COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 24/LM/Mar07

In the matter between:

Main Street 522 (Pty) Ltd Acquiring Firm

and

Edgars Consolidated Stores Ltd Target Firm

Panel	:	N Manoim (Presiding Member), Y Carrim (Tribunal Member) and Medi Mokuena(Tribunal Member)
Heard on	:	25 April 2007
Order issued on	:	25 April 2007
Reasons issued on	:	03 May 2007

Reasons for Decision

APPROVAL

1]On 25 April 2006, the Tribunal approved the merger between Main Street 522 (Pty) Ltd ("Bidco") and Edgars Consolidated Stores Ltd ("Edcon"). The reasons for approval follow.

THE TRANSACTION

2]Pursuant to the implementation of the proposed transaction, Bidco, a special purpose vehicle used by Bain Capital, will acquire from Edcon the entire issued share capital by way of two schemes of arrangement. The first of which will be entered into by Edcon and its ordinary shareholders and the second scheme will be between Edcon and its preference shareholders regarding the sale of these shares to Bidco. On completion of the proposed transaction, it is intended that the retail business of Edcon will be sold into a

newly incorporated operational company Retailco. The proposed transaction contemplates the delisting of Edcon from the JSE.

3]Bain Capital believes the acquisition of Edcon represents an attractive investment opportunity for it to expand its portfolio of companies.

THE PARTIES AND THEIR ACTIVITIES

4]The primary acquiring firm is Bidco, a special purpose vehicle that conducts no other business. Upon implementation Bidco will be a wholly-owned subsidiary of Lexshell 718 (Pty) Ltd ("Holdco"). Holdco, in turn, will be controlled by an entity referred to as Spaza Luxco, which will hold in excess of 50% of the issued share capital of Holdco.[1] The remaining shares of Holdco will be owned by the Management Trust, a vesting Trust through which the current management of Edcon will hold shares in Holdco and a BEE Trust. Spaza Luxco will, in turn, be owned by various funds which are ultimately controlled by Bain Capital.

5]The target firm, Edcon, is a public company which is incorporated in South Africa. It is a multi-brand retailer which trades through a range of retail formats namely Edgars, C.N.A., Boardmans, Red Square, Prato, Temtations and Edgars Active retail chains.

THE RELEVANT MARKET

6]Edcon, through its various retail divisions are involved in the retailing of men, women and children's clothing and footwear, luggage, stationary, homeware, textiles and furniture.

7]As indicated above Bidco, Holdco and Spaza Luxco are special purpose vehicles which have previously not traded. Bain Capital is a world wide fund

1 Spaza Luxco has not yet been incorporated but will be a company incorporated and registered in Luxembourg.

management group that manages private equity, venture capital and hedge and high yield funds. In South Africa it has interests in various companies, one being, Samsonite, a manufacturer and supplier of luggage.

8]Thus, although there is no horizontal overlap in the activities of the merging parties the transaction does raise vertical integration issues with regard to the distribution and retail of luggage.

Impact on Competition

9]Vertical mergers mostly raise concerns if one of the merging parties is a dominant player at one or more of the related vertical levels.[2]

10]According to the merging parties Samsonite, which has an estimated market share of 8-10% in the upstream market, does not manufacture luggage in South Africa but imports and distributes its luggage through an independent entity called Dynasty Luggage (Pty) Ltd. It competes with players such as Interbrand (Pty) Ltd, International Bag & Travel goods (Pty) Ltd, Leisure Luggage Manufacturers (Pty) Ltd, Capri Bag Manufacturers and various other players. Samsonite does not currently supply luggage to Edcon.

11]Edcon submits that it has a market share of between 13-14% in the downstream luggage retail market. It competes with most of the large retailers such as Pick 'n Pay, Massmart, Makro, Game, Frasers, Hepkers and various other independent retailers.

12]From the above it is clear that there are many players in both levels of the supply chain and that neither Samsonite nor Edcon are dominant players within their respective markets. The transaction is therefore unlikely to raise any vertical concerns.

13]The change of ownership will lead to a change in the financing of the business. Edcon will as a result of the financing structure carry far more debt

2 A dominant firm is defined in section 7 of the Competition Act.

than it did as a widely held listed entity. We enquired at the hearing whether the new debt structures might make Edcon less price competitive than it had been pre-merger. The merging parties assured the Tribunal at the hearing that Edcon's profit margins were sufficient to meet the additional debt brought on by the acquisition and that it would not impact negatively on Edcon's pricing policies, it being a low margin/high volume business.

CONCLUSION

14]There are no significant public interest issues and we accordingly approve the transaction without conditions.

OBJECTIONS

15]The Tribunal has received two sets of communications from parties opposed to the merger. None of these parties appeared at the hearing to address these issues or to apply formally to intervene in our proceedings prior to commencement.

16]One letter from an attorney relates to whether a former Edcon employee, retrenched in 2003, is entitled to stock options for the period after the date of the retrenchment.[3] This dispute as to whether the options are payable or not, is not merger specific, and does not implicate any provision of the Competition Act.

17]The second relates to a Mr Press, who on the morning of the hearing, purported to apply, by way of faxed and e-mailed correspondence, for a postponement in order to be allowed to intervene in the merger proceedings.[4]

18]The Tribunal decided not to postpone proceedings, and proceeded to hear the merger.

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3 See correspondence from P.R. Maharaj & Co to the Competition Commission and the bundle attached thereto dated 20 April 2007.
4 See correspondence from Mr G. Press dated 23 April to 25 April 2007.

19]Mr Press' putative application for a postponement to allow him an opportunity to intervene is unsuccessful for several reasons. In the first place we would be justified in coming to the conclusion that we have no proper application before us. Mr Press has not filed an application that meets the requirements of rule 46 (the rule that regulates intervention applications) nor rule 42 (the rule that regulates applications generally) of the Tribunal rules and it is difficult to discern what is before us – an application to postpone, an intervention application or both. This is not mere formality. If someone wishes to bring an application fairness and the proper administration of justice require some degree of adherence so that those affected by the application can understand what it is and have an opportunity to respond. In this case, what purports to be the application, has not ex facie the document, been served on the other parties. Further it arrived mid-morning of the day of the hearing and we were only made aware of it prior to our hearing as we had fortuitously taken an adjournment and our attention was drawn to by the registrar.[5]

20]At the hearing no person was present to move Mr Press's application and the record will indicate that we enquired if anyone was present as an objector. There was no response to this request.

21]A further criticism is that Mr Press did not set out a basis for why he had any legal interest in the proceedings. While the Tribunal has a broad discretion to recognise intervenors this is not unlimited. As the Competition Appeal Court has noted in Anglo South Africa Capital (Pty) Ltd and Others v IDC and others:[6]

> "*The granting of leave to participate is discretionary. However, such discretion cannot be unfettered. The discretion must be exercised judiciously or according to rules of reason and justice."*

5 Our records indicate that it was received at 10h51on the day of the hearing. Our hearings commence at 10h00.The relief sought ex facie the document reads as follows, "Leave to intervene, To apply for postponement until April 30 2007. To make submissions in the Public Good sub-clause i.v. (please refer to accompanying e-mail)."
6 See CAC Case No: 26/CAC/Dec02, page 25 of decision.

22]It would be manifestly unfair to merging parties if we postponed proceedings every time a prospective intervenor, who had neither made representations to the Commission during its investigation process nor appeared on the due date before the Tribunal to argue its case for a postponement, was allowed to obtain a postponement through a fax or e-mail to the registry. To tolerate such a practice would make merger proceedings hostage to opportunists and mischief makers.

23]Despite the lack of a proper application for postponement before us we nevertheless considered whether Mr Press, since he is not legally represented, had made out a case for being heard as an intervenor. Had we thought he had done so, we would then have had to consider whether there was a proper basis for postponing the hearing in order to hear him. Note that we make this consideration not because we are obliged to do so – since we find we have no valid application for a postponement or an intervention before us – but because, *mero motu*, we have decided to consider whether on the merits of the merger he can make submissions that may be useful to our consideration in terms of section 12A.

24]A perusal of the submissions we have received to date from Mr Press (14 emails in total which arrived over several days), indicates that the grounds of objection have been inconsistent, are in the most part difficult to discern, and where discernible, indicate a concern not relevant to our jurisdiction. There is thus no prospect that if Mr Press would be permitted to intervene, he would make submissions that might alter our conclusion to approve the merger. That being the case, there was no need for us to consider whether to postpone the hearing to consider further submissions from Mr Press.

_____ **03 May 2007**

N Manoim Date

Concurring: Y Carrim and M Mokuena.

Tribunal Researcher:	Rietsie Badenhorst
For the merging parties:	Anton Roets (Webbers Wentzel Bowens) Pieter Steyn (Werksmans)
For the Commission:	Ipeleng Selaledi and Makgale Mohlala