



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 70/LM/Oct09

In the matter between:

Nedbank Ltd
And

Acquiring Firm

Imperial Bank Ltd

Target Firm

Panel : N. Manoim(Presiding Member),
A Wessels (Tribunal Member)
and Y Carrim (Tribunal Member)
Heard on : 15/12/2009
Order issued on : 15/12/2009
Reasons issued on : 12/01/2010

Reasons for Decision

Approval

[1] On 15 December 2009 the Tribunal conditionally approved the merger between the above mentioned parties. The reasons follow below.

The Transaction

[2] The primary acquiring firm is Nedbank Limited, a wholly owned subsidiary of Nedbank Group Limited. The primary target firm is Imperial Bank Limited which is jointly controlled by Nedbank Group and Imperial Holdings.

[3] The background to this acquisition is that in January 2001 Nedcor Bank (erstwhile name of Nedbank Group and ultimate controller of Nedbank) acquired 50.1% of the share capital of Imperial Bank Limited from Imperial Bank Holdings. This transaction was not notifiable to the competition authorities as it was subject to the now repealed section 3 (1) (d) of the Competition Act which excluded from the application of the Competition Act 'acts subject to or authorised by public regulation'.

[4] The current proposed transaction is a move from joint to sole control.¹ Nedbank intends to acquire the additional stake of 49.9% in Imperial Bank Limited. Post transaction, Nedbank Group, via Nedbank, will directly and indirectly control Imperial Bank.

The Rationale

[5] According to Nedbank Group the proposed transaction will create a more efficient and competitive structure for its joint operations with Imperial Bank, and further result in increased scale and profitability of the vehicle asset finance business. For Imperial, the proposed transaction is an opportunity to employ its capital to its own core business of logistics and tourism, additionally this will relieve Imperial Holdings of the obligation to support the capital requirements of Imperial Bank.

The parties and their activities

[6] Nedbank Group operates in the various financial services as one of the four largest banking groups in South Africa. Its core services includes business, corporate and retail banking, property finance, investment banking, private banking, foreign exchange and securities trading. In addition, Nedbank Group also generates income from private equity, vehicle finance, credit card issuing and processing services, among other financial services.

¹ Initially the merging parties argued that the current proposed transaction was also not notifiable to the competition authorities given that the acquisition of additional shares by Nedbank does not result in change of control. The Commission found that by virtue of a certain clause in the 2006 Memorandum of Understanding between the merging parties which contains minority protections conferring joint control over the target firm, the proposed transaction is notifiable as it will result in an acquisition by Nedbank of unfettered control over Imperial Bank Limited.

[7] Imperial Bank provides finance for niche products. Its major focus is on motor vehicle finance, which is marketed through its Motor Finance Corporation brand. In addition it offers property, corporate and aviation finance.

Competition Analysis

[8] As mentioned above, the proposed transaction is a move from sole to joint control. Nevertheless there is a horizontal overlap in respect to instalment sale credit and general mortgaging financial services in which the merging parties compete. However there is no significant impact on the market structure of the relevant product markets due to the lack of market share accretion post merger.²

Public Interest: Employment issues

[9] According to the merging parties the proposed transaction could result in the retrenchment of 260 permanent employees and 204 temporary employees. Despite this, the Commission, based largely on submissions from the merging parties, concluded that the merger did not have a substantial effect on public interest, firstly on the basis that the retrenchments affected only less than 1% of the entire workforce of the merging parties, secondly that the retrenchment would only take place in January 2011, and therefore employees would not be summarily dismissed. Thirdly the Commission stated that out of the permanent employees that will be affected, most are skilled, qualified individuals who have considerably extensive years of work experience, and would be able to negotiate alternative employment at other institutions. On the subject of the temporary employees, the Commission said that even without the merger there was no guarantee that their employment contracts would be renewed.

² In the market for instalment sales credit Nedbank Group Limited and Nedbank Group have a market share of 10.73%, and Imperial Bank has 13.73%. Together they have a market share of 24.46%, competing against big players such as FirstRand Bank Limited which has a market share of 30.63%. In the general mortgage market Nedbank Group Limited and Nedbank Group have an estimated market share of 20.36%, Imperial has 1.28%, and together they have 21.64% market share, competing with big players such as Absa Bank Limited with 30.35% and Standard Bank with 26.33% market share.

[10] In recent decisions the Tribunal has indicated that it will intervene to impose conditions on public interest grounds where employment loss post merger is likely to be substantial and merger specific.³

[11] In this case the loss of nearly 464 jobs post merger is substantial. The fact that as a percentage of the combined workforce this figure may not be significant and hence to conclude, as the Commission has done that the adverse public interest effect is not substantial, is to adopt an erroneous approach. Whilst the Act offers no threshold number for when job losses become substantial, the proper approach is to start by having regard to the number of jobs to be lost post merger. The fact that an acquiring firm has a large workforce because it is engaged in many activities is entirely fortuitous and makes engaging in statistics of what proportions of the workforce may be lost, an exercise in relativism unconnected with the purpose of the Act. If one is to apply a percentage based approach, although far from conclusive as an exercise on its own, it would be more relevant to have regard to the percentage of the acquired firm's work force that the retrenchments represent. In this case we were not given such a breakdown. We therefore can only determine substantiality from the total numbers of jobs likely to be lost post merger. In this case it would hardly be controversial to conclude that a loss of nearly 464 jobs is substantial.

[12] The next issue is whether the loss of jobs is merger specific. In this case it emerged during the hearing that it is. Millicent Lechaba, an executive human resource manager for Imperial Bank conceded that prior to the proposed merger, no retrenchments would have been considered at all. We can conclude therefore that the merger will have a substantial effect on employment.

[13] We have also in the past indicated that we will generally respect agreements entered into between employees and management in respect of retrenchments, where those agreements have been arrived at after full information has been given to employees or their representative organisations.

[14] In this case such an agreement has been reached between Nedbank and the respective trade unions. We have no reason to conclude that the agreement

³ See *DCD Dorbyl and Globe Engineering Works* CT Case No.: 108/LM/Oct08.

has not been reached on a fully informed basis and hence we will not interfere to alter its content. However we considered its enforcement provisions weak, and that taken on its own, it would not adequately protect the public interest identified. For this reason we have made adherence to the agreement a condition on which this merger is approved. The merging parties to their credit had no objection to us doing so.

[15] In fairness to Nedbank it must be pointed out that these figures for job losses represent a worst case scenario and are by no means inevitable. As the group has vacancies on an ongoing basis, employees who might be retrenched from this division may find employment elsewhere in the group.⁴ Secondly, the undertaking to the unions is that retrenchments will not be considered before January 2011. At the request of IBSA this was extended from applying to only permanent employees to certain of the contract and temporary employees of Imperial and Nedbank who have served for more than one year.⁵

CONCLUSION

[16] In the circumstances, we consider it necessary to approve the merger with conditions based on the commitments undertaken by the merging parties at the hearing to ameliorate the employment consequences brought by the merger. The conditions are set out in Annexure A to this decision.

N Manoim
A Wessels and Y Carrim concurring

12/01/2010

DATE

Tribunal Researcher: Londiwe Senona
For the merging parties: Edward Nathan Sonnenbergs
For the Commission: N Ramroop

⁴ At the hearing the merging parties explained that the number of employees that were likely to be retrenched were seen as surplus positions, and that the estimated job losses have been assessed on a worst case scenario basis. In addition, it was mentioned that there was an integration plan in terms of which the merging parties would look at redeployment of people, re-skilling and the like in order to minimise the employment effect as far as possible. The parties also submitted that there are estimated 900 vacant positions between Nedbank and Imperial Bank, and that one of the things that they will consider is to assess each of the surplus positions to see whether they can fit in any of the vacant positions.

⁵ Refer to IBSA's letter of comfort, pg. 294 of the merger record.

