



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM271Mar19

In the matter between:

The Industrial Development Corporation SOC Ltd

Primary Acquiring Firm

And

Celrose (Pty) Ltd

Primary Target Firm

Panel	: Mr Enver Daniels (Presiding Member)
	: Mrs Medi Mokuena (Tribunal Member)
	: Prof. Fiona Tregenna (Tribunal Member)
Heard on	: 10 April 2019
Last submission received on	: 11 April 2019
Order issued on	: 11 April 2019
Reasons issued on	: 26 April 2019

REASONS FOR DECISION

APPROVAL

- [1] On 11 April 2019, we conditionally approved the merger transaction whereby the Industrial Development Corporation SOC Ltd (“the IDC”) intended to acquire control and ownership of Celrose (Pty) Ltd (“Celrose”), hereunder jointly referred to as ‘the merging parties’.
- [2] The reasons for our approval follow.

PARTIES TO THE TRANSACTION

Primary acquiring firm

- [3] The IDC is a state-owned development finance corporation that is mandated to promote economic growth and industrial development and develop domestic industrial capacity. It further provides financial support, skills development to entrepreneurs who are in competitive industries through loans, equity and other financial instruments. The IDC holds interests in a number of firms in industries such as agriculture, tourism, financial services and textiles and clothing. Of relevance to this merger transaction is the IDC's interests in firms in the textile industry.¹

Primary target firm

- [4] Celrose is a clothing manufacturer located in Tongaat and Isithebe in the province of KwaZulu Natal and supplies clothing retailers such as the Edcon group ("Edcon") and other retailers in South Africa and Zimbabwe.
- [5] Celrose owns Eddels (Pty) Ltd ("Eddels") a footwear manufacturer located in Pietermaritzburg, KwaZulu Natal that also supplies retailers including Edcon and other retailers in South Africa and Zimbabwe. Edcon holds a 55% controlling shareholding Celrose and the remaining non-controlling interests are held by Mr John Comely (13%) and the Celrose Staff Empowerment Trust (32%).
- [6] We collectively refer to Celrose and Eddels as the 'Target group'.

PROPOSED TRANSACTION AND RATIONALE

- [7] In terms of the Sale Agreement between the IDC and Edcon, it is envisaged that the IDC will acquire Edcon's 55% controlling shareholding in Celrose. Upon implementation of the merger transaction, the IDC will exercise direct control over the Target group.
- [8] The merger transaction in its essence is to raise emergency funding to keep Edcon trading as it is financial distress, until the broader restructuring is implemented,

¹ Prilla 2000 (Pty) Ltd ("Prilla"); Glodina Towelling (Pty) Ltd ("Glodina"); Sheraton Textile Holdings (Pty) Ltd; Herdmans SA (Pty) Ltd and Eerste Flambeau Huur (Pty) Ltd.

which is to be notified to the Commission as stated by Mr Garden, on behalf of the merging parties.

COMPETITION ASSESSMENT

[9] The Competition Commission (“ the Commission”) investigated and considered the activities of the merging parties and found no horizontal overlap because the IDC does not hold an interest in any entity that is involved in the manufacture and supply of clothing and footwear products. Even though the IDC holds interests in firms that are in the broad textile industry such Prilla or Glodina that manufacture and supply terry towels, none of these entities manufacture products that could be substitutes to the products of the Target group. In addition, the Commission found no vertical relationships to exist between the merging parties. From the above, the Commission concluded that the merger transaction is unlikely to change the structure of the market or result in any substantial or lessening of competition in any market.

Our analysis

[10] We did not raise any concerns regarding the Commission’s competition analysis and therefore have no reasons to part ways with their findings.

PUBLIC INTEREST

[11] The merging parties submitted that the merger transaction will not result in any job losses or redundancies in South Africa. In order to ascertain whether the merging parties’ employees had any concerns, the Commission contacted Ms Legodi, the employee representative of the IDC; the trade union representatives of the Target group being, the South African Clothing and Textile Workers’ Union (SACWTU) and the National Union of Leather and Allied Workers (NULAW).

[12] Ms Legodi indicated that the IDC’s employees did not raise any concerns. This was however not the case with SACTWU and NULAW, which we discuss below.

SACTWU

[13] SACTWU raised concerns about the future of Celrose in respect of employment; the remaining shareholders in Celrose; the growth of Celrose following the

implementation of the merger. It was concerned that employees would not retain ownership stakes in and be represented on Celrose's board and, most importantly, that Edcon would not purchase clothing and footwear products from Celrose after the implementation of the merger.

- [14] The Commission directed these concerns to the merging parties for their views and comments. First, the merging parties assured the Commission and SACTWU that the *status quo* will remain in so far as it concerns the following: (i) Celrose's staff representation on its board ii) the shareholding structure at Celrose (iii) employees ownership stake in the Celrose Empowerment Trust (iv) the IDC's intention to grow Celrose and increases jobs over the next two to three years and (v) Edcon's continued procurement from Celrose.
- [15] Be that as it may, SACTWU still had reservations in respect of job losses in that absent any commitments that post-merger, Edcon will continue to procure the same or similar volumes of footwear and clothing from Celrose, it was likely that employees at Celrose would be adversely impacted.

NULAW

- [16] NULAW's concerns, unlike those of SACTWU, were not predicated on the supply terms between Edcon and Celrose. Instead, NULAW sought the merging parties to confirm whether the Target group's employees would be transferred to the IDC under the same employment terms and conditions applicable pre-merger. NULAW further required from the Commission that a 5-year moratorium on job losses be imposed as a condition to the merger to safeguard its members' jobs.
- [17] In response, the merging parties submitted first that a transfer of employees was unnecessary as the merger transaction envisaged a sale of shares and not a transfer of a business as a going concern. Therefore, the merger transaction would not have a negative impact on jobs in South Africa.

Commission's submissions

- [18] In respect of SACTWU's concerns, the Commission alerted SACTWU to clause 4.1.2.6 of the Sale Agreement, a condition which provides that Celrose, Edcon and Eddels have amended the existing merchandise supply agreement entered

into on or about 23 April 2012 on terms reasonably satisfactory to the parties thereto and the purchaser. Effectively, the assurances which SACTWU sought would be catered for in the amended merchandise supply agreement ("Merchandise Supply Agreement"). SACTWU however remained apprehensive as the aforementioned agreement would be concluded post-merger and therefore it was not clear whether its concerns were addressed.

[19] In respect of NULAW's concerns and suggested moratorium condition, the Commission explained to NULAW its role in merger transactions and its powers thereto in terms of the Act and in the context of this transaction. It further communicated to NULAW about its preliminary findings that the merger transaction is unlikely to result in any job duplications that may necessitate retrenchments. Given this finding and that the merging parties previously made a legally binding unequivocal undertaking that job losses would not occur, should the merging parties act contrary to this undertaking, the Commission would be well in its right to exercise its power to revoke and or seek an administrative penalty in terms of section 16(3) of the Act. With that said, NULAW indicated that it no longer wished to persist with its 5-year moratorium on job losses in order to safeguard its members' jobs. However, it subsequently required assurance that Edcon will continue to procure from the Target group post-merger to secure jobs, as SACTWU had sought.

[20] The Commission explored whether the concerns raised by the trade unions necessitated intervention and whether such concerns were merger specific. The Commission found that the concerns raised by the trade unions on the likely effects on employment should Edcon not procure the same volume of goods from the Target group post-merger were indeed merger-specific. Edcon constituted a substantial portion of the Target group's total turnover and sales over the past 12-month period. As such, the Commission found that the concerns raised by the trade unions were credible and real from an employment perspective.

[21] In respect of the undertaking envisaged in the Merchandise Supply Agreement, the Commission was of the view that this agreement addressed both SACTWU and NULAW's concerns in relation to continued procurement by Edcon from the Target Group to secure the jobs of the Target group's employees. Effectively, this

agreement as envisaged in clause 4.1.2.6 ensures that Edcon will continue to procure the same volumes of merchandise from the Target group once the merger transaction has been implemented. In addition, the Commission noted that should the merchandise agreement not be concluded, the merger would fail. Edcon therefore has an incentive to conclude this agreement and implement its intended restructure or risk being placed into business rescue or liquidation proceedings.

- [22] In order to properly and effectively address the trade unions' employment concerns in spite of the undertakings given by the merging parties, the Commission was of the view that it could not impose a condition of any sort on Edcon as it is not party to the merger transaction. To ensure that no adverse effects on employment occur, the Commission recommended that the merger be approved subject to the following condition:

"3.1 The Target Firm shall not retrench any employees as a result of the merger."

- [23] This was the original employment condition we (including the merging parties) received together with the Commission's merger recommendation. During the hearing, we expressed some reservations about its perpetual nature and how the Commission sought to enforce and monitor it. After all parties had made their submissions at the hearing, we decided to amend the conditions. Our analysis thereto is discussed below.

Our analysis

- [24] We enquired about the duration of the condition and the monitoring conditions as it seemed to suggest that it would apply in perpetuity given the absence of a specified time period the condition would operate. This raised the question of enforceability and how the Commission sought to overcome this.
- [25] Mr Mfuphi, on behalf of the Commission, indicated to us that initially, it had placed a two year moratorium however the position changed as the Commission took the view that the merging parties unequivocal undertaking that no job losses would take place was not bound by a time limit.² In addition, if a party such as

² Transcript (T), page (pg.) 7, line (l) 107-114.

SACTWU approached the Commission, perhaps a number of years down the line, about merger specific retrenchments the Commission would be obligated to investigate those retrenchments as a potential breach to the conditions. And so, from a practical perspective, this would not take away from the Commission's resources.³ Be that as it may, the Commission drew our attention to the Tribunal's decision in the *Anheuser-Busch InBev SA/NV and SABMiller PLC*⁴ (*AB InBev*) merger where the Tribunal expressed the undesirability of indefinite conditions. Mr Gumbie, also on behalf of the Commission, amplified Mr Mfuphi's submission by clarifying that paragraph 4.3 of the conditions obliged the merging parties to provide proof of compliance with the conditions, not for an indefinite period, and to confirm that the conditions were circulated within the year of implementation of the merger. Therefore, the condition is not a continual commitment and because no specific duration to the condition had been placed does not necessarily mean that it would operate in perpetuity.⁵

[26] We asked the parties whether they would take issue if we sought to amend the condition to include a time duration. No party raised any objection to this.

[27] For purposes of certainty and in view of the Tribunal's *AB InBev* decision and previous conditionally approved merger transactions that have come before the Tribunal, we concluded that it would be appropriate to include a time period on the employment condition. This would enable not only the Commission and the merging parties to know for sure as to how far their obligations extend but to ensure that all stakeholders are aware and certain as to how many years the merging parties are barred from engaging in merger specific retrenchments. As such, we amended the condition to read:

"3.1 The Target Firm shall not retrench any employees as a result of the Merger for a period of five (5) years from the Implementation Date."

[28] This amended condition was accepted by the parties and is contained in "Annexure A" attached to these reasons.

³ Ibid I 114-122.

⁴ LM211Jan16.

⁵ T, pg. 7 – 8.

- [29] We further enquired from the parties about clause 4.1.6.2 in relation to the Merchandise Supply Agreement and how the merging parties undertaking thereto aimed to satisfy the concerns raised by the trade unions.
- [30] Mr Garden explained that the Merchandise Supply Agreement made provision for a minimum procurement spend in terms of Edcon's procurement from the Target group. In other words, Edcon wished to maintain the status *quo* with the intention that the minimum procurement spend would increase in future. In addition, Edcon has a longstanding relationship with the Target group and will continue to trade with it.
- [31] Miss Moonsamy on behalf of the IDC, assured us that the IDC had conducted its due diligence which extended to the buyer level to ascertain an understanding from Edcon in terms of what its local procurement would look like given its new trading model and to ensure that there is still significant demand that the Target group can supply Edcon which will allow the IDC to continue at an economically feasible position.⁶ The IDC has tried to the best of its ability to ensure that the supply agreement is close to finalisation and that the minimum procurement spend ensures that the IDC will maintain the current levels of employment.⁷
- [32] Mr Comely, the Chief Executive Officer (CEO) of Celrose confirmed that the Target group had worked diligently and was involved in the entire process and is satisfied with the minimum spend requirement which will protect current jobs in the organisation.⁸
- [33] As indicated in its recommendation, the Commission was satisfied with the undertakings envisaged in the Merchandise Supply Agreement as it sought to address the potential job losses that would have occurred in the event Edcon did not maintain current procurement levels from the Target group.
- [34] The Commission confirmed that it informed the trade unions about its decision to conditionally approve the merger transaction. NULAW did not respond to the Commission's e-mail dated, 8 April 2019 informing it of such decision. SACTWU in

⁶ T, pg. 32, I 652-662.

⁷ Ibid I 663-667.

⁸ T, pg. 35, line 712-715.

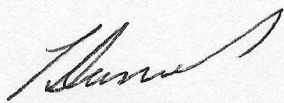
its letter to the Commission, dated 5 April 2019, indicated that it had no objections to the recommended condition.

- [35] In light of the submissions put forward by Mr Garden and the representatives of the IDC and the Target group, we were satisfied the minimum procurement spend as envisaged in the Merchandise Supply Agreement addressed the issue of potential job losses and that Mr Comely was involved in the entire process and he himself expressed satisfaction and confidence that the agreement will ensure sustainability of the Target group and will protect employment. Further, we were of the view that the trade unions would be given comfort that the condition imposed including the 5-year moratorium would address their concerns.
- [36] We were however aware that the Sale Agreement and Merchandise Supply Agreement before us were draft versions. We therefore requested the merging parties to avail the final signed versions in order to confirm their submission to us. Mr Garden assured us that the final versions of the agreements would be sent to us on 11 April 2019 before we issue our order.
- [37] Lastly, given that the Merchandise Supply Agreement is such an important document on which the condition to this merger rests, we were of the strong view that it be incorporated into the conditions, especially under the monitoring and compliance section which, compels the Target Firm shall submit an affidavit on each anniversary of the Implementation Date that Edcon has complied with its obligations in terms of the Merchandise Supply Agreement. This would assist the Commission in ensuring that the condition is complied with fully.

CONCLUSION

- [38] We were accordingly satisfied that the merger transaction is unlikely to result in any substantial and or lessening of competition in any market. In terms of the public interest, although the trade unions initially had reservations about the merger's effect on the Target group's employees, the conditions imposed as amended by the Tribunal addressed these reservations accordingly. No concerns were raised in so far as the other public interest grounds are concerned.

[39] As such, we approved the merger transaction subject to the conditions contained in 'Annexure A' of these reasons.



Mr Enver Daniels

26 April 2019

Date

Mrs Medi Mokuena and Prof. Fiona Tregenna concurring

Tribunal Case Manager : Ndumiso Ndlovu

For the Merging Parties : M Garden of ENSafrica

For the Commission : A Mfuphi and W Gumbie

ANNEXURE A

THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA SOC LIMITED

AND

CELROSE PROPRIETARY LIMITED

CASE NUMBER: 2019MAR0039

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:-

1.1.1. “**Acquiring Firm**” means The Industrial Development Corporation of South Africa SOC Limited;

1.1.2. “**Approval Date**” means the date on which the Merger is approved by the Tribunal and as set out in the Tribunal’s clearance certificate (Notice CT 10);

1.1.3. “**Celrose**” means Celrose (Pty) Ltd;

1.1.4. “**Commission**” means the Competition Commission of South Africa;

1.1.5. “**Conditions**” means the conditions set out herein;

1.1.6. “**Days**” means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.1.7. “**Edcon**” means Edcon Limited;

1.1.8. “**Eddels**” means Eddels Shoes (Pty) Ltd a wholly owned subsidiary of Celrose;

1.1.9. “**IDC**” means the Acquiring Firm;

1.1.10. “**Implementation Date**” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.1.11. “**Labour Relations Act**” means the Labour Relations Act, 66 of 1995 (as amended);

1.1.12. “**Merchandise Supply Agreement**” means the strategic merchandise supply agreement concluded between Edcon, Celrose and Eddels on 10 April 2019.

1.1.13. “**Merger**” means the acquisition of control by the Acquiring Firm over the Target Firm;

1.1.14. “**Merging Parties**” means the IDC and Celrose;

1.1.15. “**NULAW**” means the National Union of Leather and Allied Workers;

1.1.16. “**SACTWU**” means South African Clothing and Textile Workers’ Union;

1.1.17. “**Target Firm**” means Celrose and Eddels; and

1.1.18. “**Tribunal**” means the Competition Tribunal of South Africa.

2. **RECORDAL**

2.1. On 27 June 2018, the Merging Parties notified a large Merger to the Commission wherein the IDC intends to acquire control over Celrose. Following its investigation of the Merger, the Commission is of the view that the Merger is unlikely to substantially prevent or lessen competition in any market because it does not result in any overlaps.

2.2. The Merging Parties submitted that the Merger would not result in any job losses or other negative impact on employment. However, the Commission received employment concerns from NULAW and SACTWU relating to Edcon’s exit as a controlling shareholder of the Target Firm. In particular, SACTWU and NULAW are concerned that in the absence of commitments that post-merger, Edcon will continue to procure the same or similar volumes of footwear and clothing from Celrose and Eddels, it is likely that employment at Celrose and Eddels will be negatively impacted.

- 2.3. The Commission found that the concern from SACTWU and NULAW and the likely effect on employment raised by the trade unions is merger-specific because but for the proposed transaction, Edcon would remain the controlling shareholder of the Target Firm and continue to procure from the Target Firm. The Commission further found that sales to Edcon constituted a substantial portion of the Target Firm's revenue pre-merger.
- 2.4. In response to the trade unions' concerns, the Merging Parties submitted that the merger agreement has a condition precedent clause which requires Edcon, Celrose and Eddels to conclude an amended and reinstated merchandise supply agreement on terms reasonably satisfactory to each of them, and have in fact concluded the Merchandise Supply Agreement, and as such, Edcon will continue to procure products from Celrose and Eddels post-merger. In addition, the Merging Parties provided an unequivocal undertaking that the Merger will not result in any retrenchments. Despite the merging parties' submissions, SACTWU and NULAW indicated that they remain concerned about the Merger's possible effect on employment.
- 2.5. In order to address the employment concerns raised by SACTWU and NULAW, the Merger is approved subject to these Conditions.

3. CONDITIONS

- 3.1. The Target Firm shall not retrench any employees as a result of the Merger for a period of five (5) years from the Implementation Date.
- 3.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.
- 3.3. The Target Firm must, during the first five year period of the Merchandise Supply Agreement, provide reports to the Commission on the Merchandise Supply Agreement in accordance with paragraph 4.5 below.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1. The Target Firm shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.
- 4.2. The Target Firm shall circulate a copy of the Conditions within 5 (five) Days of the Approval Date to all employees of Celrose and Eddels and their trade unions or employee representatives.
- 4.3. As proof of compliance thereof, the respective Chief Executive Office or Managing Director of the Target Firm shall within 10 (ten) Days of circulating the Conditions, submit an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees and respective trade unions.
- 4.4. The Target Firm shall submit an affidavit on each anniversary of the Implementation Date, confirming compliance with clause 3 of the Conditions for the duration of the Conditions. This affidavit must be deposed to by the Chief Executive Officer or Managing Director of the Target Firm.
- 4.5. The Target Firm shall submit an affidavit on each anniversary of the Implementation Date, confirming that Edcon has complied with its obligations in terms of the Merchandise Supply Agreement. This affidavit must be deposed to by the Chief Executive Officer or Managing Director of the Target Firm.

5. GENERAL

- 5.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.
- 5.2. In the event that the Commission discovers that there has been an apparent breach of these Conditions, this shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Competition Tribunal read together with Rule 39 of the Rules for the Conduct of Proceedings in the Competition Commission.
- 5.3. The Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.