

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No's. : 63/AM/May00

In re: Request for Consideration of Intermediate Merger

Bubble Pac (Pty) Ltd

Applicant

and

The Competition Commission of South Africa

Respondent

Case No. : 64/AM/May00

In re: Request for Consideration of Intermediate Merger

Sealed Air Africa (Pty) Ltd

Applicant

and

The Competition Commission of South Africa

Respondent

Decision of the Competition Tribunal

1. In this matter the Competition Commission has prohibited the intermediate merger between Bubble Pac (Pty) Ltd and Sealed Air Africa (Pty) Ltd. The applicants have each filed a separate request for consideration of intermediate merger, which were heard together on 28 June 2000 since both applications involve the same set of procedural facts.

2. The applicants have requested the Tribunal to consider the prohibitions of the Commission in terms of sections 15 and 16 of the Competition Act 89 of 1998 (the Act). At the outset the applicants indicated that they wished to raise certain procedural points challenging the validity of the prohibition, which, if resolved in their favour, would obviate the need for any further inquiry.
3. The question we have to decide is whether the Notice of Prohibition was issued within the requisite time period allowed by section 14(1) of the Act. If not, since it is an intermediate merger, it is deemed to have been approved, regardless of the merits of the Commission's decision on competition grounds. If, however, the prohibition was made within the period contemplated then the Tribunal has jurisdiction to hear whether the Commission's decision was correct on substantive grounds.

Background

4. On 9 February 2000 Sealed Air Africa (Pty) Ltd (Sealed Air) gave notice in terms of section 13 of a merger between Sealed Air as the primary acquiring firm and Bubble Pac (Pty) Ltd (Bubble Pac) as the primary target firm.
5. On 3 March 2000 the Competition Commission issued to the parties an extension certificate in terms of section 14(1)(a), extending the time for consideration of the merger to 9 April 2000 (the first extension certificate).
6. On 7 April 2000, the Competition Commission issued to the parties a second extension certificate in terms of section 14(1)(a), to extend the time for consideration further to 27 April 2000 (the second extension certificate).
7. On 25 April 2000, the Competition Commission issued to Bubble Pac only a third extension certificate in terms of section 14(1)(a), to extend the time for consideration further to 8 May 2000 (the third extension certificate).
8. On 8 May 2000 the Competition Commission prohibited the merger without providing reasons, as required by section 14(4) of the Act. The applicants have asked us to reconsider the decision.

Grounds for Consideration

9. The applicants argue that the prohibition is ineffective because the Notice of Prohibition was not issued within the time period allowed for by section 14(1) of the Act in that the first and only permissible certificate only extended the time

period in which the Competition Commission was entitled to consider the merger to 9 April 2000 and subsequent further extension certificates issued by the Commission on 7 April 2000 and 25 April 2000 were *ultra vires* and invalid. The Commission, therefore, must be deemed to have approved the mergers in terms of section 14(2) of the Act. The applicants also sought to rely on other grounds for the invalidity of the purported prohibitions but because of our decision on section 14(2) it is not necessary for us to consider them.

10. The relevant portions of section 14 of the Act are the following:

(1) “Within 30 days after receiving notice of an intermediate merger, the Competition Commission must either –

a) extend the period in which it has to consider the proposed merger by a period not exceeding 60 days, and in that case, issue an extension certificate to any party that notified it of the merger; or

b) after considering the merger in terms of section 16 –

(i) Approve the merger by issuing a clearance certificate;

(ii) Approve the merger subject to any condition;

(iii) Prohibit the implementation of the merger.

(2) If, upon the expiry of the 30 day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection, or upon the expiry of an extension period contemplated in subsection (1)(a), the Commission has not issued a certificate referred to in subsection 1(b), the Commission will be deemed to have approved the merger, subject to subsection (5).”

11. Similarly, rule 33(1) of the Commission’s Rules provide that:

“If the Commission extends, or is deemed to have extended, the time period for considering an intermediate merger, it must serve a copy of the Extension Certificate in Form CC 14 on each participant in the proceedings within 30 days after receiving the Merger Notice.”

12. The Commission argues that it is entitled to a sixty days extension period and that

section 14 is not specific as to whether the Commission can or cannot divide the extension period into shorter successive periods. Therefore, they can issue more than one extension certificate, as long as it is within sixty days.

13. Section 14(1) clearly states that the extension certificate must be issued within the thirty-day period from the date of filing of the notice. Even if the Act contemplated that the Commission was not confined to a single extension period, an interpretation which we doubt is correct, the Commission cannot escape the problem that the act of extension must take place within the thirty-day time period. On this point the language of the Act is clear and unambiguous. It is common cause that the second and third certificates were issued only after this thirty- day period had expired. In our view they are for this reason invalid and since the prohibition was issued during the currency of the third extension period it was issued at a time that no valid extension was in force and is therefore a nullity.

Finding

14. We find that the Commission's purported prohibition of the merger is invalid. The merger is deemed to have been approved in terms of section 14(2). We direct the Commission to issue a clearance certificate to the parties and to otherwise comply with Rule 33(2) of the Commission Rules.

D.H.Lewis

11 July 2000
Date

Concurring: N.M.Manoim, D.R. Terblanche