

SOUTH AFRICA / JUDGMENT

Old Mutual Life Assurance Company (SA) Ltd v Momentum Group Ltd (38/LM/MAY11) [2011] ZACT 113 (21 December 2011)

[2011] ZACT 113

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andiswa Ndoni, Medi Mokuena

CASE / FILE NUMBER

38/LM/MAY11

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:38/LM/MAY11

In the matter between:

OLD MUTUAL LIFE ASSURANCE

COMPANY (SA) LTDAcquiring Firm

And

MOMENTUM GROUP LTD

.....Target Firm

Panel : Norman Manoim (Presiding Member) Andiswa Ndoni (Tribunal Member) Medi Mokuena
(Tribunal Member)

Heard on : 9 November 2011

Order issued on : 09 November 2011

Reasons

issued on : 21 November 2011

Reasons for Decision

Approval

On 9 October 2011, the Competition Tribunal (“Tribunal”) approved the large merger between Old Mutual Life Assurance Company (SA) Ltd and Momentum Group Ltd. We explain below our reasons for this conclusion.

The Parties to the transaction

The primary acquiring firm is Old Mutual Life Assurance Company (SA) Ltd (“OMLACSA”), a public company incorporated in accordance with the laws of the Republic of South Africa. Its ultimate South African shareholder is Old Mutual (South Africa) Limited which is controlled by Old Mutual PLC. OMLACSA controls in excess of twenty subsidiaries.

The primary target firm is Momentum Group Ltd (“Momentum”), in respect of certain Transfer Policies and Transfer Assets.

Momentum is a wholly owned subsidiary of MMI Holdings Limited and ultimately FirstRand Limited. Momentum controls a number of subsidiaries.

In April 2009, the parties concluded a transfer agreement in terms of section 37(2)1 of the Long-Term Insurance Act 52 of 1998 (“transfer agreement”). The transfer agreement involved the transfer of

Policies and Assets from Momentum to OMLACSA. These Policies comprised of rights and duties emanating from certain linked policies issued by Momentum to their shareholders and include the policies of institutional customers such as Nestle Provident Fund, Eskom Pension Fund and MacSteel Group Pension Plan, amongst others. These customers gave consent to the transfer in question. The Assets

mentioned represent the underlying assets associated with these policies and are purely of an investment nature. They are held by Momentum in order to meet its liabilities towards the policyholders. These assets include amongst others certain retail properties.

The Rationale

This transfer was triggered by the acquisition of Futuregrowth (which was initially solely controlled by Momentum, until WipCapital (Pty) Ltd acquired a 70% interest in it) by Old Mutual in 2008. After the acquisition, Momentum was no longer comfortable with the arrangement it had with Futuregrowth because of its close ties with the Old Mutual Group, one of Momentum’s significant competitors. Various ways in which termination could take place were considered and it was decided that a transfer in terms of section 37 (2) of the Long Term Insurance Act was the most suitable, as such transfer took the interests of the policyholders into account. Prior to this acquisition, Futuregrowth managed the transfer assets linked to policies that were sold and issued by Momentum to a diverse group of policyholders (“linked policies”).²

The parties’ activities

The acquiring group offers a diverse range of financial products and services. OMLACSA is a registered long term insurance provider

currently authorised to provide amongst others, life policies, assistance policies, disability policies, and health policies. It operates in both individual and group life segments of the market.

Momentum is involved in life insurance, investment and multi-management activities within the FirstRand group as well as the provision of medical aid scheme administration services and managed care services.

The relevant market and the impact on competition

The Commission found that there is a horizontal overlap in the long-term insurance, specifically the market for linked policy³ investment products offered to institutional clients.

According to the Commission, long term insurance can be subdivided into individual and group (institutional), risk and investment, as well as linked and non-linked policies. The two subcategories, risk and investment, are offered to both institutional and individual customers. According to the Commission, when an individual takes a risk or investment policy with a long term insurer, the contract is directly between that particular individual and the long term insurer and institutional customers take out risk and investment policies on behalf of their members. The Commission submitted that in non-linked policies, the insured party is often guaranteed to receive a pre-determined amount whereas in linked policies, the benefit is dependent on the value of the assets linked to the policies.

The Commission further submitted that long term insurers administer individual products differently from institutional products and that although there is some degree of supply side substitutability, there is limited demand side substitutability. Further that there is also limited demand side substitutability between risk and investment products as well as linked and non-linked policies. However, both the Commission and the merging parties did not make a definitive conclusion on the broad relevant product market, this being due to the fact that from the Tribunal's previous decisions, there has been a tendency to approach the issue of the product market on a case by case basis.⁴ Nevertheless, the Commission assessed the transaction based on the narrow market for long term insurance linked policies.

The Commission also found that the relevant geographic market is national in scope.

The Commission submitted that Long Term Insurers are required to be registered in terms of the Long Term Insurance Act 52 of 1998 and certain requirements have to be followed including what is termed capital adequacy requirement ("CAR") which currently is R10, 000, 000. The Commission also found that barriers to entry in the linked policies space are relatively low as compared to the broad long term insurance market. However, although barriers to entry appear to be relatively high in the broad long term insurance market and relatively lower in the linked policies, the Commission submitted that such barriers are not insurmountable.

The Commission submitted that its investigation revealed that clients are able to switch between competitors given that long term insurers offer the same broad classes of products subject to notice periods and policy provisions and that depending on the type of linked policy, a termination charge may be levied by the long term insurers. However, the Commission submitted that the merging parties indicated that the policies involved in the present transaction are not subject to termination charges. This, the Commission submitted, is an indication of the presence of countervailing power in the linked policy space.

In relation to theories of harm that may result as a result of the merger, the Commission submitted that given the low share accretion,

the high degree of countervailing power, barriers to entry which are not insurmountable and the number of rivals in the market, it is unlikely that the transaction will give rise to unilateral effects. Further that coordinated effects are unlikely to arise as the market has significant number of players with some degree of product differentiation and the transfer of the linked policies also removes a point of possible interaction between Old Mutual and Momentum. Therefore it is unlikely that the transaction will result in an increase in the likelihood for coordination.

Additionally, the Commission also found that there is another overlap in respect to convenience/ neighbourhood shopping centre as both the Old Mutual Group and Momentum, through its wholly owned subsidiary Community Property Holdings Limited (“CPH”) control shopping centres in Mitchell’s Plain, in Cape Town. However, the Commission found that with a post merger market share of 21% and a share accretion of roughly 3%, the transaction is unlikely to result in substantial prevention or lessening of competition in this market.

Accordingly, the Commission found that the proposed transfer of specific linked policies from Momentum to Old Mutual does not enhance Old Mutual’s market power in a manner likely to prevent or lessen competition and that there are significant competitive constraints in the market to limit the ability of the merged entity to exercise market power post merger. As such, the Commission concluded that the transaction is unlikely to result in the substantial prevention or lessening of competition in the relevant market.

CONCLUSION

The parties submitted that the proposed transaction will not result in employment losses. The proposed transaction does not raise any other public interest issues.

We agree with the Commission’s conclusion above and find that the merger is unlikely to lead to any substantial prevention or lessening of competition in the relevant market. Accordingly, we approve the above merger unconditionally.

21 November 2011

ANDREAS WESSELS DATE

Medi Mokuena and Andiswa Ndoni

Tribunal Researcher: Tebogo Hlafane

For the merging parties: Cliffe Dekker Hofmeyr

For the Commission: Bongani Ngcobo

1It provides that “Any arrangement entered into between two or more insurers whereby a liability of any long-term insurer towards policyholders is to be substituted for a liability of any other insurer towards such policyholders (whether or not the liability of the long-term insurer is expressed in or created by existing policies or by new policies, or the terms of such new policies are the same as or different from the terms of the original policies), shall be deemed for the purposes of this section to be a scheme for the transfer of the insurance business concerned, unless the Registrar is satisfied that the said policyholders have been or will be made aware of the nature of such substitution and have signified or will signify their consent thereto in writing”.

2The Long Term Insurance Act defines a linked policy as “a long term policy of which the amount of the policy benefits is not guaranteed by the long term insurer and is to be determined solely by reference to the value of particular assets or categories of assets which are specified.”

3The Long Term Insurance Act defines a linked policy as “a long term policy of which the amount of the policy benefits is not guaranteed by the long term insurer and is to be determined solely by reference to the value of particular assets or categories of assets which are specified in the policy and are actually held by or on behalf of the insurer specifically for purposes of the policy.” See pg 13 of Commission’s record.

4See pg 13-14 of the Commission’s record.

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