were merger specific.
- [40] As regards the issue of future retrenchments the condition agreed to between the merging parties and the Commission limits future retrenchments to a maximum of 70 employees and is further qualified by the caveat that of this number no more than 20 may be semi-skilled employees. This seems a reasonable condition given the troubled state of the IAT business that Bytes has inherited, whilst at the same time offering enhanced protection to less skilled employees - and hence those less likely to obtain new employment.

Conclusion

- [41] In this case the merging parties should have disclosed information pertaining to retrenchments made prior to the proposed transaction given that they were effected after the date that the transaction was contemplated. By not doing so the hearing of the matter was prolonged.

[42] In light of the reasons mentioned above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. We conclude that there is no evidence to corroborate the contention that the retrenchments made prior to the proposed transaction were merger specific and therefore we do not think that it warrants alterations to the Commission's conditions. Accordingly we approve the proposed transaction subject to the conditions submitted by the Commission in its initial report.

20 February 2015

DATE

Norman Manóim

Yasmin Carrim and Andreas Wessels concurring

Tribunal Researcher: Aneesa Ravat

For the merging parties: Natalia Lopes and Aziza Mdee of Edward Nathan Sonnenbergs Inc.

For the Commission: Maanda Lambani and Nompucuko Nontombana

1 Inter alia Schedule to Form CC4(2) on pg 28 of the record.

2 Inter alia The Commission's Report pg 13.

3 BB investment Company (Pty) and Adcock Ingram Holdings (Pty) Ltd CT case no: 018713

4 The Minister of Economic Development and The. Competition Tribunal in South African Commercial Catering and Wal-Mart Stores INC CAC no: 110/CAC/JuIl 1 111/CAC/JUN11

5 The amount is confidential

6 The former employees were Mr Nobel and Mr Koloi.

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