COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 41/LM/Jul10

In consideration of the large merger between:

Metropolitan Holdings Limited	Primary acquiring firm
and	
Momentum Group Limited	Primary target firm

Panel:	N Manoim (Presiding Member)
	Y Carrim (Tribunal Member)
	A Wessels (Tribunal Member)
Heard on:	06 and 07 October 2010
Order issued on:	14 October 2010

Application for variation of order heard on:	26 November 2010
Order in regard to variation application issued on:	01 December 2010
Reasons issued on:	09 December 2010

Reasons for Merger Decision and Variation Application

CONDITIONAL APPROVAL

[1] On 14 October 2010, the Competition Tribunal ("Tribunal") in terms of section 16(2)(b) of the Competition Act, 1998 (Act No. 89 of 1998, as amended) ("the Act") conditionally approved the proposed transaction involving Metropolitan Holdings Limited and Momentum Group Limited. The imposed conditions related to the public interest issue of the negative employment effects of the proposed

deal. The reasons for the conditional approval of the proposed transaction follow below.

PART A: REASONS FOR CONCLUSION ON COMPETITION ISSUES

THE PARTIES TO THE PROPOSED MERGER

[2] The primary acquiring firm is Metropolitan Holdings Limited ("Metropolitan"). Metropolitan is a public company listed on the Johannesburg Securities Exchange (JSE) and as such is not controlled by any single shareholder. The largest institutional shareholders of Metropolitan are: Kagiso Trust Investment (Pty) Ltd (20.6%); Public Investment Corporation (12.6%); Sanlam (4.7%); and Old Mutual (4.6%). Metropolitan has a large number of subsidiaries operating in different areas of the financial services industry.

[3] The primary target firm is Momentum Group Limited ("Momentum"). Momentum is a wholly owned subsidiary of FirstRand Limited ("FirstRand"). FirstRand, the holding company of a diversified banking and financial services group[1], is a public company listed on the JSE and accordingly it is not controlled by any single shareholder. The following shareholders hold more than 5% of the shares in FirstRand: RMB Holdings Limited ("RMBH")[2] (30.1%); GEPF Equity (PIC) (9.8%); Financial Securities Limited (8.5%); and First Rand Empowerment Trust (5.1%). Momentum has a large number of subsidiaries operating in different areas of the financial services industry.

THE TRANSACTION

[4] In terms of the concluded Merger Agreement, Metropolitan will ultimately acquire 100% of the issued ordinary share capital in Momentum from FirstRand, but the proposed transaction will take place through a number of steps. As consideration for the sale of Momentum's issued share capital by FirstRand to Metropolitan, Metropolitan will allot and issue Metropolitan Consideration Shares to FirstRand in an agreed ratio. The final ratio of the share swap must still be determined, but it is estimated that FirstRand would upon completion of this step

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[1] Both First National Bank and Rand Merchant Bank fall within this group.
[2] RMBH currently holds an approximate 25% shareholding in Discovery Group Limited.

hold in excess of 50% of the issued ordinary share capital of Metropolitan. FirstRand will thereafter immediately unbundle its shares in the merged entity to the FirstRand shareholders as a distribution *in specie*. As stated above, the ultimate outcome pursuant to the implementation of the proposed transaction is that Metropolitan will own 100% of the issued share capital of Momentum and will accordingly solely control Momentum in terms of section 12(2)(a) of the Act.

RATIONALE FOR THE PROPOSED TRANSACTION

Metropolitan's submission

[5] Metropolitan in the merger filing submitted that the rationale for the transaction includes that the transaction avails a number of enhanced growth opportunities, cost synergies and economies of scale through the combination of complementary target markets and resources since Metropolitan and Momentum operate in different target markets. Metropolitan focuses predominantly on the low-to middle-income markets whilst Momentum's key area of focus is the upper-income market. This difference is especially visible in the retail sector of each business.[3]

Momentum's submission

[6] Similarly Momentum in the merger filing submitted that the two merging parties largely complement each other which allows for post merger synergies, efficiencies and opportunities to extract cost benefits.

OVERLAPPING ACTIVITIES OF THE MERGING PARTIES

[7] Metropolitan and Momentum are both diversified service providers within the broader financial services sector.

[8] The Metropolitan group of companies comprises of five operating businesses, namely the retail, corporate, asset management, international and health businesses. Through these operating businesses Metropolitan provides *inter alia* long-term insurance to individuals and groups; healthcare products and services,

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[3] Also see paragraph 41 below.

more specifically medical aid scheme administration services and managed healthcare services; and asset management services to both retail/private investors and corporate/institutional investors. In addition, Metropolitan Staff Medical Scheme operates as a restricted medical scheme that is offered to Metropolitan's employees.

[9] Momentum develops markets and distributes a variety of products such as risk insurance, investments, employee benefit products and services, medical aid cover, medical scheme administration and managed care services. The various services offered by Momentum are organised around several business units active in the long-term insurance, medical insurance, retirement fund administration, asset management and property investment industries.

[10] The merging parties' activities horizontally overlap with respect to the following broad areas:

(i) the long-term insurance industry, including the provision of long-term insurance products to both individuals and corporate customers, for example disability, fund, health, life, assistance and sinking fund policies;
(ii) the medical aid industry, including the provision of medical scheme products, medical scheme administration services[4] and managed care services to medical schemes[5];
(iii) the provision of retirement fund administration services[6];
(iv) the provision of multi-purpose asset management services; and
(v) the provision of rentable office and retail space.

[11] We shall below discuss each of these areas of overlap under the relevant market analysis.

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[4] Momentum and Metropolitan both provide medical scheme administration services including membership services, claims related services, accounting and investment of funds services and query services.

[5] Most medical scheme administrators have grown their product portfolios to an extent that they offer services beyond the traditional administration services. In more recent times, a number of managed care service providers have emerged, offering more specialized services to medical schemes, also known as managed care services. This involves the provision of a range of different services that include both back-office management and actual medical service delivery. These services include, for example, pre-authorization services, hospital case management, disease management programmes and networked service providers and capitation arrangements.

[6] This includes a range of services such as member contribution management, data management, benefit calculation and processing, pensioner payroll services, death claim investigation and support, member liaison and servicing via call centre, website and regional office services, trustee services and reporting, legal and compliance services and member communication services.

RELEVANT MARKETS

(i) Long-term insurance

[12] The Competition Commission ("Commission") concluded that a national broad market exists for the provision of long-term insurance that can be further delineated into separate relevant markets for (i) individual insurance products, i.e. policies for natural persons; and (ii) corporate customer groups insurance products, i.e. group or employee benefits.[7]

Individuals

[13] Under individual policies the life, health or disability of an identifiable individual is insured and the policy is entered into by the policy holder for the purpose of providing benefits to that individual or to persons who have an interest in the insured risk. Individual policies generally involve an investment element and a risk component, with the issuing of policies ranging between (i) pure investment policies, for example an endowment; (ii) pure risk policies, for example disability, life or dread disease benefits; and (iii) a combination of investment and risk policies, for example a retirement annuity combined with life cover if the member dies before retirement.

Corporate customer groups

[14] A group being *inter alia* an employer, retirement fund or a medical scheme, where the policy covers a group of persons identified by reference to their relationship to the fund or scheme for the purpose of providing benefits to its members in the event of sickness, accident or unemployment of the member or of providing benefits to surviving spouses, children, dependants or nominees of deceased members.

[15] In regard to a distinction between the provision of individual and group long-term insurance, the Commission found that there is limited if any demand-side substitutability between individual versus group products. The Commission's

[7] The merging parties stated that they are not aware of any international companies offering life insurance products to any South African customers, unless they have a local branch in South Africa. Sanlam Limited ("Sanlam") for example noted that it would be more sensible for international companies to acquire a local insurer than set up their own operations; see Sanlam submission to the Commission of 08 July 2010, page 23 of the record. Also see response from Discovery Group submitted to the Commission on 12 July 2010 suggesting a national geographic market; page 7 of the record.

market investigation further revealed that companies providing long-term insurance themselves run and administer individual products differently from group products. The route to market for these insurers in respect of group long-term insurance is mainly through brokers and company specific intermediaries or agents. In respect of certain products sold to individuals on the other hand, direct distribution features for certain relatively simple product classes such as funeral policies and sinking funds that do not require the expertise of a broker.

[16] There is however no need for the Tribunal in this matter to definitively conclude on the precise market definition for the provision of long-term insurance. We shall in our competitive assessment below consider the effects of the proposed deal in a national (broadly defined) market for the provision of long-term insurance, as well as in national (more narrowly defined) potential markets for the provision of long-term insurance products to respectively; (i) individuals, and (ii) group corporate customers. Since a large number of niche operators are active in the long-term insurance market, we shall furthermore also consider a further potential segmentation of the relevant market based on the different types of risks covered, for example pension fund, funeral, sinking fund, disability, annuities and life policies.

(ii) Medical aid

[17] The Commission defined a number of relevant markets in relation to the areas of overlap between the activities of the merging parties in the medical aid sector, as discussed below.

Provision of medical scheme products

[18] Since medical schemes undertake liability on behalf of their members and pay for their members' health services and products, for example services provided by medical practitioners, pharmacies and hospitals, in return for a premium or contribution, the Commission defined a national (broad) market for the provision of medical scheme products and services.

Open and closed medical schemes

[19] The Commission further concluded that since medical schemes can either be registered as open or closed schemes the above-mentioned broadly defined

market for the provision of medical scheme products and services could potentially be further delineated into separate relevant markets for respectively; (i) open, and (ii) closed or restricted medical schemes. Open schemes refer to schemes in which any member of the public can join the scheme, provided that the relevant contributions are paid. Closed or restricted schemes refer to schemes in which only a pre-specified group of people (i.e. certain qualifying persons) are allowed to join per set criteria such as current or former employees of a certain company or industry, or membership of a particular profession, professional association or union. The Government Employees Medical Scheme (GEMS) is an example of a closed scheme and is currently the largest closed scheme in the country.

[20] Momentum Health Medical Scheme operates as an open medical scheme whereas the Metropolitan Staff Medical Scheme is a closed scheme offered exclusively to Metropolitan employees. Thus, on a more narrow delineation of the relevant market into open and closed medical schemes the activities of the merging parties do not overlap. We therefore do not consider these narrower potential relevant markets any further below.

Provision of medical scheme administration services

[21] In line with previous Tribunal decisions[8], the Commission defined a national market for the provision of medical scheme administration services, inclusive of both third party and self-administration.

Third-party versus self-administration

[22] Medical schemes require the performance of basic administrative functions, for example the management of membership applications and files, claims related services, accounting and investment of funds services and query services, which are often outsourced to third-party, for-profit administrators. So-called self-administrators however also exist in the market. The latter administrators typically have critical mass, i.e. a sufficiently large number of principal members. Currently there are 17 self-administered medical schemes in South Africa.[9]

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[8] See, for example, the Tribunal's decision in large merger involving *Momentum Group Limited* and *African Life Health (Pty) Ltd* (CT Case no. 87/LM/Sep05), paragraphs 9 and 10.
[9] Source: CMS Annual Report for 2008-2009.

[23] The merging parties submitted that significant switching has occurred in the market from third party administration to self-administration by schemes such as Medshield, Pro Sano Medical Scheme, Genesis Medical Scheme and Selfmed Medical Scheme.

[24] In the context of third-party versus self-administration, the Tribunal in the large merger involving *Momentum* and *African Health* concluded that all beneficiaries whether they are currently members of a self-administered scheme or not form part of the contestable market:

> "*Just as Discovery competes for customers to join its medical aid scheme, so other medical aid administrators compete to get customers away from schemes administered by their rivals, to join their own. Administrators assist medical schemes to win customers, and Discovery has in fact been able to win customers to its own schemes in this way ... Since individual beneficiaries, or the collective in a closed scheme, are free to change administrators, and the quality of an administrator is what makes a scheme an attractive one in the case of an open scheme, Discovery Medical Aid's members are part of a contestable market. The Commission may be correct that the scheme itself as a legal entity may not be about to defect to another administrator, but the same cannot be said of the individual members and hence, they do form part of the contestable market.*"[10]

Provision of managed care services

[25] Independent managed care companies have emerged in recent years since administrators have grown their product offerings to medical schemes to a range of back office managed care services over and above the above-mentioned administration services as well as actual medical service delivery, for example pre-authorisation services, hospital case management, disease management programmes (usually for chronic conditions) and capitation arrangements (these can involve for example primary care, specialist services and hospital-based services). Managed care service providers thus either seek to offer a package of comprehensive and integrated clinical risk management services to the members within a medical scheme or they specialise in one or more areas of risk management. The Commission therefore defined a national market for the provision of managed care services to medical schemes.

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[10] *Idem* footnote 8 above, see paragraphs 21 and 22 of the Tribunal's decision.

[26] In relation to the overlapping activities of Metropolitan and Momentum in the medical aid sector, the Tribunal shall assess the competition effects of the proposed deal in the above-mentioned various (potential) relevant markets as defined by the Commission.

(iii) Retirement fund administration

[27] Metropolitan and Momentum both provide retirement fund administration services to respectively (i) large standalone retirement funds operated for employees employed by one corporate entity, a group of related corporate entities or a specific industry; and (ii) umbrella funds, which allow employees of different unrelated companies and organisations to place their retirement savings into a single fund.

[28] The Commission's market investigation showed that services to standalone retirement funds are more customized compared to the more standardized services to umbrella funds. In the case of standalone retirement funds there generally is more flexibility and customer interaction with the boards of trustees compared to umbrella funds where the focus is more around self services or use of brokers. The Commission however did not make a definitive finding on the exact parameters of the relevant market(s) in question.

[29] The Tribunal likewise shall leave the market definition open and analyse the competitive effects of the proposed transaction in a national (broadly defined) market for general retirement fund administration, as well as in national (more narrowly defined) potential relevant markets for the provision of retirement fund administration services to (i) large standalone retirement funds and (ii) umbrella funds.

(iv) Asset management

[30] Metropolitan and Momentum both are active in the national provision of asset management and collective investment schemes to respectively (i) institutional investors for example insurance companies, retirement funds and corporations; and (ii) individual investors, both directly via investment contracts and more

commonly via collective incentive schemes, for example mutual funds. Furthermore, both entities also provide asset management services to their respective long-term individual and corporate insurance businesses.

[31] The Commission did not delineate separate relevant product markets per the source of funds, i.e. whether institutional or individual, since the Commission found that most if not all asset managers would accept funds from either source or the customers themselves consider all asset managers equally when selecting a provider of asset management services. The Commission however did consider the effects of the proposed transaction on the management of collective investment schemes separately from general asset management funds.

[32] There is no need for the Tribunal in this case to define the exact parameters of the relevant product market(s) in relation to the provision of asset management services since no competition issues arise regardless of alternative approaches to market delineation. We therefore shall consider in our competitive assessment below the effects of the proposed deal in a national (broadly defined) market for the provision of general asset management services to all investors as well as in national (more narrowly defined) potential relevant markets for the management of respectively (i) collective investment schemes and (ii) general asset management funds.

(v) Property

[33] In line with existing Commission and Tribunal practice, the Commission defined the following relevant product markets in relation to the activities of the merging parties in the property sector:

(i) rentable office space which due to different customer profiles and property features can potentially be further delineated according to the grading on the classification system devised by the South African Property Owners Association (SAPOA) namely P, A, B and C; and

(ii) rentable retail space which can be further delineated according to the size of the property in question (measured in rentable square metres), for example super regional, regional, community, neighbourhood, convenience, retail warehouse and value centres.

[34] In regard to the geographic market delineation the Commission as a theoretical proposition used the conventional nodal approach on the assumption that market players in the property sector usually compete with each other in the same geographic node.

[35] The Tribunal shall in its assessment of the competitive effects of the proposed deal in regard to the overlapping property related activities of the merging parties follow the same approach to market delineation as the Commission.

COMPETITION ANALYSIS

[36] We shall limit our competitive analysis below to the potential horizontal effects of the proposed merger per relevant market, since the proposed deal does give rise to appreciable vertical issues that warrant further discussion.

(i) Long-term insurance

[37] In a broadly defined market for the provision of long-term insurance the post merger national market share of the merged entity, based on total net premium income, will be approximately [20-30]%. The merged entity will however face competition from large reputable players in this market such as Old Mutual and Liberty with market shares exceeding 20%, from Sanlam with a market share exceeding 15%, as well as from Discovery Life and other smaller players.[11]

[38] In a more narrowly defined market for the provision of long-term insurance products to individuals the merged entity's post merger national market share, based on premium income, will be less than 20%. Based on the claimed ownership of number of policies by company in 2009 this market share reduces to less than 15%. Competition in this market will come from the aforementioned large competitors with recognised brands amongst individuals, as well as from smaller players such as Hollard, Nedgroup Life, Clientele, ABSA Life, Channel Life and Guardrisk.

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[11] Merging parties' calculations based on "*South African Life Insurance Industry Bulletin – June 2009*" by Global Credit Rating Company, ASISA Industry statistics and Swiss Re 2008 Group Volume Survey - August 2009.

[39] In respect of a market for the provision of long-term group insurance products, the post merger national market share of the merged entity, based on premium volumes, will be approximately [20-30]%. However, Old Mutual, Liberty and Sanlam respectively all have market shares in excess of 20% in this market and other players include Discovery Life, Alexander Forbes and Centriq.[12]

[40] From the above it is evident that the merged entity will post merger face significant constraining influence from Old Mutual, Liberty and Sanlam. Furthermore, a number of smaller players are active in the markets under consideration, including Discovery Life.

[41] The merging parties further stress the fact that they cannot be regarded as close competitors in the market for the provision of long-term insurance since they have a different focus in the market with their individual product offerings being "largely complementary" to each other. In the aforementioned individual market segment, Metropolitan focuses on the lower value, volume driven business and Momentum on the higher income, higher premium value segment.[13] Whilst both Metropolitan and Momentum broadly compete for corporate customers, Momentum has a stronger focus on umbrella funds which target the SMME market by allowing them to buy into a standardised group product despite not having the scale, whilst Metropolitan derives a greater proportion of its revenues in the corporate segment.[14] The above-mentioned differences in the merged entity's post merger market shares based on either the number of policies or on premium income[15] are illustrative of this different market focus of Metropolitan and Momentum.

[42] A potential further segmentation of the market based on the various individual types of risks covered does not raise likely competition concerns since there are a sufficient number of larger and smaller competitors to Metropolitan and Momentum in each of the individual product classes. According to the Financial Services Board ("FSB") 30 of the long-term insurers in South Africa are classified as "typical insurers" offering most of the six classes of business as

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[12] Merging parties' estimates using Swiss Re Group volume survey, August 2009.
[13] See page 33 of merging parties' Competitiveness Report, page 121 of record.
[14] See page 44 of merging parties' Competitiveness Report, page 132 of record.
[15] See paragraph 38 above.

defined in the Long-Term Insurance Act, 52 of 1998. Furthermore, the number of typical insurers increased by 15% from 2008 to 2009.

[43] Based on the above we conclude that it is unlikely that the proposed deal would substantially prevent or lessen competition in the (potential) market(s) for the provision of long-term insurance.

(ii) Medical aid

Provision of medical scheme products

[44] In the hypothetical event that the merging parties' medical schemes should amalgamate, no likely competition issues arise in a (broadly defined) market for general medial schemes since the merging parties' combined post merger national market share, based on the number of members of each scheme, will be less than 5%.[16] Given this very low combined market share we do not deal with this market in any further detail.

Provision of medical scheme administration services

[45] In a market for medical scheme administration services the post merger national market share of the merged entity, based on the average number of beneficiaries administered, will be approximately [20-30]%, with Metropolitan contributing more than 20% to this combined market share.[17] However, Metropolitan's market share based on beneficiary numbers greatly exceed its market share based on administration fees due to the comparative lower fees of the larger schemes.[18]

[46] The merged entity will post merger face competition in this market from reputable players such as Discovery Health and Medscheme, both with market shares in excess of 20%, as well as from a number of smaller players including Full Circle Health, Sechaba Medical Solutions and Allcare Administrators. There are 24 registered medical scheme administrators in respect of open schemes and 23 which administer closed schemes (with most of these being the same entities).[19]

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[16] Source: CMS Annual report 2008-2009.
[17] Merging parties' estimates utilising the CMS Annual report 2008-2009.
[18] Also see paragraph 48 below.
[19] Source: CMS Annual report 2008-2009.

[47] Furthermore, as motivation for the lack of competition concerns in this market as a result of the proposed deal, the merging parties stress that Metropolitan and Momentum are not close competitors since Metropolitan is mainly focused on the administration of a few of the largest closed schemes whilst Momentum, outside of the Momentum Health Medical Scheme, has a number of smaller schemes (both open and closed) under its administration. Metropolitan considers its closest competitors to be Discovery and Medscheme which have the capacities and a proven track record in administering very large schemes. Momentum, according to the merging parties, does not have such capability.

[48] The Commission's market investigation confirms that market shares in this market are cyclical in nature since they are heavily skewed towards the player(s) administering the large schemes. For example the GEMS administration contract[20], with a membership approaching [0 – 500 000] members, would significantly affect the market share of whichever incumbent firm wins that tender. The Commission in relation to Metropolitan attributes its above-mentioned relatively large market share in this market to the successful bidding and winning of tenders relating to the administration of certain large medical schemes. Furthermore, the available evidence in relation to these large medical schemes shows that they routinely review their contracts with administrators. According to the Commission, GEMS submitted that administrators are appointed pursuant to a transparent and comprehensive tender process conducted in accordance with the scheme's Supply Chain Management Policy and furthermore that it has appointed a number of different administrators over the years. The Commission therefore concluded that market shares in this market are heavily influenced by the company winning large tenders such as GEMS and Polmed and further that these market shares in all likelihood change after at most a three-year cycle.

[49] In regard to the potential switching of customers between alternative medical scheme administration services providers, a medical scheme may in terms of the Medical Schemes Act, 131 of 1998, on giving a minimum of three months notice replace its administrator with another. The Tribunal in the *Momentum*

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[20] Also see paragraph 19 above.

Group/African Health[21] merger found that a high degree of switching activity exists of medical schemes to alternative medical scheme administrators and the available switching-related evidence in this case supports this previous finding of the Tribunal.

Provision of managed care services

[50] The Commission found that back-office type managed care services are essentially an extension of general medical scheme administration and hence competition in this "extended arm of administration" mirrors the competition landscape in the general medical scheme administration market. The merging parties only provide back-office management type managed services that leverage their own administrative capabilities and they contract in managed care service providers for the actual delivery of specialised services.

[51] In a market for managed care services the merged entity will, based on membership, have an estimated post merger national market share of less than 20%.[22] There are several competing firms providing managed care services in South Africa including large players such as Lethimvula/Medscheme and Discovery Health, both considerably larger than the merged entity with market shares exceeding 20%, as well as a number of smaller players including Liberty/V-Medical Aid Administrators and Full Circle.

Conclusion

[52] None of the third parties contacted by the Commission as part of its market investigation including customers, competitors and regulatory bodies, expressed any concerns in relation to any of the above-mentioned areas of overlap between the activities of Metropolitan and Momentum in the medical aid industry. Based on the available evidence we therefore conclude that it is unlikely that the proposed deal would substantially prevent or lessen competition in any of the (potential) relevant markets concerned.

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[21] *Idem* footnote 8 above, see paragraph 15 of the Tribunal's Decision.
[22] Merging parties' estimates based on figures reflected in the CMS report 2008-2009.

(iii) Retirement fund administration

[53] The Commission found that the South African market for retirement fund administration is highly fragmented. The merging parties submitted that there are approximately 13 000 FSB registered retirement funds in South Africa, with 3 000 of these having more than 100 members and 1 000 having more than 500 members. Furthermore, the merging parties submitted data indicating that there are a total of 140 registered retirement fund administrators (excluding companies that administer their own funds).

[54] In a (broadly defined) market for retirement fund administration, as well as in a (more narrowly defined) potential relevant market for retirement fund administration services to large standalone funds the merged entity will, based on total membership, have a post merger national market share of less than 20%. In a (narrowly defined) potential market for retirement fund administration services to umbrella funds, the merged entity will have a post merger national market share of less than 10%.[23] In all these (potential) markets the merged entity will face competition from reputable players such as Alexander Forbes, Sanlam, ABSA, Old Mutual and Liberty that would exert constraining influence on the merged entity.

[55] The merging parties further submitted that they are not close competitors in the potential relevant markets since Metropolitan's retirement fund administration services are primarily targeted at large retirement funds whilst Momentum on the other hand targets mainly umbrella funds.

[56] Furthermore, none of the third parties contacted by the Commission as part of its market investigation expressed concerns in relation to any of the aforementioned (potential) relevant markets relating to retirement fund administration. We therefore conclude that it is unlikely that the proposed deal would substantially prevent or lessen competition in any of the (potential) relevant markets concerned.

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[23] Merging parties' estimates based on FSB pension administrator data and the known statistics in respect of the Transnet statutory funds.

(iv) Asset management

[57] In a market for multi-purpose asset management services the merged entity will have a post merger national market share of less than 10%.[24] There are several reputable players active in this market such as Old Mutual, Sanlam, Allan Gray, Stanlib and Investec, all of which are larger than the merged entity, as well as smaller competitors such as Coronation and Investment Solutions and a whole host of even smaller asset managers. If the management of collective investment schemes is considered as a potential separate relevant market, the merged entity will post merger, based on assets under management as at March 2010[25], still have a national market share of less than 10%. Given these relatively low market shares no likely competitive issues arise in any of the potentially affected markets.

(v) Property

[58] Both Metropolitan and Momentum have diverse property portfolios and own various retail, office and industrial properties throughout South Africa. However their activities in the provision of rentable office and retail space overlap only in the following geographical nodes:

(i) Rentable A grade office property in the Bellville node;

(ii) Rentable B grade office property in the Johannesburg CBD node; Sandton node; Bedfordview node; and Parktown node.

(iii) Rentable C grade office property in the Durban CBD node and the Bloemfontein node.

(iv) Rentable retail space in Claremont, Cape Town.

[59] Several properly investment companies are present in the general property investment market including Growthpoint, Pangbourne, Emira, Apexhi/Ambit, SA Corporate, Redefine, Hyprop, Vukile, Resilient, Fountainhead and numerous other smaller property investment funds. From a localised geographic perspective the post merger market shares of the merged entity will, based on SAPOA Survey data of gross lettable area (GLA) for the fourth quarter in 2009, be less than 20% in all of above-mentioned overlapping geographic nodes.

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[24] Merging parties' estimates using the Alexander Forbes Asset Management Survey, 31 December 2009.

[25] Merging parties' calculations using ASISA Industry Statistics, March 2010.

Therefore, regardless of whether the transaction is considered in the broad scheme of general property investment or according to the property grading/size at a nodal geographic level, no likely competition issues arise from the proposed deal.

CONCLUSION ON COMPETITION ASSESSMENT

[60] Based on the above we conclude that it is unlikely that the proposed merger would substantially prevent or lessen competition in any potential relevant market.

_________________________ 9 December 2010

A Wessels

Y Carrim and N Manoim concurring

PART B: REASONS FOR CONCLUSION ON PUBLIC INTEREST

[61] This merger gives rise to only one public interest concern - the effect the merger will have on employment. In their filings the merging parties indicated that as a worst case scenario, the merger may lead to up to a 'net' amount of 1000 retrenchments.[26]

[62] While the merging parties did not concede that this amounts to a 'substantial public interest' concern, prudence led them to agree certain conditions with the Commission which were intended to ameliorate the effect of the retrenchments. The merging parties were willing to accept that these undertakings could be imposed as conditions for approving the merger.

[63] The National Education Health and Allied Workers Union ('NEHAWU'), a union representing some of the affected employees opposed this remedy and argued that the merger should be prohibited because the merging parties were unable to justify the retrenchments.

[64] On 14 October 2010 we approved the merger subject to a limited moratorium on retrenchments for two years. The terms of this condition are:

[64.1] *MMI Holdings, the merged entity, shall ensure that there are no retrenchments in South Africa resulting from the merger for a period of 2 (two) years from the effective date of the proposed transaction.*

[64.2] *The condition in 1 shall not apply to "senior management" as set out in the table on page 242 of the record and defined in Annexure J: Maximum number of potential retrenchments in respect of skilled employees of the combined merged entity": Level: Senior*

[26] The use of the concept net amount arose because in their filing they indicated that the staff reduction needs could amount to 1500 jobs or 9,5% of total employees in the merged firm, but that due to mitigating factors, which we discuss later, the net amount would be closer to 1000 or 6,4% of the total number of employees in the merged firm.

Management to Metropolitan's supplementary documentation filed at the Tribunal on 01 October 2010.

[64.3] *Metropolitan and Momentum must circulate the condition in 1 and 2 above to all their employees within 7 days of the date of this order.*

[65] In this section of the reasons we explain why we concluded that the merger could not be justified on public interest grounds, why we considered neither the remedy proposed by the merging parties nor that proposed by the union as appropriate, and finally, why we imposed the remedy that we did.

LEGAL ISSUES

[66] The schema of section 12A of the Act, which provides for a consideration of mergers, requires the Tribunal to *"initially determine"* the competition effects of a merger. If the merger *is* not *"... likely to substantially prevent or lessen competition"*, as is the case with this merger, then the Tribunal must still consider its effect on the public interest. This is in terms of section 12A(1)(b) which states:

> *"... otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)."*

[67] Section 12A(3) set out the public interest grounds. We quote only the relevant portion below:

> *"(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*
>
> *....*
>
> *(b) employment..."*

[68] In *Harmony/Goldfields*[27] we held that the merging parties are not required to affirmatively justify a merger on public interest grounds. What we did not decide in that case is whether once a substantial public interest ground has been raised whether the merging parties face an evidential burden of justification. In this case we have decided that they do. Once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it.

[69] Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made. This is not an unfair burden given that only the merging parties can answer this question.

[70] The evidential burden that the parties must meet, once the prima facie case has been established, must satisfy two criteria namely that:

1) a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and
2) the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.

[71] Thus even if the merging parties make a good efficiency argument for job losses, this efficiency gain must, if the job losses are substantial, be justified on a ground that is public in nature to countervail the public interest in preserving jobs. This is because the Act refers to a public interest which must be distinguished from a private interest. Thus although a firm may be able to demonstrate that employment loss is rationally connected to an efficiency claim this would on its own not be sufficient if the efficiency gain is a private one. By way of example an employment loss cost saving which is justified solely by a

[27] *Harmony Gold Mining Company Limited and Gold Fields Limited* CT Case No.: 93/LM/Nov04.

gain to shareholders and to no one else, could not be regarded as a countervailing interest. Gains to shareholders on this scenario would be purely private. If gains to shareholders as a result of efficiencies introduced through job reduction were regarded as a public interest this would have received express mention in the Act. The Act is silent on this point.

[72] From the structure of section 12A it would appear that purely private efficiency gains are only to be taken into account as countervailing a loss to competition but not a loss to the public interest. This is because the Act requires that a merger which has been justified on efficiency grounds should still be evaluated on the public interest grounds.[28]

[73] Section 12A(1)(a)(i) and (ii) which provides for the efficiency defence to be raised to offset a loss to competition, still requires one thereafter to apply the public interest test set out in subsection 3:

> "12A(1)(a) *If it appears that the merger is likely to substantially prevent or lessen competition then determine-*
> *(i)whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and*
> *(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)."*

[74] This interpretation is further supported by the balancing of *"... the interests of workers, owners and consumers"* that the preamble of the Act refers to. The preamble also refers to regulating *".... the transfer of economic ownership in keeping with the public interest."*[29]

[75] Thus in the balancing exercise, the private interests of shareholders would have to yield to the weightier public interest in preventing employment loss as a result of the merger. This does not mean that there are no circumstances where efficiency gains, even if achieved through substantial job losses, could not be

[28] Section 12A(1)(a)(ii) and (b) of the Act.
[29] Refer to the Preamble of the Act.

justified on public interest grounds, as opposed to purely private interest grounds. What might those grounds be? Firstly, section 12A(3) enumerates other public interest grounds, which as we pointed out in the *Distell case,* might lead to opposing conclusions.[30] Thus an adverse effect on employment might in certain circumstances be justified e.g. keeping a factory open in a region to prevent an adverse effect on that region's economy might require a substantial number of jobs to be lost.[31] But sources of countervailing public interest need not be limited to those specifically mentioned in section 12A(3).

[76] In *Harmony/Goldfields* we recognised that the public interest inquiry was related to the prior competition enquiry:

> *"This prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence section 12 A makes use of the term "justified" in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion."*[32]

[77] Examples of possible public interest justifications that might flow from the prior competition inquiry might be that the merger:

1) is required to save a failing firm;

[30] *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd*, CT Case No: 08/LM/Feb02, para 214**.**
[31] Section 12A(3)(a).
[32] *Harmony/Goldfields* decision supra footnote 2, at para 56.

2) is required, because pre-merger, the merging firms will not be competitive unless they can lower their costs to be equally as efficient as their rivals and only the merger can bring about these savings through the contemplated employment reduction; or

3) will lead to lower prices for consumers because of the merged firm's lower cost base and that this lower cost base can only come about or is materially dependent upon, the contemplated employment reduction.

[78] We discuss more fully below how we have applied the test propounded above to the facts of this particular case.

FACTUAL ISSUES

[79] When this merger was filed the merging parties indicated that the employment loss was in a *"very worst case scenario"* likely to be 1500 employees estimated to be 9, 5% of the combined employment figure of 15 725.[33] The merging parties sought to dispel fears about the size of the potential job loss by stressing that only a portion of the potential staff reductions would result in retrenchments as a result of redeployment, retraining, natural attrition, offer of early retirement and business growth. Potential redeployment within the First Rand Group was also mentioned.[34] As a result of these mitigating features which would attenuate the bleakest scenario the net job loss was considered to be 1000 employees or 6.4% of the combined employment figure.

[80] As we shall see later, both the reliance on business growth and redeployment within the First Rand Group ceased to be options for mitigating job losses by the time of the hearing.

[81] In its recommendation the Commission concluded that the transaction *"... results in a significant negative impact on employment."*[35] The Commission noted that it had asked the parties to make undertakings in respect of the job losses which they then did. The Commission then concluded that the transaction be approved

[33].Merging parties' market and competition analysis report, record page 221.
[34] Ibid, record page 221.
[35] Recommendation page 55.

subject to the undertakings to alleviate *"... the negative (sic) unemployment."*[36] The Commission does not analyse the undertakings however and justify why they alleviate the negative effect of unemployment which it has identified. The undertakings provided then, which as we shall see got improved during the course of the hearing, amount largely to providing two things: a hope, but not guarantee of redeployment within the merged firm or its business partners, including the First Rand Group, and a retraining allowance of up to R 10 000, provided the employee fell within a certain category which was essentially offered to those with less skilled qualifications.[37]

[82] When the merger was filed with the Tribunal we held a pre-hearing and requested a number of further documents from both merging firms which were duly provided. At the same time NEHAWU which had filed a notice of intention to participate during the Commission's investigation advised that it wished to intervene in the Tribunal proceedings.

[83] We held our hearings from 6 to 7 October 2010. During the course of the hearing, apart from legal submissions, we heard testimony from two of the merging parties' employees, Nicholas Kruger who is the chief executive officer of Momentum and chief executive officer designate of the merged firm, and Werner van der Veen, a member of Momentum's capital management team. NEHAWU did not call any witnesses, but was allowed to cross examine the two merging parties' witnesses. At the commencement of the hearing the Commission and merging parties announced that the undertaking had been strengthened. The ceiling on the number to be retrenched was set at a maximum of 1000 and the period of restriction was three years. The amount to be paid to employees as a retraining allowance was set at R 15000 and the pool of eligibility was extended to those who had a National Qualification Framework of 5 or below. This qualification threshold was considered to define the class of semi-skilled and unskilled employees. The estimate was that this would comprise a class of 339 employees. This means the balance facing retrenchment, approximately 661, would not be eligible for this allowance.[38]

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[36] Recommendation page 10.
[37] Recommendation pages 7-10.
[38] Transcript page 11.

[84] Kruger testified that the logic of the merger was to drive efficiencies between two firms with complementary rather than competitive businesses. Nevertheless on integration of the respective business units that had been identified redundancies would be inevitable and this would necessitate retrenchments but would make the merged firm more efficient than its two progenitors. Kruger who has been involved in integrating insurance firms after a merger based most of his assumptions about what would happen based on this experience.

[85] In documents filed by Momentum a key document outlined the retrenchment process assumptions. According to this document:

> *"It is therefore assumed that the potential headcount reduction is proportional to the estimated total management expense savings"*[39]

[86] Kruger conceded that the relationship between savings and head count was proportional:

> *"...you know for example, if in our retail business we say we can save 10% of costs, it translates into a head count reduction of 10%, but it's done per business unit."*[40]

[87] He went on to state that this was not an unreasonable assumption given that the people cost was roughly 60% of the total cost based on the experience of his previous transactions.[41] Kruger is not a detail man, so when pressed for detail it was indicated that detail would be supplied by the next witness Van der Veen.[42] But Van der Veen, although more of a detail man, was unable to account for how the working groups had come up with the figures that they had. This emerged when he was being cross-examined about whether past retrenchments had been taken into account in arriving at how many more retrenchments might be required:

> *"MR VAN DER VEEN: By implicitly I mean in the number that was given to us by the business units they took account of that, but I can't tell you exactly how they did that.*

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[39] Annexure I –unpaginated Momentum document titled '*Social impact of proposed transaction on employment*' from Werner van der Veen dated 21 April 2010.
[40] Transcript pages 77-8.
[41] Transcript page 78.
[42] Transcript pages 77 and 82. When asked for the methodology Kruger said the question will be answered by Van der Veen.

ADVOCATE UNTERHALTER: Alright, so again all that we can have is your say-so that you believe it was taken into account, but how it was done, what its implications, you can't help us with?
VAN DER VEEN: No."[43]

[88] Earlier on Van der Veen had conceded that he did not know how cost estimates had been made up as these had been determined by the business units.[44] Various reasons were given for the inability of the merging parties to give a more precise account of why they had arrived at these figures. They had been advised that too precise planning might result in an inference of implementation and so that should be avoided. Second, they had not yet decided on the implementation of a common IT platform that would have job consequences for those IT people schooled on the old system, or if it did happen when, how long the IT technicians who were part of the old system still needed to be retained.

[89] According to Van der Veen natural attrition was no panacea. Although it seemed that on some figures natural attrition exceeded the number of jobs to be considered redundant, retrenchments were still necessary as natural attrition would result in a 20% mismatch of skills in the first year and 17,5% in the next year.[45] To put an extreme example, the departure of an actuary would create a vacancy but that could not be filled by offering the post to one of the redundant administrative clerks.[46]

[90] Van der Veen's calculation of the mismatch was difficult to follow and he relied on different assumptions to Kruger who had testified the day before him. (Kruger had said the mismatch estimate was 25%).[47] Eventually when specifically asked for the numbers he stated that 487 employees would terminate employment due to natural attrition and 35 due to early retirement which gives a total of 552 which he rounded off to 500.[48] We are not in a position to accept or reject this evidence

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[43] Transcript, page 174.
[44] Transcript, page 162.
[45] Transcript 147.At one stage the merging parties indicated to employees that natural attrition was at a rate of 10-20%, but that retrenchments would be at a rate of 10%. See Annexure B – Merger Communication Update Document from Nicolaas Kruger dated 9 July 2010.
[46] Transcript, page146. Van der Veen does not use this example but he says that not every vacancy created can be considered to arise in a redundant position. Thus some resignations create vacancies that need to be filled. He does not state this quite so clearly but presumably he means the vacancy cannot be filled by an existing employee occupying a position considered redundant.
[47] Transcript page 148.
[48] Transcript, page 147.

but it again points to the arbitrariness of the merging parties' approach, and the lack of consistency between the public position which sees the attrition as a fully mitigating factor to redundancies and this much more limited one. The net result of Van der Veen's mismatch arithmetic is that at best 500 jobs can be due to natural attrition and early retirement, but no more. Hence we get to the net figure of 1000 jobs that might be lost as opposed to the 1500 positions that were thought to be redundant as a result of the merger. But because of the mismatch factor the 1000 jobs must still go and cannot be resolved by natural attrition.

[91] Despite these reservations the merging parties were not able to give a satisfactory account of their approach. Rather it seems the merging parties were animated by a desire to achieve a pre-determined level of cost savings and given certain prior assumptions of how large a part of costs salaries comprised, conclusions were drawn in a categorical manner as to how many job losses were required to achieve these savings. Thus little allowance is made for the fact that these costs may differ in the respective firms, differ as per department, and differ as to skill range. Also the assumptions were made based on past merger integration experience. There is no reason to expect that the past integration experience which involved different firms, constitutes a reliable metric for predicting employment outcomes in this merger, more particular as this merger is premised on the complementary and not competing nature of the businesses.

[92] In short the tail is wagging the dog here. Cost cutting appears to have justified the deal to key shareholder constituencies and these pressures seem to have driven the approach to the needed job cuts.[49] We thus find that the merging parties have failed to discharge the evidential burden of showing a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary on their worst case scenario. Rather we find that this figure has been arrived at in an arbitrary manner on the basis of sweeping assumptions made in a broad brush fashion. This is not to say that parties will have to justify job losses by considering all the minutiae of integration – that would be too burdensome on firms, but where the job losses are of this

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[49] By way of example a board document that served before the Metropolitan Board refers to a cost saving of R[ ] Million which could be extracted from a business combination of this nature and then goes through the business units to show how the R[ ] million could be extracted. Page 12 of the Document entitled "*Project Newton*" dated 24 November 2009, prepared for Metropolitan board meeting of 1 December 2009.Unpaginated file 1 of 3 submitted by Metropolitan.

magnitude a more considered exercise is required. But the merging parties have not met the second leg of our criteria namely that the job losses can be justified for a reason that countervails the job loss incurred by the merger.

[93] Whilst there may be a relationship between these two criteria in the sense that a strong public interest justification for the job loss may make up for a weakness in the evidence concerning the first requirement, it must be present at least in some form.

[94] Conversely however, even if merging parties justify the first leg i.e. make a convincing argument for why the job loss is rationally connected to the efficiency claimed, this does not mean that there can be any compromise on their meeting the second criteria. However in the present merger it is common cause that neither party is failing. On the contrary both firms appear to be very successful businesses. More controversial is whether the job losses were intended to make the merged firm more competitive. Kruger was led on this aspect and not surprisingly he said yes to that proposition:

> *"And clearly, some of the benefits of these savings will flow through to shareholders, but some will also flow through to clients, you know, as we become more competitive we will be able to price more competitively and in that way indirectly, you know, through lower premiums and so forth for certain benefits give the benefits back to consumers."*[50]

[95] When asked for further detail on this Kruger conceded that this had not been done but the reason was that it was inappropriate to consider each others' pricing.[51] However what is stated in the internal documents we were provided with provide a less sanguine intent. No mention is made in any document we could find that the lowering of costs would lead to lower premiums for consumers. Indeed more probable are some suggestions that the cost saving realised would be passed on to shareholders.

[96] Indeed strong hints of this appear from a document prepared by Van der Veen for the executive management of Momentum entitled *"Indicative internal rate of*

[50] Transcript pages 71-72.
[51] Transcript page 72.

return on proposed Smartie transaction", which talks of an amount of excess capital efficiencies achieved by combining the two firms:

"[quote redacted]."[52]

[97] Whilst the extract quoted refers to savings on capital adequacy ratios and not redundancies, it is evidence of what the drivers of this transaction were; persuading a shareholder constituency of an increased rate of return by savings not driven by growth through more aggressive pricing in the form of lower premiums to consumers. No doubt the merged firm would be to some extent more competitive if the cost savings were achieved, but there is little to suggest that this would result in a more aggressive competitor rather than a complacent member of an already concentrated market as our prior analysis shows. Thus we would have expected to see projections of market share increases, repositioning of products and the niche markets where these cost savings would translate into greater market share growth. We do not find this in the strategic documents provided.

[98] Indeed the merging parties relied instead on growth in other countries and not in South Africa and said that this growth would have to come from employment from within those other countries. Yet in the merger filing the merging parties had said growth would mitigate job losses. It was quite clear that they meant growth that would offset job loss of local employees in the context of what was stated. Clearly this was designed to make the Commission feel that job losses were not a serious factor to consider at the time it was investigating the merger. Yet at the time of hearing the merging parties backtracked on a number of issues they had advanced in their filing. Thus growth was focussed on the rest of Africa not South Africa, complementarity would not result in employment complementarity and natural attrition was more limited.

[99] The parties were thus sanguine about the extent of employment loss at the time of filing when they thought they could obviate further scrutiny of the employment issue, but became pessimistic about their prospects when faced with the possibility of a ceiling placed on retrenchments at the time of the hearing and faced with opposition from the union. This has detracted from the credibility of their claims that employment loss had been rationally determined. Whilst some

[52] Page 4 of Annexure E -document dated 8 May 2009 in the unpaginated file submitted by Momentum .

inconsistency may be attributable to the time since filing and hearing this has not been satisfactorily explained. The investigation process, which depends as well on proper information being given to employees from the time of filing, requires frank disclosure so that the consequences can properly be investigated.

[100] It is not seriously disputed that the employment loss of potentially 1000 is substantial and that prospects for re-employment of the affected employees are limited in the short term.[53] The most compelling evidence that re-employment prospects are limited is the recent decline in natural attrition as this reflects employees' assessment that if they leave alternative job prospects are limited. Thus the evidential onus of justifying the retrenchments shifts to the merging parties. We find that they have failed to 1) establish a rational connection between the efficiencies claimed and the job losses contemplated and 2) that even if they have, that they have not successfully raised any public interest that would justify the job loss.

[101] The merger thus leads to an adverse effect on the public interest on employment. Having come to this conclusion we now consider whether an adequate remedy has been proposed to mitigate it.

ARE THE CONDITIONS IMPOSED BY THE COMMISSION AND MERGING PARTIES ADEQUATE?

[102] Although during the course of the hearing the undertakings offered were strengthened by the merging parties, they remain wholly inadequate. These are soft conditions as suggested by the union. In part they consist of undertakings to offer jobs at some future date if the opportunities arise. These expectations are unenforceable, unspecific and indeed in the context of the merged firm's desire to downsize, unlikely to be realised in any significant respect. Nor were the offers to retrain this limited class meaningful counters to someone losing a job.

[103] There was no evidence of how these amounts were arrived at, whether employees affected were consulted on them, and what re-training would allow those whose jobs had ended to be re-skilled to do. The Commission was frank

[53] A weak attempt was made by handing in some statistics from Statistics South Africa to suggest that prospects for re-employment were better than suggested by Nehawu. The statistics were not analysed by any witness with the necessary expertise to do so, nor had they been provided in advance to the union so that they could challenge them.

enough to admit that it is in the process of reviewing from past merger experience whether these schemes work and that the answer goes "*both ways*".[54] The improvement of the offer in the course of the hearing was more an indication of its ad hoc nature than of the merging firm's sense of largesse. Further the retraining allowance was limited to unskilled and semi skilled employees comprising only 339 of the 1000 to be affected.

FAILURE TO PROPERLY CONSULT

[104] The Tribunal in the past has not second guessed agreements relating to employment where they have been the subject of proper negotiation between the merging firms and their employees. We recognise that the Act intends such outcomes given the special rights granted to labour under the Act which are unusual in competition statutes.[55] In this case there is no evidence of any agreement reached with employees and indeed the presence of NEHAWU to oppose the merger reflects this. That neither firm was faced with significant organised labour to negotiate with is evident from this extract from the Momentum board minutes where Kruger is quoted as saying:

> *"He explained that there were no unions involved, other than in relation to a small area in the medical scheme administration unit."*[56]

[105] Although both firms have communicated with employees, this has neither constituted negotiation nor have employees been given meaningful information. If anything the message has been designed to allay any concerns that employees had about retrenchments as this excerpt from Kruger of Momentum to staff indicates:

> *"Over the past few years, the average natural attrition rate for both companies ranged between 10 and 20% a year. Natural attrition during the first year of the merger will already address the duplication of roles to an extent. Providing an early retirement option to eligible staff and the need to resource organic growth in existing businesses will also be mitigating factors."*[57]

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[54] Transcript page 11. Comments made by Mr Van Hoven of the Commission.
[55] See section 13A(2) of the Act.
[56] Extract from minutes of Momentum board meeting dated 13 May 2010. Annexure G in unpaginated file submitted by Momentum.
[57] Document entitled '*Merger Communication update no 9'* dated 9 July 2010. From Nicholas Kruger to staff. Page 2 of Annexure B of unpaginated file submitted by Momentum.

[106] A similar message emanated from the Metropolitan Group Chief Executive Officer in April 2010 in a communiqué to employees:

> *"I can only reiterate that we intend resolving as many of the overlap issues as possible through natural attrition (± 10% per year) plus retraining and redeployment where possible, combined with a very conservative approach to our new appointments. Where redundancies are inevitable, we will not proceed without due consultation and will of course take great care and caution."*[58]

[107] However in an earlier document prepared for the Metropolitan Board, and thus not for employee consumption, the following less optimistic view is taken on staff reduction:

> *"Assuming that staff and other costs will be cut in the same proportion we can expect a staff reduction of the order of 8% - about 1100 staff – "fairly split" between the two entities. It is hoped that at least some of this reduction can be achieved through natural attrition but we must assume that a large proportion will have to come from a form of forced exit from employment – especially where we may have to move quickly to achieve integration benefits."*[59]

[108] This view starkly contrasts what the parties were telling one another, where at a meeting of the merger committee a Mr Van der Ross stated the expected reduction was not more than the normal staff attrition and that the reduction would take place "over time".[60]

DEFERENTIAL APPROACH TO LABOUR ISSUES – WE SHOULD NOT LIGHTLY INTERFERE

[109] The merging parties argued that we should approach labour issues by adopting a deferential approach citing past decisions of the Tribunal such as *Shell/Tepco* where we stated:

> *"The role played by the competition authorities in defending even*

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[58] Email from Group CEO Metropolitan dated 1 April 2010. Unpaginated file 1 of 3 submitted by Metropolitan.
[59] Document entitled "*Project Newton*" dated 24 November 2009, prepared for Metropolitan board meeting of 1 December 2009.Unpaginated file 1 of 3 submitted by Metropolitan
[60] The meeting is dated 29 April 2010. See Annexure H of the unpaginated Momentum bundle.

> *those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the Charter itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.”*[61]

[110] It was argued that if retrenchments were unfair the Labour Relations Act, in particular section 189, were the appropriate remedy. Although it is correct to make these arguments, adopting a deferential approach does not mean a hands-off approach. The Act gives us a discretion which we must exercise where appropriate. The approach set out earlier in this decision indicates that we view the public interest through a competition prism.

[111] By way of example a labour tribunal views retrenchments from the point of view of the operational requirements of a firm and fairness of the process in relation to a particular employee. It does not ask the prior question – should the merger have been permitted in the first place, which gave rise to the subsequent operational circumstances. The Tribunal does ask the prior question, but then does not deal with the subsequent issue of operational requirements or whether a particular individual has been treated fairly in the retrenchment process. Understood in this way we are not duplicating the role of another regulator.

WILL THE CONDITIONS IMPOSE AN UNDUE BURDEN ON THE MERGED FIRM?

[112] The condition we have imposed places a moratorium on all merger related retrenchments for a period of two years excluding senior employees as defined. The condition is thus limited both in time and extent. The merging parties have stated that the integration process would take three years and in their proposed undertaking gave undertaking for this period. We have thus imposed a more limited time burden than they themselves proposed.

[113] We have excluded senior employees from the moratorium on retrenchments as these employees are most likely to obtain new employment and hence there is a less compelling public interest to protect them. An amendment to our order

[61] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*, CT Case No.: 66/LM/Oct01, at para 58.

clarifies which group of employees qualifies for this class. Since senior employees are the highest earners, their salaries are disproportionate to their number, so the merged firm can still achieve meaningful employment cost savings on this class of employee, if it so chooses.

[114] The condition does not exclude voluntary retrenchments or other forms of incentives for employees to resign such as early retirement packages, where the methods chosen are non-coercive. We deal with this aspect more fully below when we discuss the application for a variation of our order. Initially as we have shown the parties contended that natural attrition and growth would negate the need for coerced retrenchments. At the hearing this was no longer their position. We have accepted their subsequent position as being the correct position i.e. that they are less sanguine about growth prospects in the South African market and that natural attrition has declined in recent years and to the extent that it applies it is still limited because of the skills mismatch problem discussed earlier.

[115] Yet even on their revised figures, and with the mismatch limitation, natural attrition will still allow the merging firms to achieve some employment cost savings without the need for coercive retrenchments. The condition restricts only merger related retrenchments. Non merger related retrenchments are still permissible. It is worth noting that even with the imposed condition the merger still has a negative effect on employment as the number of jobs in existence in both companies after the two year period has expired, will have declined from what they would have been in all likelihood had the merger not proceeded. Thus the conditions do not fully mitigate the employment effects of the merger only partially, and in that respect the adverse impact on the merged firm needs to be balanced with the consideration of the longer term decline in employment opportunities as a result of the merger.

[116] It is also worth noting that in arguing the competition aspect of their case the merging parties have stressed the complementary nature of their businesses as we highlighted earlier. This would suggest that if the businesses are largely complementary there would be less of a need for redundancies to occur. The merging parties however argued that we should distinguish between the employment and competition aspects of redundancies. Complementary businesses would still be run off the same platforms and hence redundancies

would still arise. However given the lack of detail we have concerning the retrenchments it is at least likely that given the complementary nature of the merger this will result in at least some reduction in the need for redundancies.

SHOULD THE MERGER HAVE BEEN PROHIBITED?

[117] Although the union has suggested that the merger should be prohibited as the merging parties have not justified the employment loss we consider that to be an extreme measure. Whilst some mergers would create a substantial adverse public interest that could not be remedied by conditions in most instances employment loss can be mitigated by appropriate conditions. In the present case the conditions we have imposed achieve this without having to prohibit the merger.

CONCLUSION

[118] We have found that the merger will not result in a substantial lessening or prevention of competition. We have found however that the merger cannot be justified on substantial public interest grounds, specifically the effect on employment. However there is no reason to prohibit the merger for this reason as we consider the adverse effect on employment can be remedied by appropriate conditions. Whilst the Commission and merging parties have proposed a condition, we do not find that this adequately remedies the substantial public interest concerns and hence we have imposed the conditions contained in **Annexure A** to these reasons

________________________ 9 December 2010

N Manoim

Y Carrim and A Wessels concur

PART C: REASONS FOR CONCLUSION ON VARIATION APPLICATION

[119] Lastly in these reasons we deal with an application brought by the merging parties in terms of section 66(1) of the Act to vary our order. In terms of the relevant portions of that subsection the Tribunal may "vary or rescind its decision or order":

> *"(a) ...*
>
> *(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or*
>
> *(c) made or granted as a result of a mistake common to all of the parties to the proceeding."*

[120] The relevant portions of the amendment are contained in paragraphs 1 to 3 of the Notice of Motion which we set out below:

"The Tribunal's order issued on 14 October 2010...is clarified in terms of section 66(1)(b) and (c) of the Competition Act...to read as follows:

1. *MMI Holdings, the merged entity, shall ensure that there are no dismissals, based on the merged entity's operational requirements, in South Africa resulting from the merger for a period of 2 (two) years from the effective date of the proposed transaction.*
2. *For the sake of clarity, dismissals do not include (i) voluntary separation arrangements (ii) voluntary early retirement packages; and (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act,1995, as amended*
3. *The condition in 1 shall not apply to "senior management" as set on the table on page 242 of the record and defined in the table attached hereto.*
4. *...*
5. *..."*

[121] The amendment seeks to achieve two things: to amend our order to 'clarify' the term retrenchments, in particular to ensure that it does not preclude the merged firm from offering voluntary separation or early retirement packages and to permit the merged firm to take action against employees who unreasonably refuse to accept redeployment.

[122] The second part of the order seeks to better define the class of persons falling into the category of 'senior management'. Our order of 14 October 2010 described senior management with reference to an annexure supplied to us by the merging parties. Apparently the information supplied in that annexure was erroneous due to a mistake in instructions given by one of the firm's to its attorneys and further that it met the definition of only one of the merging firm's concept of senior employees, because the other firm categorises them differently.

[123] We will deal with this aspect first since it was not opposed by the Commission or the union.

[124] In the variation application the merging parties produced two lists of categories of employees' and invited us to choose which one to use. This was a most peculiar way of doing this given the problem identified was of different categories existing in the respective firms. At the hearing of the variation we requested the firms to come up with a list of the job categories for the respective firms so uncertainty – if there indeed was one – could be eliminated. We were assured that this could be done and a list would be forwarded to us early the following week. We did not get this, instead we received a letter from the merging parties explaining their definition process, no list for each firm but what was termed an illustrative list. According to the letter:

> "*Examples of senior management are attached as Annexure A hereto (this list is intended to be illustrative and is neither conclusive nor comprehensive*".[62]

[125] This was neither what we requested nor what the merging parties undertook to produce. The variation was intended to create certainty not introduce further uncertainty.

[126] We have nevertheless decided to amend clause 2 of the order by removing the erroneous reference to annexure J, but to limit it only by reference to the 204 senior employees contemplated in the filing. The merging parties have decided who their senior employees are as they could not otherwise have come up with

[62] Letter from the merging parties dated 29 November 2010.

a figure of 204 in their merger filing.[63] We have not provided more specificity because the merging parties despite two attempts to do so have not given us that. Since the merging parties must have compiled this list from their own internal lists if there is a dispute as to whether a particular employee falls into the class of senior employee, this can be resolved by reference to the original information that informed the list. The parties were quite specific about the numbers of employees from each firm that fell into this category and this must therefore have come from some pre-existing list.

[127] NEHAWU and the Commission opposed the variation to the order insofar as it sought to remove the reference to the term retrenchment and to replace it with language the merging parties contended remedied the ambiguity the term introduced. The merging parties sought the amendment to prayer 1 on the grounds that the term retrenchment is ambiguous. They argued that the term retrenchment is not to be defined in the Labour Relations Act which speaks of dismissals based on operational requirements.[64]

[128] No other ground for variation other than ambiguity is relied on. It is common cause that in order for us to vary an order in terms of 66(1)(b) of the Act, on the grounds that the order is ambiguous we must first be satisfied that it is. As the Competition Appeal Court noted in *Mike's Chicken:*

> *"Only when the order is ambiguous, in the sense that it cannot properly be construed, may a court vary it on the grounds of ambiguity."*[65]

[129] The use of the term retrenchment is not one imposed on the merging parties by the Tribunal. The merging parties have used the term throughout these proceedings and it was included in the language of their draft undertaking. NEHAWU conceded that the term 'retrenchment" is not to be found anywhere in the Labour Relations Act. Nevertheless it argued that it is of common usage and is not ambiguous. We were not referred to any court decision where the term is defined and both sides relied on dictionary definitions.

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[63] See record page 242.
[64] Section 189 read with section 213 of the Labour Relations Act, 1995.
[65] *Mike's Chicken (Pty) Ltd v Astral Foods Ltd* 32/CAC/Sep03, para 13.

[130] The Oxford Dictionary defines retrenchment as *"to cut down, reduce diminish; especially to curtail (one's expenses) by the exercise of economy...".* No dictionary definition suggests that the term retrenchment includes acts of voluntary termination of employment. Rather the term is defined as a unilateral one that does not contemplate consensual acts.

[131] There is nothing in the papers to indicate that any employee or the union has any different understanding of the term. As the union puts it in its answering affidavit in the variation proceeding:

> *"There is nothing in the Tribunal's order to indicate that the word retrenchment is used to include voluntary termination as agreed between the merged entity and its employees."*[66]

[132] This therefore does not explain why the merging parties have sought the variation contemplated in 1 and 2 of the notice of motion. It seems the real reason is the third gloss on the redefinition, which seeks to exclude from the ambit of the prohibition, employees who unreasonably refuse redeployment. Thus the merging parties seek to place outside of the ambit of the order dismissals of employees who when offered redeployment, unreasonably refuse the offer. NEHAWU argued that this is an attempt to expand the original order not to rectify any ambiguity. The union argued that the merging parties are now seeking to raise a new issue not raised in the hearing and that the order can never be considered to have contemplated this exemption.

[133] We agree with this submission. The prohibition on retrenchments is not ambiguous and does not require further elaboration to state that it does not apply to consensual termination of employment in whatever form. But it does not contemplate that employees who do not reasonably accept redeployment may be retrenched. That was never raised as an issue during the hearing, and is not contemplated by the ordinary use of the term of retrenchment. Instead it is an attempt to widen the terms of our original order beyond what rectification permits.

[134] For this reason the amendment to this portion of the order is refused. The variation in respect of re-defining senior employees is allowed as explained

[66] NEHAWU's Answering Affidavit, para 8.4.

above and is annexed hereto marked **A1**. A consolidated order reflecting this amendment is annexed hereto marked **A2**.

________________________ 9 December 2010

N Manoim

Y Carrim and A Wessels concurring

In the merger hearing:

Tribunal Researcher: Ipeleng Selaledi

For the merging parties: Adv Jerome Wilson instructed by Webber Wentzel Attorneys and Edward Nathan Sonnenbergs Inc.

For NEHAWU: Adv David Unterhalter SC instructed by Cheadle Thompson & Haysom Inc.

For the Commission: Maarten van Hoven and Grashum Mutizwa

In the variation application hearing:

Tribunal Researcher: Londiwe Senona

For the merging parties: Adv Jerome Wilson instructed by Webber Wentzel Attorneys and Edward Nathan Sonnenbergs Inc.

For NEHAWU: Adv. Kennedy SC instructed by Cheadle Thompson and Haysom Inc.

For the Commission: Sbusiso Madonsela