

SOUTH AFRICA / JUDGMENT

Imperial Holdings Limited v Itumelo Bus Lines Proprietary Limited (LM105Sep16) [2016] ZACT 119 (21 December 2016)

[2016] ZACT 119

COURT

Competition Tribunal

BEFORE

Norman Manoim, AW Wessels, Medi Mokuena

CASE / FILE NUMBER

LM105Sep16

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM105Sep16

In the matter between:

Imperial Holdings Limited Primary

Acquiring Firm

and

Itumele Bus Lines Proprietary Limited Primary

Target Firm

Panel

: Norman Manoim (Presiding Member)

: AW Wessels (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on

: 30 November 2016

Order Issued on

: 30 November 2016

Reasons

Issued on : 21 December 2016

Public Reasons for Decision

Conditional approval

[1] On 30 November 2016, the Competition Tribunal ("Tribunal") conditionally approved the merger involving Imperial Holdings Limited ("Imperial") and Itumele Bus Lines Proprietary Limited ("Interstate").

[2] The reasons for approving the proposed transaction follow.

Parties to the transaction

Primary acquiring firm

[3] The primary acquiring firm is Imperial, a public company listed on the JSE Limited. Imperial is not controlled by any one firm. It controls a number of firms in South Africa.

[4] Imperial is the holding company of a diversified industrial services and retail group ("Imperial Group"). The main

business activities of the Imperial Group are the provision of consumer and industrial logistics services and motor vehicle retail

and vehicle related financial products and services.

Primary target firm

[5] The primary target firm is Interstate. Interstate is controlled by a number of individuals and trusts.[1] Interstate controls Cut A Cross Projects (Pty) Ltd t/a Imfuyo Bus Services, a commuter bus operator. Interstate also holds shares in the following firms: Big Sky Coaches (Pty) Ltd, TP Hentiq 6313 (Pty) Ltd ("TP Hentiq") and Boleng Wheel Solutions (Pty) Ltd ("Boleng").

[6] Interstate is a commuter bus operation which is currently active in the Free State Province and operates on routes between

Bloemfontein, Botshabelo, Thaba 'Nchu and outlying areas and Brandfort and Soutpan.

Approximately 25 000 passengers commute daily,

on services provided by Interstate, to and from the Bloemfontein area for work and school.

[7] The target firms offer two types of bus services: (i) contracted (subsidized) bus services; and (ii) non-contracted (unsubsidized) bus services. The contracted bus services relate to

commuter bus services and the non-contracted bus services relate to private charter (hired) bus services, tour and charter bus services, commercial bus services, scholar bus services and seasonal cross-border bus services.

[8] TP Hentiq and Boleng are involved in the retail sale of tires and the holding of investment property.

Proposed transaction and rationale

[9] In terms of the proposed transaction, Imperial intends acquiring 55% of the ordinary share capital in Interstate. Following the implementation of the proposed transaction, Imperial will control Interstate.

[10] Imperial submitted that the proposed transaction will enable it to enter the public transport market.

[11] Interstate submitted that it considers the proposed transaction to be strategically advantageous and would allow it to expand its operations.

Impact on competition

[12] The Competition Commission ("Commission") found that there is no product overlap in the activities of the merging parties. The Commission therefore concluded that, from a horizontal or vertical perspective, the proposed transaction is unlikely to result in a substantial lessening or prevention of competition in any relevant market. We concur with this finding.

[13] However, during its investigation the Commission discovered that the merging parties have entered into a Restraint of Trade agreement ("restraint") that cannot be justified and would likely give rise to anti-competitive effects.

[14] The Commission noted that in terms of this restraint a certain category of shareholders and key management of the target firm are restrained from competing with the target firm and the Acquiring Group as long as they have shareholding in the target firm and remain employed in the merged entity. The Commission further noted that these shareholders/employees are also restrained for a period of five years after they cease to be the shareholders of the target firm and are no longer employed within the Acquiring Group.

[15] The Commission after investigating the issue concluded that the restraint cannot be justified in relation to three aspects:

(i) its geographic scope: the Commission found that the geographic scope of the restraint is too broad in that it applies to the whole of South Africa whilst the target firm currently only provides bus transportation services in the Free State Province;

(ii) the activities included in the restraint: the Commission found the

scope of activities included in the restraint to be unjustified since it includes the activities of the Acquiring Group and not only the activities of the target firm(s) whilst the restraint parties are not currently involved in the markets where the Acquiring Group is active; and

(iii) the duration of the restraint, i.e. five years: the Commission found

a duration of five years to be unjustified given the (limited) level of knowledge and expertise of the target firm/management employees

that the Acquiring Group would have to familiarise itself with during the period of the restraint. The Commission suggested that a period of three years would be reasonable.

[16] Before the commencement of the hearing the Commission and the merging parties however reached an agreement regarding the narrowing of the scope of the restraint in relation to the activities to be included in the restraint and its duration. The merging parties agreed to limit the restraint to only the target firm's activities [2] and further agreed to reduce the duration of the restraint from five years to three years.[3]

[17] The only outstanding issue still in dispute between the Commission and the merging parties related to the geographic scope of the restraint. In support of their case, the merging parties argued inter alia that Imperial had expended significant capital in investing in Interstate and would therefore want to protect its investment. In order to assist the parties, we suggested that the geographic scope of the restraint should be the geographic areas in which the target firm is active in at the time when the restraint commences. The merging parties and the Commission agreed to this.[4]

[18] The Commission and the merging parties submitted an agreed set of conditions in relation to the restraint and we approved the proposed transaction subject to this set of conditions. More specifically, we imposed the following conditions in relation to the restraint:

- a. The merging parties shall reduce the Restraint Period[5] from five years to three years.
- b. The merging parties shall reduce the Restraint Area[6] from the whole of South Africa to the geographic area within which the target firm conducts its business activities as at the date on which the Restraint Period commences.
- c. The merging parties shall reduce the Restraint Activities [7] to the Business[8] and the Restraint Activities shall exclude the businesses conducted by the Group Companies [9] within Imperial Logistics.

[19] We are satisfied that the proposed conditions address and are proportional to the competition concerns related to the restraint.

Public interest

[20] The merging parties confirmed that the proposed transaction will not result in an adverse impact on employment. [10]

[21] The proposed transaction further raises no other public interest concerns.

Conclusion

[22] In light of the above, we conclude that the proposed transaction is unlikely, from a horizontal or vertical perspective, to substantially prevent or lessen competition in any relevant market. However, the restraint entered into by the merging parties raises likely anti-competitive effects. We have approved the proposed transaction subject to conditions that limit the restraint and address the concerns. Furthermore, no public interest issues arise from the proposed transactions. Accordingly, we approve the proposed transaction subject to the conditions attached hereto as "Annexure A".

21 December 2016

DATE

Mr AW Wessels

Mr Norman Manoim and Ms Medi Mokuena concurring

Tribunal Researcher: Aneesa Ravat

For the merging parties: Floris Potgieter of De Vries Incorporated

For the Commission: Boitumelo Makgabo and Xolela Nokele

ANNEXURE A

Imperial Holdings Limited

And

Itumele bus line (Pty) Ltd Case number: LM105Sep16

CONDITIONS

1 Definitions

The following expressions shall bear the meaning assigned to them below and cognate expressions bear corresponding meanings -

1.1. "Acquiring Firm" means Imperial Holdings Limited;

1.2. "Approval Date" means the date referred to on the Tribunal's Merger Clearance certificate (Form CT 10);

1.3. "Business" means the combined business presently conducted by Itumele Bus line (Pty) Ltd;

1.4. "Commission" means the Competition Commission of South Africa;

1.5. "Conditions" mean these conditions;

1.6. "Group Companies" shall mean all of the companies (other than Imperial Holdings), close corporations, businesses and other legal entities within that group;

1.7. "Imperial Holdings" means Imperial Holdings Limited;

1.8. "Imperial Holdings Group" means the group of companies of which Imperial Holdings is ultimately the holding company, and includes the divisions of that group;

1.9. "Imperial Logistics" means the South Africa division of the Imperial Holdings Group organised under a single corporate identity known as "Imperial Logistics," consisting those Group Companies which are grouped together as an administrative or functional unit, from time to time, for financial reporting, branding, marketing and other purposes, and reporting for the time being to the Imperial Logistics divisional executive committee of the board of directors of Imperial Group;

1.10. "Interstate" means ltumele Bus line (Ply) Ltd;

1.11. "Merged Entity" means the legal entity to established pursuant to the successful implementation of the Merger;

1.12. "Merger" means the acquisition of control by Imperial Holdings over Interstate;

1.13. "Merging Parties" means Imperial Holdings and Interstate;

1.14. "Restraint Activities" means any and all activities or businesses in the Restricted Areas, which are the same as, similar to, or directly or indirectly competitive with: the Business; and/or the businesses conducted by the Group Companies within Imperial Logistics at the relevant time as contained in clause 2.1.23 of the Restraint of Trade Agreement.

1.15. "Restraint Area" means the whole of South Africa as contained in clause 2.1.24 of the Restraint of Trade Agreement.

1.16. "Restraint of Trade Agreement" means the agreement to be entered into between Imperial Holdings, [...][11];

1.17. "Restraint Period" means the period of 5 (five) consecutive years as contained in clause 2.1.22 of the Restraint of Trade Agreement; and

1.18. "Target Firm" means ltumele Bus line (Ply) Ltd.

2 RECORDAL

2.1 The Merging Parties had entered into a Restraint of Trade Agreement whereby some of the shareholders and the current management of the Target Firm are restrained from competing with the Business and the Acquiring Firm as long as they have a shareholding in the Target Firm and remained employed in the Merged Entity. They are also restrained for a period of 5 years after they cease to be the shareholders of the Target Firm or are no longer employed within the Merged Entity. The geographic area of the restraint is for the whole of South Africa notwithstanding the fact that at present the Target Firm is only operating in the Free State

Province. The scope of the restraint included businesses conducted by the Group Companies within Imperial Logistics which is part of the acquiring Firm.

2.2 In order to address the Commission's concerns, the Commission requested the Merging Parties to reduce the duration, geographic area and the scope of the Restraint of Trade Agreement and the Merging Parties have agreed to do so in the manner set out below:

3 CONDITIONS TO THE APPROVAL OF THE MERGER

3.1 The Merging Parties shall reduce the Restraint Period from five (5) years to three (3) years.

3.2 The Merging Parties shall reduce the Restraint Area from the whole of South Africa to the geographic area within which the Target

Firm conducts its business activities as at the date on which the Restraint Period commences.

3.3 The Merging Parties shall reduce the Restraint Activities to the Business and the Restraint Activities shall exclude the businesses

conducted by the Group Companies within Imperial Logistics.

4 MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1 The Merging Parties shall submit an addendum to the Restraint of Trade Agreement reflecting the amendments in line with clause 3 above within 10 (ten) Business Days of the Approval Date.

4.2 The Merging Parties shall not amend the addendum referred to in clause 4.1 above for the duration of the Restraint Period.

4.3 The Merging Parties shall submit an addendum to the Restraint of Trade Agreement referred to in 4.1 above by e-mail to mergerconditions@compcom.co.za.

5 BREACH OF CONDITION

5.1 In the event that the Merging Parties appear to have breached the above Conditions or if the Commission determines that there has been an apparent breach by the Merging Parties of any of the Conditions, this shall be dealt with in terms of Rule 39 of the Commission Rules.

- [1] Interstate's shareholders are: [...]. The merging parties have claimed the information in brackets as confidential.
- [2] See item 3.3 of the Tribunal's Conditions dated 30 November 2016.
- [3] See item 3.1 of the Tribunal's Conditions dated 30 November 2016.
- [4] See item 3.2 of the Tribunal's Conditions dated 30 November 2016.
- [5] "Restraint Period" means the period of five consecutive years as contained in clause 2.1.22 of the Restraint of Trade Agreement.

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- [6] "Restraint Area" means the whole of South Africa as contained in clause 2.1.24 of the Restraint of Trade Agreement.
- [7] "Restraint Activities" mean any and all activities or businesses in the Restricted Areas, which are the same as, similar to, or directly or indirectly competitive with: the Business; and/or the businesses conducted by the Group Companies within Imperial Logistics at the relevant time as contained in clause 2.1.23 of the Restraint of Trade Agreement.
- [8] "Business" means the combined business presently conducted by Itumele Bus line (Pty) Ltd.
- [9] "Group Companies" means all of the companies (other than Imperial Holdings), close corporations, businesses and other legal entities within that group.
- [10] Inter alia Merger Record page 13.
- [11] The merging parties have claimed the information in brackets as confidential.
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