

SOUTH AFRICA / JUDGMENT

Imperial Holdings Limited v Engineparts (Pty) Ltd (2/LM/JAN 08) [2008] ZACT 112; [2008] 1 CPLR 116 (CT) (19 March 2008) [2008] ZACT 112

COURT
Competition Tribunal

BEFORE
D Lewis, Y Carrim, N Manoim

CASE / FILE NUMBER
2/LM/JAN 08

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 2/LM/JAN 08

In the large merger between:

Imperial Holdings Limited

Acquiring Firm

And

Engineparts (Pty) Ltd

Target Firm

Panel

: D Lewis (Presiding Member) Y Carrim (Tribunal Member),

and N Manoim (Tribunal Member)

Heard on : 12 March 2008

Decided on : 12 March 2008

Reasons Issued : 19 March 2008

REASONS

Approval

- [1] On 12 March 2008 the Tribunal unconditionally approved the proposed transaction between the above mentioned parties. The reasons for the decision follow.

The Parties

- [2] The primary acquiring firm is Imperial Holdings Limited (“Imperial”).[1] The primary target firm is Engineparts (Pty) Ltd (“Engineparts”), a company which is currently under provisional liquidation.[2] Engineparts is controlled by Mr Bruce McIntyre, and has a wholly owned subsidiary called Petrosanne (Pty) Limited (“Petrosanne”).

The Transaction and its Rationale

- [3] In terms of the proposed transaction, Imperial has entered into a written offer with the provisional liquidators of Engineparts, and has proposed a scheme of arrangement with their creditors in terms of section 311 of the Companies Act 61 of 1973.[3] On the approval of the arrangement by creditors of Engineparts and sanction by the High Court, Imperial will acquire the entire issued share capital of Engineparts. If this arrangement is not sanctioned by the High Court, Imperial or its nominee[4], will acquire the business of Engineparts as a going concern in terms of the offer. The offer is subject to the fulfillment of certain suspensive conditions, among which is the

conclusion

of an offer by Imperial Group (Pty) Limited to acquire the property on which Engineparts conducts its business, from Petrosanne (Pty) Limited, a wholly owned subsidiary of Engineparts.

- [4] Imperial considers the proposed transaction as an opportunity for expansion and growth of its business. For Engineparts this transaction will ensure its continuity and secure employment for its employees.

Activities of the Merging Parties

- [5] Imperial’s various subsidiaries are active in various activities including; transportation and mobility sales and services which covers a wide range of products including; integrated logistic solutions, vehicle, forklift leasing, aviation operations, sales and leasing, car rental and tourism, motor vehicle importation, sales and after sales services and related financial services businesses, in South Africa, Europe and United Kingdom. For the purposes of this transaction, the relevant subsidiary of Imperial is Alert Engine Parts (Pty) Limited (“Alert”), which is involved in procurement, marketing and distribution of extensive range of aftermarket parts[5] including timing components, filters, clutches, lubricants and engine parts, and Imperial Auto Parts, a division of Imperial Group (Pty) Limited (“IAP”) which sells aftermarket parts, accessories and automotive replacement parts.
- [6] EngineParts has activities in the procurement, marketing and distribution of an extensive range of engine parts, auto electrical parts, diesel fuel injection parts, general parts and turbocharges into the automotive aftermarket parts market in South Africa.

The Relevant Market

- [7] A horizontal overlap exists in the activities of the merging parties in respect of the sale of non branded motor vehicle spare parts and engine parts. There is also a vertical relationship between the merging firms since Engineparts supplies Alert with engine parts. The merging parties submitted that Lectrolite, a division of Imperial Group, supplies NGK spark plugs to EngineParts.[6] The merging parties, however also submitted that post merger, Lectrolite will continue to supply its products to third parties, including competitors of Imperial.
- [8] In respect to these identified markets, both Imperial and Engineparts are active in the major cities throughout South Africa. For this reason, the relevant geographic market is considered to be national.

Horizontal Analysis

Market for distribution of non branded general spare parts

- [9] According to the merging parties, the horizontal integration will not substantially affect the market as Engineparts will continue to operate its business and supply its customers. In addition, the merging parties' combined post merger market share for the distribution of non branded general spare parts will be an insignificant 8%. Prior to this merger Alert Engine Parts had 6% and Engineparts had 2% market share in the distribution of non branded general spare parts market.
- [10] However, the merged entity will continue to face competition from Midas 26%, SuperGroup 17%, and Gaydons Motor Spare 10% which are big players in the market.

Market for distribution of non branded engine parts

- [11] In respect to the distribution of non branded engine parts, the merging parties will have a 28% combined post merger market share. Prior to this merger, Alert Engine Parts had 21%, and Engineparts had 7% market share in this market. The merged entity will continue to face competition from; SuperGroup 31%, which is the biggest player in this market, and other smaller players such as Midas 9%, Gaydons Motor Spares 5%, Sparepro and Grandmark 2%.

Vertical Analysis

- [12] In terms of the engine parts supplied by Engineparts to Alert, the merging parties submitted that Enginepart's total sales were 0.3%, and Alert's were 0.1%. These figures are too insignificant to raise any competition issues.
- [13] In respect to the vertical relationship between Lectrolite and Engineparts, the merging parties submitted that this relationship does not result in any vertical integration as such, as Lectrolite will continue to supply its products to third parties, and also because there are no exclusive agreements in place between them.

Third Party Objection

- [14] Autoparts Distributors (Pty) Ltd (“AutoParts”), a competitor of the merging parties, raised concerns about the proposed transaction. The objection was made solely on the basis that the conditions of the agreement pursuant to which the proposed transaction was made has lapsed. At the hearing the merging parties contended that the conditions of the agreement were timeously extended to 31st March 2008.
- [15] The objection raised by Autoparts is irrelevant to our consideration in terms of the Competition Act when mergers are concerned. It raises neither a jurisdictional point as to whether we have a merger before us – a contract that is legally binding between buyer and seller is not a prerequisite of section 12 of the Act for a transaction to constitute a merger, nor does it raise a substantive issue for the purpose of our enquiry in terms of section 12A.

Conclusion

- [16] Based on the competition analysis set out above, the proposed transaction is unlikely to result in a substantial lessening or prevention of competition in the identified markets and is accordingly approved unconditionally. There are no public interest concerns.

N Manoim

18 March 2008

D Lewis and Y Carrim concurring. Tribunal

Researcher : L. Xaba For the merging parties : Tugendhaft Wapnick Banchetti and Partners For the objecting party: Young.Davis Inc. For the Commission : M Mohlala and T Mavhase (Mergers and Acquisitions)

- [1] Imperial is a listed company and the shareholders who beneficially hold more than 5% of its issued share capital are; Public Investment

Corporation 18.21%; Ukhamba 10.1%; Old Mutual 11.23%; Sanlam 8.4%; and Lereko Mobility 7.25%.

- [2] See High Court Order and Certificate in Annexure “F”, pg. 406 of the merger record.

- [3] This section deals with compromise and arrangement between company, its members and creditors, in terms of which the Court has a discretion whether to sanction or not.

- [4] This is Imperial Group (Pty) Ltd, which is a wholly owned subsidiary of Imperial.

- [5] Aftermarket parts are motor vehicle parts and accessories that are not produced by Original Equipment Manufacturers (“OEM’s”), but rather alternative or generic parts which are produced by other part manufacturers other than OEM’s. These are used by the lower income market and end users repairing their own vehicles or retail owners who supply such end users or panel beaters or repair shops that are not approved by OEM’s.

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- [6] Electrolite and now NGK, have not supplied EngineParts since 1 March 2007. The amounts for this supply were not paid as EngineParts was unable to pay its debts. See correspondence from merging parties to the Commission on pgs. 437-438 of the merger record.
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