

SOUTH AFRICA / JUDGMENT

**Humulani Marketing (Pty) Ltd v High Power
Equipment Africa (Pty) Ltd (83/LM/Sep12)
[2013]
ZACT 12; [2013] 1 CPLR 215 (CT) (8 March 2013)
[2013] ZACT 12**

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Takalani Madima, Medi Mokuena

CASE / FILE NUMBER

83/LM/Sep12

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:83/LM/Sep12

015560

In the matter between:

Humulani Marketing (Proprietary) LtdAcquiring Firm

And

High Power Equipment Africa (Pty) LtdTarget Firm

Panel : Yasmin Carrim (Presiding Member),

Takalani Madima (Tribunal Member)

Medi Mokuena (Tribunal Member)

Heard on : 13 February 2013

Order issued on : 15 February 2013

Reasons

issued on : 08 March 2013

Reasons for Decision

Approval

On 15 February 2013 the Competition Tribunal (“Tribunal”) approved the merger between Humulani Marketing (Pty) Limited (“Humulani”) a wholly owned subsidiary of Humulani Investments (Pty) Ltd, the primary acquiring firm, and High Power Equipment Africa (Pty) Ltd (“HPE”), the primary target firm. The reasons for approving the proposed transaction follow below.

Parties to the transaction

The primary acquiring firm is Humulani which distributes Case earthmoving equipment in South Africa, through its CSE Division. Both Humulani and Disa Equipment (Proprietary) Limited (“Disa”) are wholly owned subsidiaries of Humulani Investments (Pty) Ltd. Disa distributes Doosan earthmoving equipment in South Africa.

Although each brand has its own operational sales and management team and the brands compete independently in the market, both firms benefit from the input, support and economies of scale as part of a single economic entity under the umbrella of their parent company Invicta Holdings Ltd (“Invicta”). The Invicta Group currently limits the flow of competitive information between operational sales and personnel at Humulani and Disa.

Invicta has measures put in place to protect the confidentiality of the manufacturers’ sensitive information and has dedicated sales teams and workshop staff focusing exclusively on each brand and similar divisional arrangements in place.¹

The primary target firm is HPE, which distributes various product categories of earthmoving equipment and earthmoving equipment accessories in Southern Africa. The only relevant activity of HPE for the proposed transaction is its distribution of Hyundai earthmoving equipment in South Africa.

Proposed transaction and Rationale

From Humulani’s perspective, the proposed transaction will expand the operations of the Invicta Group’s existing Capital Equipment Group (“CEG”) operating division. Although Invicta intends to keep HPE’s operations and distribution network independent from its existing CEG division, post-merger, HPE will be able to leverage off the efficiencies generated by the financial services of the broader Invicta Group. According to HPE, the owner wishes to exit the business and no successor exists in the family to take over the business. As a result, the proposed transaction will provide the opportunity to dispose of the business.

The Commission’s Recommendation

The Commission was of the view that due to the current exchange of information taking place in the market through the industry association, this might result in industry participants coordinating behaviour post-merger. In an effort to address these concerns, the Commission recommended the imposition of conditions which essentially seeks to address the coordinated effects the transaction might have in the market.

To alleviate this, the Commission recommended the transaction be approved with the following conditions:

Merging parties are not to appoint the same person(s) to the Board of Directors of Disa, CSE and HPE.

No sharing of competitively sensitive non-public information (i.e. pricing, margin information, cost information, marketing strategies etc) amongst the management teams of CEG, HPE and Disa.

Merging parties are to develop and adopt an internal competition policy for CEG, HPE and Disa, to ensure that its employees are aware of anti-competitive activities, and such policy shall be submitted to the Commission for approval before implementation (herein collectively referred to as “Condition 1”).

Merging parties are not to submit sensitive information relating to the overlapping markets, which are disaggregated by province to the market association (herein referred to as “Condition 2”).

Due to the fact that the merging parties were unwilling to accept these conditions, it was necessary to conduct a formal hearing.

The Hearing

A pre-hearing was held on 12 December 2012 where it was decided that the Commission would subpoena a representative of a supplier to the merging parties who would inform the panel of its concerns with the proposed transaction. The main hearing was held on 13 February 2013. The Commission led Mr Daniel Dupuy, a Regional Director for the Doosan Africa Division as its witness.

The relevant market and the impact on competition

Based on submissions from market participants, the Commission disregarded the merging parties broad product market² and decided to narrow down the product markets to the sale of backhoe loaders, skid steer loaders, wheel loaders (for heavy and light applications, wheeled excavators (for heavy and light applications), crawler excavators (for heavy and light applications), sale of articulated dump trucks (for heavy and light application), and all of the above mentioned products related spare parts.

There is a horizontal overlap in the activities of the merging parties in relation to the above-mentioned products as they are both involved in the distribution of such products.

The Commission assessed the relevant geographical market to be national as many customers submitted that they don't deal with any Original Equipment Manufacturers (“OEMs”) directly but rather buy directly from distributors. In addition, customers submitted that even for after sales services they go directly to distributors as opposed to dealing with OEMs.

The Commission submitted that although barriers to entry are high in the market, they are not insurmountable as there have been about nine new entrants in the market since 2006.

Unilateral Effects

The Commission submitted in its report that the proposed transaction would not result in anti-competitive effects resulting from unilateral conduct.

Post-merger, the merged entity will have the following market shares:

Backhoe loaders [5-7%]

Skid steer loaders [14-17%]

Wheel loaders for heavy application [11-14%]

Wheeled excavators [40-43%]

Crawler excavators [21-24%]

Mini excavators [30-33%]

With the exception of the mini excavators, crawler excavators and wheeled excavator, the Commission submitted that the merged entity's market share will be small in comparison to other competitors in the market.

The Commission was of the view that merger would not result in any unilateral effects because – the merging entities will face sufficient competition from other competitors post-merger;

the transaction will not result in the removal of an efficient competitor, as HPE will be operated separately post- merger; and

Information from customers confirmed that there are many alternatives in the market, and customers are able to switch easily between distributors.

Coordinated Effects

In its report, the Commission submitted that the merger will make the market more conducive to coordination because of two central issues. The first was because of a pre-existing practice in the industry. The majority of distributors (as many as 21) currently exchange information through the industry association (CONMESA) on monthly sales volume disaggregated by brand, product category and model, province, and consumer type. The data is circulated to a member on a quarterly basis and shows a competitor's aggregated sales volumes per product category and per region. The second was the undertaking given by the merging parties that HPE will be run independently and thereby, according to the Commission, maintaining the pre-merger inter-brand competition between the acquiring and target firms.

In order to address both these concerns the Commission proposed two conditions. Condition 1 one sought to prevent possible co-ordination between the acquiring firm and HPE that could arise from the merger and Condition 2 attempted to restrict the sharing of information at an industry level at a more aggregated level than is currently the case.

The merging parties opposed the conditions on the basis that –

They had not given the Commission the undertaking that HPE would be run independently post-merger to such an extent that it would not form part of the single economic entity. All that they had stated was that HPE would be placed in a subsidiary of the acquiring firm. The merger did not give rise to any co-ordination concerns because the target firm was being acquired in its entirety and was intended to be part of the single economic entity of the acquiring firm

Condition 2 sought to address a practice that was in existence pre-merger and which involved the entire industry, not merely the merging parties. The merger itself would result in this practice or lead to an increased likelihood of it. This was an issue of non-merger specificity. .

The former issue became a major departure point between the parties. The merging parties vehemently denied giving the Commission such an undertaking and referred to their submissions in the record in support of their position. They submitted that Invicta was acquiring 100% and not partial ownership of the target firm. While they intended at this stage to run HPEs' operations independently they would seek to achieve the benefits of the merger by leveraging off the group's resources in order to achieve efficiencies for the operations. They could only achieve these if HPE was part of the single economic entity. The Commission on the other hand did not refer us to any document or correspondence in which such undertaking was given. Accordingly, we have approached the transaction from the perspective that while HPE's operations will be run independently, it will form part of the acquiring firm's economic entity. From such a perspective we would only be concerned with unilateral effects, which the Commission has already concluded are not substantial enough to warrant a prohibition.

Furthermore the Commission's witness Mr Daniel Dupuy, a Regional Director for the Doosan Africa Division, submitted that the conditions proposed by the Commission would not really address his concerns as an international manufacturer, because his concern was not merger specific.³ During his testimony it became clear that in fact he was concerned that HPE would be better managed post-merger and would become an effective competitor to his products.⁴

In our view, neither condition recommended by the Commission is justified by the evidence. Since post-merger the target firm will

not be run independently as understood by the Commission no co-ordination concerns arise. Condition 2 does not address an issue

that arises as a result of the merger, but appears to be levelled at an existing practice in the industry.⁵ While we can understand the Commission's concerns about such a practice and its attempts to address it through merger control, no evidence was put before us that this merger, by reducing the number of players in the market, would possibly enhance co-ordination or that a

condition imposed on these two parties would reduce the existing co-ordination through the information exchange at CONMESA level. Nevertheless the Commission is well advised to pursue its investigation in the industry.

Public Interest

The merging parties submitted that the proposed transaction will not result in any job losses as Invicta intends to run the HPE business as a separate subsidiary within the Group, as a result the transaction will have no impact on public interest.⁶

CONCLUSION

Accordingly approve the merger without conditions.

08 March 2013

Yasmin Carrim DATE

Medi Mokuena and Takalani Madima concurring.

Tribunal Researcher: Caroline Sserufusa

For the merging parties: Adv Duncan instructed by Edward Nathans Sonnenbergs

For the Commission: Nelly Sakata and Kholiswa Mnisi

¹See submission by the merging parties during the hearing, at footnote 4. The merging parties submitted that this type of arrangement is not unusual in this market as Barloworld distributes competing Caterpillar and SEM earthmoving equipment and Babcock distributes competing Volvo and SDLG earthmoving equipment.

²Page 67 of the Tribunal Record. The merging parties submitted that the product market is the broader construction equipment and related spare parts market in South Africa.

³See transcript page 21 para20.

⁴See transcript page 22 para20.

⁵Merging parties' submission at the hearing page 5 para 14.

⁶See transcript page 85 para10.

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