

# COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 70/LM/Aug06

In the matter between:

**Barmarc (Pty) Ltd**

**Acquiring Firm**

**And**

**ATC (Pty) Ltd (Telecoms)**

**Aberdare Cables (Pty) Ltd**

**Target Firm**

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Panel : DH Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 17 January 2007

Decided on : 17 January 2007

Reasons Issued : 16 February 2007

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## REASONS FOR DECISION

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### Approval

[1] On 17 January 2007 the Competition Tribunal issued a Merger Clearance Certificate approving the merger between Barmarc (Pty) Ltd and ATC (Pty)Ltd (Telecoms)/Aberdare Cables (Pty) Ltd in terms of section 16(2)(b) of the Act subject to conditions. The reasons appear below.

### Parties

[2] The acquiring firm is Barmarc (Pty) Ltd ("Newco") a newly established joint venture that is owned in equal shares by ATC (Pty) Ltd ("ATC")<sup>1</sup> and Aberdare Cables (Pty) Ltd ("Aberdare").<sup>2</sup>

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<sup>1</sup> Reunert Ltd ("Reunert") controls 74.9% of the shares in ATC. Powerhouse Utilities (Pty) Ltd ("Powerhouse"), a black owned company holds an interest in ATC comparable to 25.1%.

<sup>2</sup> Aberdare is controlled by Power Technologies (Pty) Ltd ("Powertech"), which owns 70% of Aberdare shares. Aberdare has a Black Economic Empowerment shareholder, namely, Izingwe Capital, an

[3] The target firms include the telecommunication cable business and assets of ATC and telecommunications and the assets and business of telecommunication and data cable business of Aberdare. Aberdare is an ultimate subsidiary of Altron.<sup>3</sup> ATC is a subsidiary of Reunert<sup>4</sup>, a public company listed on the JSE Securities Exchange (“JSE”)

## **Transaction**

[4] The proposed transaction involves the formation of Newco, a newly established joint venture that is owned in equal shares by ATC and Aberdare. In terms of the transaction Newco will acquire ATC Telecoms’ assets and business of telecommunications cables of ATC as a going concern. The businesses of ATC Telecoms and Lambda will be sold to Newco as a going concern, but in the case of Aberdare, the mothballed assets Aberdare Telecoms Network (“ATN,”) will be sold to Newco.

## **Background**

[5] At the hearing of the matter the merging parties provided the Tribunal with insights into the background to the transaction.<sup>5</sup> Sometime in 2005 Aberdare realised that the ATN business was no longer sustainable due to prevailing market conditions. As a consequence it was forced to consider a variety of strategic alternatives, one of these being a possible partnership with ATC. The parties had had some discussions with each other during this period regarding the possible joint venture and had also consulted their major clients. Before the joint venture could be consummated, Aberdare was not able to sustain its place in the market in respect of

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investment company that holds 30% of shares in Aberdare. Powertech is a subsidiary of Allied Electronics Corporation Ltd (“Altron”), a public company listed on the JSE Securities Exchange. Aberdare directly controls AFOC and Lambda. The Aberdare division includes the fibre optic cable assets of Aberdare’s subsidiary, Aberdare Fibre Optic Cables (Pty) Ltd (“AFCOC”) as well as the copper data cable business and assets of Lambda Cables (“Lambda”) a division of Aberdare.

<sup>3</sup> Altron has 57.9% interest in Allied Technologies involved in the convergence of telecommunications, multimedia, information technology and electronics. Altron has 57.7% interests in Bytes Technology Group Ltd involved in IT services and telecommunications. Aberdare also falls under Powertech, which is involved in cable, cable accessories and electrical accessories.

<sup>4</sup> Reunert also holds a 40% stake in Siemens Telecommunications (Pty) Ltd, a leading supplier of fixed and mobile voice and data networks.

<sup>5</sup> See pages 1-3 of the transcript.

the fibre optic and outdoor copper cables part of the business which was housed in ATN. It therefore took a decision to close its ATN operations in Port Elizabeth. The parties submitted in their filing that after ATN ceased operations, Aberdare entered into an outsourcing or sub-contracting arrangement with ATC to supply product for existing Aberdare customers, Telkom being the major one, until such contracts come to an end. However Telkom independently decided to place orders directly with ATC as opposed to Aberdare. Hence by the time the merger was notified to the Commission, Aberdare had also lost its most significant customer, namely Telkom, to ATC (Lambda).<sup>6</sup> The merging parties submitted Telkom is the dominant customer in the market.<sup>7</sup>

[6] An agreement on the joint venture was ultimately reached in terms of which the ATN operations in Port Elizabeth and the Lambda plant would be combined with the ATC telecommunication and cable business.

### **Relevant Market**

[7] The Commission defined the following relevant markets: the market for the manufacturing of indoor and outdoor cables; the market for manufacturing data copper cables and the market for fibre optic cables. However the merging parties are not active in all of the three markets. The only area of horizontal overlap in the parties' activities was the market for the manufacturing of indoor copper cables.<sup>8</sup>

### **Indoor Cable Market**

[8] The parties provided the Commission with the following market shares for the above market.

### **The estimated national market shares in the market for the manufacturing of indoor copper cables.**

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<sup>6</sup> Aberdare regards its top customers as follows: Telkom SA Ltd, Sasol, Botswana Telecom, Swanlb, Fibre Centre Africa, Africom (PVT)Ltd, Interconnect, ADC Krone, Datanet See pages 17-18 of the Record

<sup>7</sup> See page 9 of the transcript.

<sup>8</sup> See Commission Report Page 12.

**Table 4** **Market Shares [%]**

| <b>Competitor</b>             | <b>2003</b> | <b>2004</b> | <b>2005</b> |
|-------------------------------|-------------|-------------|-------------|
| ATC                           | 4           | 4           | 4           |
| Lambda<br>(Aberdare)          | 83          | 79          | 78          |
| Kewberg                       | 5           | 7           | 8           |
| Cabletronics                  | 4           | 6           | 6           |
| Intercabe                     | 2           | 2           | 2           |
| Imports                       | 2           | 2           | 2           |
| <b>Total</b>                  | <b>100</b>  | <b>100</b>  | <b>100</b>  |
| <b>Post Market<br/>Share</b>  | <b>87</b>   | <b>83</b>   | <b>82</b>   |
| <b>HHI (Pre-<br/>merger)</b>  | <b>6954</b> | <b>6350</b> | <b>6208</b> |
| <b>HHI (Post-<br/>merger)</b> | <b>7618</b> | <b>6982</b> | <b>6832</b> |
| <b>Change in HHI</b>          | <b>664</b>  | <b>632</b>  | <b>624</b>  |

*Source: Merging parties*

[9] An examination of the Table 4 shows that the merging parties would have 82% combined post market share in the national market for the manufacturing of indoor copper cables. However the market share accretion as a result of the merger was only 4%.The merging parties submitted that the market share of the merged entity and its competitors is not necessarily an accurate indicator of market power because these markets were bidding markets. The ability of any player in the relevant markets to accumulate market power could be restricted by the fact that once you win a tender, your capacity to bid for more tenders is limited because you may not have all the necessary human and other resources to execute future

projects. We do not regard the indoor cable market as a traditional bidding market even though the suppliers tend to supply their cables on a tender basis.<sup>9</sup>

[10] The reason for Aberdare (Lambda's) very high market share in this segment is attributable to its winning the Telkom contract which constitutes 75% of this market. We were advised at the hearing that Lambda is the only supplier presently that is capable of supplying Telkom and in this respect is a monopoly supplier to Telkom irrespective of the merger. The remainder of the market is very small and will still have enough players in it to ensure competition especially once the link between Aberdare and Kewberg is severed.

[11] Although Telkom was consulted by the Commission it has not raised this as a concern. Neotel the newly licensed entity in fixed line was also approached by the Commission, but was apparently not interested in making a submission.<sup>10</sup> Presumably had they had concerns they would have done so.

[12] The Tribunal was also concerned that this joint venture could lead to greater co-operation between the Reunert and Altron Groups, who are competing firms in other markets outside of the joint venture. Mr Gerrit Pretorius of Reunert indicated that greater co-operation between the firms was unlikely and that the executives who would serve on the board of the joint venture would not be members of the boards of competition companies in the respective groups.<sup>11</sup> The parties were willing to consider a remedy in that respect, but because of Mr Pretorius' assurances we find it unnecessary to impose such a remedy. There is nothing in the board materials from the merging parties which suggests that this possibility is being contemplated. In future however the Commission should investigate these issues further, in joint venture mergers where merging parties continue to compete in activities outside of the joint venture.

### **Relationship between Kewberg and Aberdare**

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<sup>9</sup> See in this regard; Murray & Roberts Ltd / The Cementation Company (Africa) Case No 02/LM/Jan04 and Murray & Roberts Ltd / Concor Ltd 101/LM/Oct 05.

<sup>10</sup> See page 8 of the transcript

<sup>11</sup> See page 15 of the transcript.

[13] The Commission also investigated the relationship between Kewberg and Aberdare. Recall that in the indoor cable market Kewberg is one of the competitors of the merging entity and will post merger be the second largest competitor in this segment. The Commission discovered during its investigations that Aberdare owns 33⅓ % of a share capital in Kewberg Cables and Braids (Pty) Ltd (“Kewberg”). This was not mentioned by the parties in the merger filing. This was raised with Aberdare who stated this was an oversight. Mr Cornelius Meiring (“Mr Meiring”) of Aberdare is entitled to a board seat on Kewberg but has not exercised this right in recent years. The shareholding link is historic – Kewberg owed money to Aberdare, since it could not repay the money, the latter was given equity in the former in return. The Commission was concerned that the link with Kewberg could result in Aberdare being able to influence the operational and strategic decision making of Kewberg.

[14] In order to address the above concerns the Commission recommended approval of the transaction subject to the imposition of several conditions which addressed the Commission’s concerns about the relationship between Kewberg and Aberdare.<sup>12</sup>

[15] The parties consented to the approval of the transaction subject to the imposition of these conditions. At the hearing the merging parties handed in a sworn affidavit by Mr Meiring confirming that Aberdare had entered into an agreement to dispose of its stake in Kewberg and that he had already submitted his written resignation as a director of Kewberg, with effect from 14 December 2006 . Given this development we find it unnecessary to impose the conditions attached by the Commission in its recommendations.<sup>13</sup> However as the sale was still subject to the approval of the Aberdare board, an event that was to take place after the date of our order, we have made it subject to the condition set out below, in case board approval is not obtained,

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<sup>12</sup> The following conditions were imposed: Mr Hans Meiring of Aberdare resigns with immediate effect as a director of Kewberg; Aberdare are not to attend any board or company meetings with Kewberg; Aberdare disposes of the 33.3% of the share capital of Kewberg within one calendar month after the matter has been approved by the Competition Tribunal and the CEO of Aberdare will within five business days of the disposal file a sworn affidavit with the Commission, confirming the disposal of the 33.3% share capital.

<sup>13</sup> The disposal by Aberdare of its interest in Kewberg will render the other conditions redundant.

## **Public Interest**

[16] There are no public interest issues.

## **Conclusion**

[17] Based on the above, we are of the view that the transaction will not result in a substantial lessening or prevention of competition in the identified markets and is accordingly approved on the condition contained in annexure A.

## **Annexure A: Conditions**

A. The merger is approved in terms of section 16(2) (b) of the Act subject to the following condition:

1. The sale of Aberdare Cables (Pty) Ltd (“Aberdare”) 33.3% interest in Kewberg Cables and Braids (Pty) Ltd (“Kewberg”) to S R Van Rensburg as contemplated in the affidavit of Cornelius Johannes Meiring, being effected by the 31<sup>st</sup> January 2007 (“the effective date”).
2. In the event that the sale referred to in paragraph 1 does not take place by the effective date then -
  - a. Aberdare must sell its 33.3% interest in Kewberg within one month after the effective date to a buyer approved by the Competition Commission, on the basis that the buyer is independent of both ATC (Pty) Ltd and Aberdare.

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**Y. Carrim**

Tribunal Member

**16 February 2007**

**Date**

N Manoim and D Lewis concurring.

Tribunal Researcher : J Ngobeni  
For the merging parties : Adv D Unterhalter SC (Instructed by Derek Lotter  
(Bowman Gilfillan Attorneys) and Paul Coetser (Brink  
Cohen Le Roux Inc.)  
For the Commission : HB Senekal (Senior Merger Analyst)  
Mergers and Acquisitions