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south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019034

In the matter between:

VODACOM (PTY) LTD — Primary acquiring firm

And

NASHUA MOBILE (PTY) LTD
IN RESPECT OF ITS
VODACOM (PTY) LTD SUBSCRIBER BASE

Primary target firm

Panel	: Yasmin Carrim	(Presiding Member)
	: Andreas Wessels	(Tribunal Member)
	: Medi Mokuena	(Tribunal Member)
Heard on	: 26 September 2014	
Order Issued on	: 29 September 2014	
Reasons Issued on	: 31 October 2014	

Reasons for Decision

Approval

[1] On 29 September 2014 the Competition Tribunal ("**Tribunal**") unconditionally approved the acquisition by Vodacom (Pty) Ltd ("**Vodacom**") of the Vodacom subscriber base of Nashua Mobile (Pty) Ltd.

[2] The reasons for unconditionally approving the transaction follow hereunder.

Background

[3] It may be of assistance by way of background to briefly explain the merging parties' respective positions in the mobile telecommunications value chain and their pre-merger relationship.

[4] In South Africa there are a handful of mobile network operators ("**MNOs**") of which Vodacom is the largest.[1] All of South Africa's MNOs are vertically integrated entities involved in operating mobile networks (at the upstream level) and the provision of a broad range of mobile communication services to end-users (at the downstream level).[2]

[5] By contrast, Nashua Mobile (Pty) Ltd ("**Nashua**") does not operate at the upstream, mobile network level. Nashua is known as a Service Provider ("**SP**")[3] and essentially acts as a retail and distribution channel for each of the MNOs. Since the SPs are not operative at the upstream level, they compete with the MNOs only at the downstream level of retailing mobile telecommunication services.

Parties to the Transaction

Primary acquiring firm

[6] The primary acquiring firm is Vodacom, as aforesaid, South Africa's largest MNO. Vodacom is a provider of both fixed and mobile voice and data services; mobile messaging services; mobile handsets; certain value added services; and other subscription services at both wholesale and retail level. Vodacom is a vertically integrated entity and is operative at each level in the mobile telecommunications market; from network operation level right through to the provision of telecommunication service to end-users.

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[1] The MNO's operational in South Africa are Vodacom, MTN, Cell C, Virgin Mobile and Telkom Mobile.

[2] With the exception of Virgin Mobile which operates as a virtual MNO as it has not rolled its own network out but roams on an existing operator's network.

[3] Also referred to as an Independent Service Provider.

[7] Vodacom is controlled by Vodacom Group Limited ("**Vodacom Group**") as to 93.75% with the remaining shares being held by:-

- Lisinfo 209 Investment (Pty) Ltd (1.97%);
- Main Street 661 (Pty) Ltd (0.84%); and
- YeboYethu Limited (3.44%).

The Vodacom Group is a listed company on the Johannesburg Securities Exchange Limited ("**JSE**") with roughly 35% of its shares being held publically with the remaining 65% held by Vodafone Investments (SA) (Pty) Ltd.

Primary target firm

[8] The primary target firm is Nashua in respect of its Vodacom subscriber base. In other words, what is being acquired is each and every Nashua subscriber who makes use of Vodacom's service(s) as an MNO.

[9] Nashua Mobile is a wholly-owned subsidiary of Reunert Limited ("Reunert"), a public company listed on the JSE with its shares widely held.

Proposed Transaction

[10] The proposed transaction is just one of seven separate yet interrelated transactions, each of which flows from Nashua's decision to exit the market.

[11] The specific transaction currently at hand involves Vodacom assuming Nashua's position in respect of each contract concluded between Nashua and Nashua's Vodacom subscribers. That is to say, all Vodacom subscribers who were previously in a contractual relationship with Nashua Mobile will now be in a direct relationship with Vodacom.

Rationale

[12] In order to fully comprehend the merging parties' respective rationales in this proposed transaction, an understanding of the way in which the industry has changed over the years is necessary.

[13] As explained by the merging parties, when mobile telecommunications services were first introduced in South Africa, the MNOs were required to make infrastructure investments of significant proportions with little certainty that such investments would reap the abundant rewards subsequently experienced. The MNOs were thus exposed to substantial risk and were, understandably, averse to exposing themselves to further risk by assuming the credit risk associated with individual contract customers.[4] The MNOs thus considered the existence of SPs, as a valuable route to market and a mechanism through which to reduce their risk exposure.[5] SPs would bear the cost of their own operations and would 'own' the customers including the risks thereof.

[14] With the unprecedented success of the industry, the advent of prepaid products and regulatory developments, the MNOs now invest heavily at the retail level and consider offering services directly to end-users as core to their business models.[6]

[15] Vodacom submits that it no longer considers Nashua's offering as an important route to market and it believes the "*service provider business model is becoming inefficient and obsolete.*" Vodacom considers the transaction as a

[4] Note that during the initial phases of mobile telecommunications in South Africa, pre-paid as a concept was not yet in existence. Thus, the only route to market for MNOs was through the conclusion of post-paid contracts or through the use of an SP which would assume the risk associated with the conclusion of such contracts.

[5] The RBB Economics Report entitled: Nashua Mobile/ Vodacom, Nashua Mobile/ MTN- Competitive Assessment ("RBB Report") at para 8 page 62 of the Record.

[6] RBB Report para 7 at page 61 of the Record.

mere manifestation of the "*natural continuation of the vertical integration of the service provider function…*"[7]

[16] Nashua is acutely aware of the changes the market has undergone and acknowledges that offerings directly to end-users – a territory previously inhabited primarily by SPs – now falls squarely within the competencies of the MNOs. Further, the margins available at the retail level of the mobile telecommunications market in South Africa have been declining consistently since 2008.[8] Nashua's offering to end-users is mirrored by that of the MNOs and Nashua submits that it does not envisage this trend changing in the near future.

[17] While Nashua's survival in the market is not under immediate threat, its long-term viability is uncertain and it has elected to exit the market now rather than later, while it is in a position where it is able to offer its employees favourable severance packages, and return some value to shareholders.[9]

Relevant Market

[18] The merging parties submit that concluding definitively on the relevant product market is unnecessary since, howsoever one defines the market the proposed transaction, it raises no substantial competition concerns.

[19] The Commission however, proposes that the effect of the transaction be assessed on the "*market for the resale of Vodacom post-paid subscription and services.*"

[20] Notwithstanding their dissimilar submissions regarding the relevant product market, both the Commission and the merging parties consider the geographic market to be national in scope.

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[7] See paras 3.11 and 3.12 of the Report entitled Report on Competitive and Public Interest Aspects in the Large Merger Between Vodacom (Pty) Ltd and the Vodacom Subscriber Base of Nashua Mobile (Pty) Ltd ("Competitiveness Report"), appearing at page 51 of the Record.
[8] See page 14 of The CC's Report.
[9] *Ibid*. See also submissions by Nashua at the hearing.

[21] Having considered the submissions of the Commission and the merging parties, we find that the effect of the proposed transaction is to be assessed on the market for the resale of Vodacom post-paid subscription and services.

[22] We are of the view that even if were to view the transaction on this basis the competition effects would be unlikely to raise any concerns.

Competition Analysis

[23] According to the Commission's analysis the merged entity will have a market share in the region of between 40-45% with the transaction accounting for accretion of a between 0.1% and 2%. The Commission considered this accretion to be minimal and unlikely to raise any competition concerns.

[24] The Commission also found that pre-merger, the SPs have very little ability to influence pricing to end-users. The question then became whether the merging parties compete vigorously on service and whether the removal of Nashua from the mobile telecommunications arena would reduce service levels to end-users.

[25] Nashua submitted that its service levels to customers had fallen behind market trends and that of the MNOs. As an example it pointed to the fact that while subscribers of the MNOs could manage many aspects of their accounts online or through automated call centre facilities Nashua still relied on older more expensive and less efficient methods. In order to improve its service levels it would need to make significant investments in IT infrastructure which it was unwilling to make because of the anticipated downward pressure on margins. In light of this it was unlikely that service levels to end-users would decline as a result of the transaction. In any event the services offered by Nashua in relation to network issues was not within its control as this was provided to the end-users in a back to back contractual arrangement with MNOs.

[26] The MNOs on the other hand claim that they are intent on continuously improving their offering from a service perspective and they in fact compete robustly with one another on service.[10] Further, the MNOs are required, by the End-User and Subscriber Service Charter Regulations[11], to provide high levels of service. In light of the above, we are satisfied that transaction will not result in a substantial lessening of service levels to end-users in the relevant market.

[27] The Commission then assessed the extent to which the proposed transaction, and the subsequent removal of Nashua, would adversely impact on inter-brand competition. The finding in this respect was that Nashua currently accounts for a very small, and declining, percentage of all post-paid subscribers. The parties also confirmed that the sale of the subscriber base did not enable any individual Vodacom customer to switch to another MNO simply because the terms and conditions for that individual customer were still governed by the contract it had concluded with Vodacom and Nashua.[12]

[28] In light of the above, we are largely in agreement with the submissions of both the Commission and the merging parties in that the proposed transaction is unlikely to result in a substantial lessening of competition in the relevant market. That is not, however, the end of the matter. The Tribunal is enjoined, as in all merger proceedings before it, to consider the likely effect of the proposed transaction on the public interest.

[10] Ms Burger- Smidt of Werksmans Attorneys, MTN's legal representative at page 52 of the transcript. See also Mr Patel of Vodacom at page 41 lines 4-9 of the Transcript where he states *"We're now becoming an industry that's more focused on customer retention and good quality service experience. And so one of the conditions and one of the key areas we wanted all of our service channels to invest in is really around service experience. Vodacom alone is also making quite dramatic and quite significant investments in service experience."*
[11] Issued by the Independent Communications Authority of South Africa (ICASA) in 2009.
[12]This was confirmed in the hearing by Counsel for Nashua Mobile. See Transcript page 27 line 7 to page 30, line 17.

Public Interest

[29] The merging parties were at pains to impress upon the Tribunal that the proposed transaction does not constitute the sale of a business as a going concern, and that Nashua Mobile's employees would thus not be transferred to the acquiring firm.[13]

[30] At first, we were uncertain as to the exact number of employees adversely affected by the transaction since the figures provided by the merging parties were somewhat inconsistent. At the hearing of 26 September 2014, the position regarding employment effects was clarified by counsel for the merging parties.

[31] While we deem the employment effects of the proposed transaction to be significant, we are cognisant of the fact that Nashua has decided to exit the market. We have also taken cognisance of the substantial commitments made by Nashua in respect of minimising the adverse effects on employment.

[32] Nashua has undertaken to redeploy as many affected employees within the Reunert Group as possible and expects this figure to be between 100 and 150. The severance packages Nashua has offered all of its employees ("the Severance Packages") appear to be particularly generous, being between three and five times more than they would ordinarily be entitled to in terms of the Labour Relations Act.[14] It also appears that many employees preferred to accept the Severance Packages rather than be transferred to the acquiring firm. Further, the merging parties have established support structures which provide affected employees with, *inter alia*, psychological and financial counselling; assistance in updating their curricula vitae; having their curricula vitae circulated within the Reunert Group and afforded preferential consideration in the event of vacancies arising; and letters of reference.

[13] *Inter alia* para 8.2 of the Competitiveness Report which appears at page 65 of the Record.
[14] Act No. 66 of 1995.

[33] It is also necessary to remark here that Nashua has provided specific undertakings in respect of all affected unskilled employees, i.e. those deemed most vulnerable and least likely to find alternative employment were they to be retrenched as a result of the transaction. Nashua has undertaken to redeploy each affected unskilled employee within the Reunert Group.

[34] In addition to the Severance Packages, our concerns regarding adverse employment effects have been further allayed by Vodacom having given certain undertakings which also go towards mitigating employment concerns. These undertakings are set out fully in the Tribunal's Order and Merger Clearance Certificate dated 29 September 2014.

Conclusion

[35] In conclusion we find that the transaction results in minimal market share accretion and will not alter the structure of the market. We do not consider that the proposed transaction is likely to result in a substantial prevention or lessening of competition in the relevant market, howsoever defined.

[36] While we do consider the employment concerns elucidated above to be serious, we consider the undertakings put forward by Nashua and Vodacom as likely to go a long way in mitigating the hardships associated with retrenchment.

[37] For the reasons set out above, we approve the proposed transaction unconditionally.

YCARRIM

31 October 2014

DATE

MS YASMIN CARRIM

Mr Andreas Wessels and Ms Medi Mokuena concurring

Tribunal Researcher: Derrick Bowles

For the target firm:	Adv David Unterhalter SC instructed by Norton Rose Fulbright
For the acquiring firm:	Adv Jerome Wilson instructed by Andries Le Grange from Cliffe Dekker Hofmeyr
For the Commission:	Mogau Aphane and Lesenda Grace Mohamed