COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no.: 95/FN/Dec02

In the matter between:

The Competition Commission	**Applicant**
and	
Edgars Consolidated Stores Limited	**1st Respondent**
Retail Apparel (Pty) Ltd	**2nd Respondent**

Reasons for decision and Order

INTRODUCTION

1. In this matter we have to decide whether an acquisition by the first respondent constitutes a merger as defined in section 12 of the Competition Act. If it does, then the transaction ought to have been notified as a merger in terms of the Act and approved in the manner the Act provides, prior to the acquisition being implemented.

2. In this case the Commission alleges that the respondents have implemented a merger without the required consent and seek the imposition of a fine on the respondents.

BACKGROUND

3. In May 2002 the Retail Apparel Group ("RAG"), a group of companies carrying on business under various brand names in the retail clothing and apparel trade, went into provisional liquidation.

4. The first respondent, a firm carrying on business in the same trade, made a written offer to purchase the assets of RAG on 3 June 2002. The offer was accepted by the liquidators on the 13th of June 2002. We will refer to this document as the agreement.

5. The construction of this document is fundamental to the issues in this case. What the parties purported to do was to divide the purchase into two legs.

6. The first leg involved the first respondent purchasing the second respondent's book debt and certain ancillary rights. In the second leg the first respondent purchased further assets of RAG and its subsidiaries. This latter sale was subject to the condition that the parties obtain the necessary approval from the competition authorities.

7. The parties are of the view that the second leg constituted a notifiable merger, but that the first did not as it did not amount to the acquisition of a business or part of the business.

8. After the liquidators had accepted the offer[1] the second respondent's attorneys wrote to the Commission on 13 June 2002[2] to advise them of the agreement and they stated in paragraph 4 that:

> *"The purpose of this letter is also, as a courtesy, to inform you that Edcon has, as a separate agreement with the liquidators, agreed to purchase the book debts ("book debts"), that is the claims against trade debtors, of Retail Apparel (Pty) Ltd and certain of its subsidiaries. This sale has been concluded in advance of the proposed merger and will be implemented immediately and was necessitated by the fact that Edcon's ability to recover the book debts is entirely dependent on it being afforded the opportunity as a matter of urgency. The sale of the book debts is not dependent on the proposed merger, will be implemented even if the proposed merger does not proceed and therefore does not form part of the proposed merger. As such, Edcon's purchase of the book debts does not constitute a merger or part of a merger and does not*

1 The written acceptance of the offer is dated 14 June 2002.Record page 53.
2 See page 54 of the record.

require approval in terms of the Competition Act. Edcon's purchase of the book debts is akin to a situation in which a creditor discounts its book debts to a financier."

9. The Commission did not respond to the letter. The parties proceeded to implement the first leg and, in due course, notified the second as an intermediate merger on 25 July 2002. At that stage the Commission queried the notification. It contended that the bifurcation sought to be achieved by the agreement was artificial, and that there had been a single transaction, which included the first leg, and hence, with the added attributable turnover, constituted a large, not intermediate, merger. The parties then conceded this point and notified both legs of the transaction as a large merger. They did so on a without prejudice basis in order, they allege, to expedite clearance. The Tribunal considered both legs of the transaction as a single notification, and approved the merger unconditionally on the 23rd of September 2002. [3]

10. The Commission then brought the present application before us in which they seek the following relief:

    1) *That the purchase by Edgars Consolidated Stores Ltd ("Edcon") of certain claims against trade creditors of the Retail Apparel (Pty) Ltd and certain of its subsidiaries, as described in Edcon's offer to purchase dated 13 June 2002 ("the book debts") constitutes a merger as contemplated in section 12 of the Competition Act No. 89 of 1998, as amended ("the Act").*

    2) *That the Respondents contravened section 13(A)(3) of the Act in that they have implemented the merger prior to approval by the Applicant;*

    3) *Ordering that the Respondents jointly pay an administrative penalty of R 85 552 610 in terms of sections 59(1)(d)(i) and/or 59(1)(d)(iv) of the Competition Act 89 of 1998 (as amended) and;*

    4) *Further and/or alternative relief.*

11. Section 13A(3) states the following:

    The parties to an intermediate or large merger may not implement

3 This decision is reported as 53/LM/Aug02

that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.

12. Section 59(1) of the Act sets out the circumstances in which an administrative penalty may be imposed. For our purposes the following sub-sections are pertinent:

59(1) The Competition Tribunal may impose an administrative penalty only-

(d) if the parties to the merger have

(i) failed to give notice of the merger as required by Chapter 3;
(ii) …
(iii) …
(iv) Proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act.

DISCUSSION

13. Initially the Commission was of the view, when it issued its notice of non-compliance to the parties after notification of the second leg, that the first and second legs constituted a single transaction.

14. Yet in Paragraph 5.4 of his founding affidavit, in the present application, the Commission's deponent alleges that:

> "..the first transaction between the First and Second Respondents constitutes a notifiable merger as contemplated in section 12 of the Act, as amended. .."[4]

15. Later in Paragraph 5.5 of the affidavit, after all the facts have been set out, he states:

> "I submit that the transaction between the First and Second Respondents constitutes a notifiable merger as contemplated in section 12 of the Act in

4 See affidavit of John Nesidoni, page 6 of the record, paragraph 5.4.

that the ***second*** *transaction has the effect of ….".* [5] (Our emphasis)

16. Not surprisingly this latter paragraph led the first respondent, in its answering affidavit, to query what is meant by the reference to the second transaction and whether the Commission was alleging, in contrast to what it had stated in earlier 5.4, that the transactions constituted a single transaction.

17. Regrettably the Commission does not deal with this in its replying affidavit. In its Heads of Argument, however, it appears to consider them as "*separate and discrete"*.[6] Yet in oral argument in response, the Commission warns of the dangers of piecemeal notification, which would again suggest that it considers there to have been one transaction.

18. We have approached this decision in a manner that does not require us to resolve this question. We have analysed the first leg as a stand-alone transaction in order to decide whether it constitutes a merger. As we answer this question in the affirmative, the question of whether the two legs constitute a single or discrete transactions is not one we are required to determine, since on either approach there would have been a transgression of the Act - i.e. either a merger or part of a merger had been implemented without prior approval. We nevertheless express the view that the two legs constitute elements of a single merger.

19. For this reason the crisp issue that we have to decide is whether the first leg constitutes a merger. To be crisper still, what we have to determine is whether the rights sold in terms of the first leg constitute the sale of part of a business.

20. The reason for this comes from the definition of a merger in section 12 (1):

> *(a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.* (Our emphasis).

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –

> (i) *purchase or lease of the shares, an interest or assets of the other firm in question; or*

5 See affidavit of John Nesidoni, page 7 of the record, paragraph 5.5
6 See 4.1.2 of the Commission 's heads of Argument

(ii) *amalgamation or other combination with the other firm in question*. (Our emphasis)

21. The first respondent does not dispute that the first leg gave it control over the book debt and that a book debt is an asset, what is in dispute is whether the rights acquired constitute part of a business.[7]

22. The mere acquisition of an asset, assuming it otherwise falls within the thresholds of capture in section 11 of the Act, does not constitute a merger. What the Act clearly sets out, as a limiting feature, is that which is taken control of is a "*business"* or "*part of a business"*.

23. Now if one reads sections 12(1) and 12(2) together, clearly the Act contemplates that the acquisition of an asset may constitute the acquisition of a business. It also contemplates that a *business* is divisible, and hence a merger can be accomplished by the acquisition of *"part of the business of another firm."*

24. When an asset becomes a business and when it is just to be considered an asset, is a subject for interpretation. Too wide a notion of business would make any number of ordinary transactions notifiable as mergers, too narrow, would risk creating a loophole for regulatory avoidance.

25. The Act does not define what a *business* is. Black's Law Dictionary defines a *business* as:

> *A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.*

26. While the word *business* has been interpreted frequently by our courts in relation to other statutes, this has not been of assistance, since the word has a chameleon-like quality– its meaning is usually coloured by the context of the statutory framework in which it is located.[8]

---

7 Initially the Commission had stated that was all that it had to prove, but correctly this stance was not adopted during argument before us and it too agreed with the manner in which the first respondent had characterized the issues to be decided, although it came to the opposite conclusion on the facts.

8 See in this regard the Butterworth's Dictionary of Legal Phrases where, it is observed that generally the word *business* is susceptible to a wide range of meanings and then goes on to refer to the range of meanings accorded to the word *business* in the case law, dealing with legislation as varied as licensing ordinances and the Motor Vehicle Insurance Act, No. 29 of 1942.

27. More useful guidance comes from other jurisdictions where the principle of when asset acquisitions qualify for notification as mergers is examined.

28. In the European Union in the case of Blokker v Toys R Us,[9] the Commission stated:

> *"…Therefore, acquisition of control is not limited to cases where a legal entity is taken over but can also happen through the acquisition of assets. In this situation the assets in question must constitute a business to which a market turnover can be clearly attributed."*

29. The Commission proceeded to analyse the assets being acquired:

> *"In this operation Blokker takes over all the assets (leases, fixtures and inventory, personnel, use of brand name) which make up the business of Toys 'R' Us in the Netherlands. To this business, a turnover can be clearly attributed.*

30. The Commission concluded that the transaction constituted a concentration within Article 3(1)(b) of the Merger Regulation.

31. In the United States mergers are governed by section 7 of the Clayton Act. Historically this statute applied only to stock acquisitions, but the Act was amended in 1950 to cover acquisitions of assets.

32. In Antitrust Law Developments[10] the authors note that:

> *"Section 7 applies to a wide variety of asset acquisitions – not only those resembling mergers (i.e., acquisitions of substantially all of a business' assets), but also to acquisitions of certain key assets such as patents, trademarks, or sales volume, leases, and to transactions resulting in control of decision making."*

33. Herbert Hovenkamp in discussing the problem presented by partial asset acquisitions observes that:

> "Antitrust policy becomes concerned with partial asset acquisitions when the asset that changes hands represents a measurable and relatively permanent transfer of market share or productive capacity from one firm

9 Case No IV/M.890 paragraph 13.
10 ABA, Antitrust Law Developments (Third), page 279 -280

to another".[11]

34. He then goes on to observe that:

> *".. no shorter analysis has yet appeared that will effectively separate harmless from dangerous asset acquisitions."*

35. He does however formulate a general approach:

> " In general, if the asset acquisition appears on its face not to affect industrial concentration or the market share of its buyer, the acquisition will be treated as outside the scope of section 7. If it does tend to enlarge the market share or productive capacity of the acquiring firm, or if it increases concentration in the industry, then its effects on competition must be assessed."[12]

36. He makes the salient point that:

> "Certain asset acquisitions may tend to increase concentration or give the acquiring firm a larger market share even though the asset itself does not increase productive capacity. Acquisition of a trademark will fall into this category."[13]

37. The Hovenkamp approach seems the one closest to serving the purpose of understanding what is contemplated by business in section 12.

38. We turn now to analyse the first leg of the transaction, which the parties contend amounted to no more than the acquisition of a debtors' book i.e. an asset but not a business.

39. They rely for this interpretation on the definition given in the agreement to what constitutes the first leg of the transaction, which is referred to in the language of the agreement as the *first sale assets.* The *first sale assets* are defined in clause 1.16 as:

> *"..collectively, the book debts and the VAT refund."*

40. The book debts are defined in clause 1.5 as:

> *"All book debts of the group falling within the ambit of paragraphs 1*

11 Herbert Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice, page 498
12 Hovenkamp op. cit. pg 499.
13 Hovenkamp op. cit. p. 499, fn 8.

to 12 (inclusive) of annexure C (other than the delinquent debts and sundry debtors of the group) reflected in the books and records of the group as at the first effective date (including but not limited to all accounts, records, details of lists of debtors' records in respect of which credit has been issued by the group to customers of the group against defined parameters and in respect of which collections against such debts have been fully or partially made or, alternatively, in respect of which there is valid cause to proceed with such collection) together with the group's right, title, interest and benefit in and to the account protection plans in respect of and pertaining to those book debts"

41. The agreement goes on to describe the *second sale assets,* which are defined in clause 1.30 as:

"-collectively,-

1.30.1 the designated stock;
1.30.2 the fixed assets;
1.30.3 the intellectual property;
1.30.4 the group's right, title, interest and benefit in and to the Club"

42. The transaction has been structured in such a way that the offer to purchase, although contained in the same document, comprises separate offers for the purchase of the first and second sale assets. The agreement further provides that the offer is *"severable in respect of the first and second sale offer"*.

43. These clauses in the offer, the first respondent argues, demonstrate the two important hooks on which its defence is pegged. Firstly, that the first and second legs, despite being housed in the same offer, were in fact separate transactions. Secondly, that the description of what was sought to be acquired in the two respective legs, clearly indicates that the first involved the acquisition of only assets, and the second the acquisition of a business.

44. It is not entirely clear from the first respondent's argument what attributes the second sale assets possess, that make them more susceptible to constituting a business than the first. Is it the cumulative effect of the four itemized assets that are referred to in the definition of the second sale

assets that give them an attribute that they would otherwise not possess if taken individually, or are some of the assets, taken on their own, more susceptible to being part of a business than a book debt because of some characteristic inherent in them?

45. However at least one was singled out for special mention by the first respondent's counsel, as having the attributes of a business as opposed to a book debt and this was "*the group's right title and interest and benefit in and to the Club."* [14]

46. Some significance attaches to this, as in clause 15.1.1 of the agreement it provides that on the first effective date [15]the liquidators must deliver to the offeror against payment, inter alia:

> "15.1.1.1
> *a schedule, in such form (electronic or otherwise) as may be acceptable to the offeror, containing full details of each customer of the group with a written indication as to whether the debts of such customers comprise the book debts and whether such customers are, as at the first effective date, members of the Club"* (Our emphasis)

47. Thus a vital piece of information, constituting the "business" that forms part of the second sale asset, is already disclosed to the first respondent in terms of the first. Thus as a result of the first sale transaction the first respondent has not merely acquired a book debt but valuable business information concerning the seller's customer base.

48. There are other features of the agreement that suggest that what was acquired by the first respondent in terms of the first leg, went beyond the mere description of the first sale assets in clause 1.16 and on which the first respondent is so reliant to establish its case.

49. In terms of clause 8 of the agreement, the first respondent was entitled to acquire within 30 days of the acceptance of the offer (that date is set as 14 June), the right to acquire the leases subject to the necessary landlord consents and assignments. Whilst it is correct that this right comes into

---

14 Clause 1.30.4 The Club is defined in clause 1.7 as "the group's database of members of the "Smart Fashion Club", previously known as the "Bee Gee Club" and the "Smart Centre Club", incorporating "Patrick Daniel", "Bee Gee" and "Smart Centre" account holders."

15 The first effective date is defined as the " earlier occurring date of fulfillment of the conditions referred to in 12.1 and 16 June 2002;".

effect only on the second effective date [16], it does not appear to be dependant on the first respondent pursuing the second leg and indeed the right to the leases would be exercised before the second effective date. Nor is this right defined as forming either part of the first or second sale assets - it appears supplementary to the first.

50. The agreement also establishes an interim period in terms of clause 9, during which the parties have certain further rights and obligations. This period is defined as period between the date of acceptance of the offer (i.e. 14 June) and the close of business on 28 August 2002.

51. During the interim period the liquidators are obliged to continue carrying on the business at premises designated in the agreement, and to extend credit to existing customers on the same terms and conditions as previously. In return the first respondent agrees to acquire these debts, which are defined as the subsequent debts, at a discounted price.

52. The first respondent is then granted access during the interim period to the books, records and systems of the group to enable it to[17]:

> *"centrally manage and control the recovery of the sale debts;*
>
> *effect the migration of the records pertaining to the sale debts from the company's to the offeror's systems, and without limiting the generality of the aforegoing, enable the offeror to manage the group's centralised credit call centre for the purposes only of recovering the sale debts, provided that the liquidators furnish all reasonable assistance to the offeror in doing so and that the offeror bears all direct costs and expenses of the operation of the centralised credit call centre (including the direct costs of engaging employees of the company to operate the centre) in recovering the sale debts during the interim period;*
>
> *with effect from the close of business on 15 June 2002, pay to the offeror on a daily basis all amounts received by the liquidators on account of the discharge of any of the sale debts."*[18]

---

16 The second effective date is defined in clause 1.31 as *" the later occurring of – 11 August 2002, the date of fulfillment o f the conditions referred to in 12.2; and if an arrangement is proposed pursuant to 19, the date of registration by the Registrar of Companies of the court order sanctioning the arrangement in terms of section 311(6) of the Companies Act.*

17 Clause 9.1.3.1- 9.1.4.

18 Note that the first respondent was to pay for these subsequent debts on the last business day of each month during which the subsequent debts are created. (Clause 6.1.4)

53. Observe that this clause gives the first respondent, during the interim period, the right to transfer all sale debts from the RAG systems to its own system and the right to effectively take over the operation of the RAG call centre, and if necessary to supply its own staff for that purpose. The *sale debts* are defined to include the *book debts* and the *subsequent debts*. The first leg was thus not confined to the purchase of historic debt as the subsequent debts are in turn defined as:

> *"all debts of the group (other than delinquent debts) which have been created by the group on the basis set out in 9.1.2 at any time after the first effective date together with the groups right, title, interest and benefit in and to the account protection plans in respect of and pertaining to those book debts."*

54. That this was the parties understanding as well, is manifest from an affidavit made by Graham Evans, a director of the first respondent, to the High Court, in terms of section of section 386 of the Companies Act, dated 14 June 2002 (ie the date of acceptance of the offer) and which is attached to his answering affidavit. In paragraph 11 of that affidavit he states:

> "It is to be noted that in the offer document, Edcon specifically stipulated that it needed to be given access and possession of the book debts of the company, as well as access to all other books, documents and records, which Edcon required for the collection of the book debts, and also to enable Edcon to be in control of the book debts by Tuesday 18th *June 2002. This would enable Edcon to immediately extend credit to customers of the company's business, and that of its subsidiaries, so that the Liquidators could commence trading immediately to realise the best possible prices for the sale of the stock of the company and its subsidiaries. In addition, the Liquidators would have no risk in doing so because Edcon were purchasing the new book debts created. This would obviously result in an enormous benefit to the creditors of the company, and its subsidiaries."* (Our emphasis)

55. Why did the parties purport to divide the transaction into two discrete legs?

56. According to the first respondent' s affidavit in answer to this application, it had considered acquiring RAG's book debts alone, and not RAG's business as well, at some time before the liquidation in discussion with RAG and its bankers.[19]

57. However Evans in his High Court affidavit, which was deposed to prior to these proceedings, describes these discussions more broadly, and the acquisition of the book debt is stated as an alternative to the acquisition of the company, but both are clearly contemplated.[20]

> "About ten days before the company was placed into provisional liquidation, Edcon was approached by the company's bankers, in an endeavour to ascertain whether Edcon was possibly interested in acquiring the company's book debts, or *whether Edcon would also consider the possibilities of proposing an offer to purchase the shares and/or of the company."* (Our emphasis)

58. The clearest indication of the parties' intent emerges however from the agreement itself where in clause 19 there is a clause setting out the *"arrangement"*.

59. In terms of this clause:

19.1 "The offeror records that in order, inter alia, to –

> *19.1.3 obviate the delays which would be suffered in seeking to-*
>
> > *19.1.3.1 acquire the sale assets through a mechanism of an arrangement*
> >
> > *19.1.3.2 obtain the approval set out in 12.2.2*[21]*,*
>
> *it was necessary for the offeror to structure this transaction on the basis provided for in the offer which seeks to achieve an expeditious acquisition and implementation process…."* (Our emphasis)

19 Paragraph 18.1.1 of the answering affidavit.
20 Paragraph 4, page 76 of the record.
21 This is approval in terms of the Competition Act.

60. This clause appears to evidence the real intent of the parties, namely that it was expedition, and not uncertainty about what they finally wanted to purchase, that drove the choice to divide the transaction into two stages, and the reason why expedition was so crucial to them appears again from Evans affidavit in the High Court application.[22]

> *"It immediately became apparent to me, to whom Edcon had entrusted the assessment of the Retail Apparel Group, as well as its book debts, that because of the provisional liquidation, it would be imperative to both the Liquidators and to Edcon that in order not to destroy the goodwill of the business, and to preserve any value in the book debts, an agreement had to be concluded urgently with the liquidators, failing which:-*
>
> > *8.1. customers denied access to credit purchases would find no reason to effect payment against a debt owing to the company. This was exacerbated by the fact that the provisional liquidation had occurred at month end;*

8.2 customers of the company would switch loyalty by seeking alternative credit at competitors of the company, which would ultimately lead to a loss of this customer and would have a severe impact on the prospects of a successful collection from this debtor;

8.3 to miss a further month end payment would cause a severe deterioration in the value of the company's book debts, which would be to the severe prejudice of the creditors of the company;

> > *8.4 to meet month end deadlines, Edcon would need at least a period of 10 days prior administration of the book debts, and a period of 2 days in which to integrate its own management and to extract the relevant records by which to evaluate the book debts, and the recovery prospects thereof."*

61. This is further evidenced in paragraph 13 where he states:

> *"I contend that it is essential for Edcon to have this transaction in its present form consummated immediately, and pray that an order be granted by this Honourable Court urgently for the following reasons:-*

22 Paragraph 8, page 77-78 of the record.

13.1 Edcon has to incur substantial costs and risks in having to arrange for experienced personnel in different fields to be available over this long weekend to transfer the book debts of the company, and its subsidiaries, to Edcon's credit management. Edcon is unable to make the necessary arrangements without the Liquidators being granted the relevant authority in law to accept Edcon's offer;

13.2 If Edcon for any reason whatsoever are unable to control of the book debts this long weekend, the value of the book debts which Edcon is purchasing according to a specified formula, which is highlighted in the offer document, would be eroded to the prejudice of the company's creditors. There would also be a great increase in the risk by which Edcon is acquiring such book debts;

13.3 The uncertainty and low morale of the company's staff at present, especially in the credit call centres is further reducing the productivity in regard to the collection of the book debts;

13.4 The liquidators are being deprived of effecting credit sales at present, and the impact is particularly severe in trading the stock of the group. Due to seasonal variations, the group's stock in trade is depreciating on a daily basis;

13.5 Customer loyalty is also being lost and this will lead to the debt recovery, especially collections over the next month end, being reduced dramatically;

13.6 Third party collection agents are totally demotivated, which is now having an adverse effect and is slowing down the collection of the book debts.

62. What all this analysis serves to show is two features – one that the separation of the first and second transactions was designed to create a mechanism for the first respondent to secure the book debt of RAG on an urgent basis to prevent the migration of customers to RAG's competitors. This objective would have been frustrated had the transaction been held up to obtain regulatory approval.[23]

63. Secondly, that the distinction between the two legs is sometimes difficult to discern from the agreement and that is because they were intended to form part of one overall transaction.

64. However, as we stated above, our approach has been to examine whether the first leg constituted a merger and hence we are not required to decide

23 This is not to suggest that this was the only form of regulatory approval that the parties wished to obviate in the first transaction it seems clear that exchange control and the Labour Relations Act were also of concern.

whether the two legs formed part of a single, seamless transaction.

65. We do however agree with the Commission that there is a danger in allowing parties to structure transactions in a way that could obviate their obligations to notify. If parties to asset transactions could purchase one stand alone asset by agreement to form part of a severable agreement it is easy to see that this could be used to reduce the threshold for the merger notification either to make an otherwise large merger an intermediate one or to render it not notifiable at all.

66. We need to look at a transaction holistically and not piecemeal. This was the approach we took in Khumo Bathong, Case No: 31/LMN/May02 where we held that what were in contract law two discrete transactions were part of the same merger and hence notifiable only once.

67. The approach in Europe is even stricter, Frank L. Fine in his book *Mergers and Joint Ventures In Europe: The law and Policy of the ECC* (1998), p. 179, states that:

> *"…if two or more such transactions take place within a two-year period between the same undertakings, these transactions are treated as one concentration arising on the date of the last transaction."*

68. What the parties acquired as a result of the first merger was a not a mere book debt. Indeed, this case should not be considered as authority for the proposition that the acquisition of a book debt constitutes, if the thresholds are met, a notifiable merger. What we are saying is that when the acquisition of an asset constitutes the acquisition of a business or part of a business is a question of fact that must be examined in the context of the whole transaction. Is the acquiring firm by acquiring the asset, acquiring something more than a bare asset that would enhance its competitive position? One example of this would be where the purchase of an asset enables the acquiring firm to increase its market share or to pre-empt a rival from increasing its.

69. The first respondent, a firm that sells clothing and apparel to the retail trade on credit, acquired the book debt of a fallen rival coupled with significant ancillary rights that gave it access to the core of the seller's business, namely its customer base. What needs to be borne in mind is that the first respondent is in the same line of business as RAG and competes for the same customer base in the credit retail apparel market.

In the High Court affidavit for instance, Evans describes the credit base of its debtors and states:

> *"there are many similarities between Edcon's credit base and the credit base of Retail Apparel (Pty) Ltd.."*

70. What was acquired in the first leg was more than the right to collect past debts. It included, through the identification of the Club members valuable information about RAG's customer base, the right to its subsequent debts, the right to require it to continue to trade on credit, and control of over subsequent debtor management and information. By its own admission this was to attempt to prevent the migration of the seller's business to rivals. It was a bridgehead into the RAG business, designed to ensure that the customer base kept its loyalty and did not defect to rivals, until such time as regulatory approval could be secured for the second leg.

71. The haste with which the arrangement was to be instituted, as evidenced from Evans' High Court affidavit, suggests that the value to be preserved by permitting the implementation of the first transaction was the value of a business not a mere asset.[24] Edcon decided to make the offer on the 3rd June 2002, the offer was accepted by an informal meeting of creditors on 12th June, put into written form on the 13th June and accepted on the 14th June.[25]

72. Properly understood within the context of the agreement, and the reasons advanced by Evans for the purchase in his High Court affidavit, the first leg amounted to the acquisition by the first respondent of RAG's custom and the pre-emption of that custom being acquired by a third party rival.

73. In our view that makes the subject matter of the first leg a legitimate matter for enquiry in terms of the interests the Act seeks to protect.

74. The Competition Appeal Court in Distell[26] observed that in terms of our Act the obligation to notify will be broadly construed – this is because in

---

24 There is some US authority to suggest that haste is an indication that what is being purchased is more business than mere asset. See Antirust Law Developments (Third edition) fn.40 p.281

25 See Evan's High Court affidavit record page 78-9.

26 Distillers Corporation (South Africa) Limited and Another v Bulmer (SA)(Pty) Ltd and Another, 2002(2) SA 346 (CAC) at 358: *"… It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger restrictions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of broad interpretation to section 12 of the Act."*

our law notification is essential to jurisdiction, and not as in some other pre-notification regimes, independent of it. For this reason we will err on the side of notification in interpreting whether a transaction constitutes a merger in terms of the Act.

75. We are satisfied that the first leg constituted the acquisition of part of a business of the selling firm and hence it constitutes a merger.

THE PENALTY

76. In terms of section 59(1)(d)(i) and (iv) of the Act both the failure to notify a merger and the implementation of a merger before it has been cleared by the appropriate competition authority are contraventions of the Act for which an administrative fine is competent.

77. We have found however that the respondents have only contravened the Act in one respect, namely implementing the merger prior to it being cleared. The impugned transaction was notified to the Commission, albeit belatedly.

78. The Commission initially sought a fine of R 85 552 610, which we were advised was 10% of the turnover of the acquiring firm and hence the maximum permissible fine in terms of the Act. During argument however the Commission conceded that there were a number of mitigating features concerning the merger and that a fine of half that amount was more appropriate.

79. The first respondent contended that as the Commission had not sought to adduce any evidence to motivate its recommendation for a fine, no fine was appropriate.

80. We cannot agree with this conclusion. The factors that we must take into account in determining a fine are set out in section 59(3) of the Act. This section states:

> *When determining an appropriate penalty, the Competition Tribunal must consider the following factors:*
>
> a) *the nature, duration, gravity and extent of the contravention;*
> b) *any loss or damage suffered as a result of the contravention;*

c) *the behaviour of the respondents;*
d) *the market circumstances in which the contravention took place;*
e) *the level of profit derived from the contravention;*
f) *the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and*
g) *whether the respondent has previously been found in contravention of this Act.*

81. To the extent that this information is on the record we can take it into account. The fact that the Commission has not adduced any evidence in aggravation does not preclude us from imposing a fine. From the papers we have sufficient evidence before us of the factors that section 59(3) requires us to consider. To the extent that much of this evidence has been adduced by the respondents it is to their benefit and meant that we find the Commission's proposed fine, albeit revised downward, inappropriate on these facts.

82. We have had regard to the following:

- The implementation was not of long duration the merger was implemented on 13 June 2002 and notified on 25 July 2002 and then approved by the Tribunal on 23 September 2002.

- Given that the merger was approved unconditionally there is no evidence that the contravention led to any loss or damage. However it needs to be borne in mind that had the merger not been approved or had it been approved subject to the divestiture of part of the business such as the client lists, the premature action could have frustrated such a purpose.

- The respondents do not appear to have intended to evade competition scrutiny. They notified the transaction albeit belatedly and also notified the Commission of their legal view of the status of the first leg, prior to implementation.[27] (We say more about the construction to be put on this letter when we deal with the parties co-operation with the Commission below.) At worst what they wanted to do was to secure

27 See letter from Werksmans dated 13 June 2002, page 54 of the record. The Commission never replied to this letter, which the parties seek to rely on. The Commission argued that as the letter did not request anything of them it was not necessary for them to reply and the parties were not entitled to place any reliance on its passivity.

the book debt advantage without having to face the delay associated with obtaining regulatory approval. It is thus a lesser form of evasion, although not one we can treat with impunity as all mergers cause parties delay and that is a reality which firms must accept and factor into their activity. Prior to implementation the respondents had sought and received legal advice that the transaction did not constitute a merger. Whilst we have differed from the conclusion given in that advice, given this set of facts, we cannot suggest that the advice was unreasonable or not considered.

- The market circumstances in which the contravention took place are not pertinent here.

- There is no suggestion that the respondents acquired any profit as a result of the contravention given that the merger was approved.

- The respondent on the Commission's own admission co-operated with it. Whilst the letter from the respondents attorneys, dated 13th June 2002, which we referred to above, shows that the respondents advised the Commission at the outset, the respondents moral high ground is dented, by the acknowledgement that the information was to appear in the press and thus presumably would have come to the Commission' s notice in any event.[28] Furthermore the facts disclosed concerning the first leg of the transaction amount to a gloss on the transaction that does not accord with the facts as we have analysed them above. The letter suggests that the transaction amounted to a *" separate agreement with the liquidators"* and later on states that *"Edcon's purchase of the book debts is akin to a situation in which a creditor discounts its book debts to a financier."* We have found neither of these propositions to be correct. The agreement containing the offer does not appear to have been disclosed to the Commission in the June letter. We are not suggesting bad faith on the part of the respondents. We do however suggest that the mitigating aspect of the letter is diminished by inadequate disclosure.

- The respondents have not previously been found in contravention of the Act.

28 See Paragraph 21.5 of the answering affidavit where Evans states, *" Edcon instructed [the attorneys] to write the letter …. because Edcon was concerned that press reports might suggest that Edcon had implemented the second transaction immediately in June 2002 and Edcon wished to avoid concern on the part of the Commission and to assure the Commission that it would not implement in violation of the Act."*

83. In essence the violation is one of a procedural rather than substantive provision of the Act; this coupled with the fact that the respondents had never intended to evade substantive scrutiny of the merger suggests that a fine far lower than proposed by the Commission is appropriate. On the other hand it cannot be so low a firm would regard it as worth evading the procedural prerequisites of the Act to secure a quick deal. In our view a fine of R 250 000 is appropriate.

ORDER

a) We find that the respondents contravened section 13(A)(3) of the Act in that they have implemented a merger prior to approval in terms of the Act.

b) In terms of section (59(d)(iv) of the Act, we order the Respondents to pay an administrative penalty of R 250 000.

c) The respondents are jointly and severally liable for the payment of the fine, should one pay the other is to be absolved.

d) The fine must be paid to the Commission within 7 business days of date of this decision.

24 March 2003
N. Manoim **Date**

Concurring: D. Lewis and P. Maponya