COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: FTN228Feb16

In the matter between:

The Competition Commission of South Africa Applicant

and

The Standard Bank of South Africa Limited Respondent

Panel : Yasmin Carrim (Presiding Member)
: Mondo Mazwai (Tribunal Member)
: Andiswa Ndoni (Tribunal Member)
Heard on : 03 June 2016
Reasons Issued on : 05 July 2016

Failure to Notify Reasons and Order

Introduction

[1] This matter concerned an application ("referral") brought by the Competition Commission of South Africa ("the Commission") to impose an administrative penalty on the respondent, Standard Bank of South Africa Ltd ("Standard Bank"), as a result of its failure to notify a merger implemented without the prior approval of the Commission, in contravention of sections 13A(1) and 13A(3) of the Competition Act ("the Act").

[2] Standard Bank is a financial services institution that offers, *inter alia,* transactional banking, saving, borrowing, lending, investment, insurance, risk management, wealth management and advisory services.

[3] On 5 December 2011 Standard Bank acquired 100% of the issued share capital of Halberg Guss South Africa (Pty) Ltd ("Halberg"), now referred to as Autocast South Africa (Pty) Ltd ("Autocast"). The acquisition came about as a result of Halberg defaulting on its various loan obligations to Standard Bank.[1] Standard Bank intended to dispose of the shares as soon as it found a suitable purchaser within a relatively short period of time.

[4] The Commission's Practitioner's Update, Issue 4, entitled *"The application of merger provisions of the Competition Act 89 of 1998, as amended, to risk mitigation financial transactions"* ("the Practitioner Update") contemplates acquisitions made by financial institutions as a result of their debtor's defaulting and with the view of selling such acquisitions to new purchasers as soon as the business has been turned around. In this temporary period the financial institution might exercise management control over the acquired business.

[5] Paragraphs 3, 4 and 5 of Part 5 of the Practitioner Update provides the following:

> *"3. Thus, in respect of transactions outlined in points (i) to (iii) above, where a bank acquires an asset or controlling interest in a firm in the ordinary course of its business in providing finance based on security or collateral, the Commission would not require notification of the transaction at this point. Similarly, if upon default by the firm the bank takes control of the asset or controlling interest in that firm with the intention to safeguard its investment or on-sell to another firm or person to recover its finance, a notification would not be required.*
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> *4. However, if the bank fails to dispose of the assets or the controlling interest within a period of twelve (12) months, notification would be required upon the expiry of the twelve-month period. This twelve-month period commences only when the bank assumes control over the security interest. The expiry of this period in itself will trigger notification of that acquisition if thresholds are met. In seeking an extension of this period, the institution concerned bears the onus of providing a substantial basis for non-disposal of the asset or control over the firm in question. The Commission would then exercise its discretion in granting such an extension on a case-by-case basis.*

[1] See paragraph 2 of the letter from Standard Bank to the Commission dated 19 September 2013.

5. Failure to notify the transaction upon expiry of the twelve-month period or the extended period will be construed as an implementation of a merger and the penalties in terms of Section 59(1)(d) and (2) will be applicable."

[6] Of significance for this case is that the Practitioner Update provides that the bank should only notify the Commission of such a merger in the event that it had not yet disposed of its controlling interest after twelve months of it acquiring control of the firm. Expiry of this period would trigger notification of the merger to the Commission which would require the payment of the prevailing filing fee. It bears mention that at the time of hearing this application, the Commission had extended this 12 month period to 24 months.

[7] Standard Bank wrote to the Commission on 18 January 2011 and submitted that it made the acquisition of Halberg/Autocast with a view to turning the business around within a year and selling it to recoup its loans and associated costs.[2]

[8] By 5 December 2012 (upon the expiry of the twelve month period stipulated in the Practitioner Update), Standard Bank had not yet disposed of its controlling interest.

[9] Nine months after the expiry of the twelve month period, on 11 September 2013, Standard Bank became aware that the twelve month period had expired and that it had failed to request an extension. On 19 September 2013, by way of a letter, Standard Bank approached the Commission to request an extension in order to dispose of its interest. In this letter, Standard Bank expressed the various steps it had taken in an attempt to sell Autocast and that it was in the process of engaging management for a potential Management Buyout ("MBO"). Standard Bank therefore requested an extension from the Commission until 1 January 2014 to dispose of Autocast.[3] The MBO would be a small merger and would therefore not be notifiable.

[10] On 6 November 2013 the Commission denied Standard Bank's request for an extension and indicated its intention to investigate Standard Bank for prior implementation. Thereafter, on 12 December 2013, Standard Bank disposed of the shares in terms of the MBO. All suspensive conditions in respect of the sale of the Shares were fulfilled on 12 December 2013.

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[2] See paragraph 9 of the letter from Standard Bank to the Commission dated 18 January 2011.
[3] See Standard Bank letter of 19 September 2013 paragraphs 7-12.

[11] On 2 October 2015, after a period of 23 months, the Commission informed Standard Bank that its conduct constituted the implementation of a merger without approval in terms of section 13(A)(3) of the Act.

[12] Standard Bank denied that it had contravened the Act. The Commission and Standard Bank entered into settlement proceedings. The parties were unable to reach agreement on the appropriate penalty and the matter was eventually heard as an opposed application at the Tribunal.

[13] It was common cause that upon the expiry of the twelve month period in the Practitioner Update, Standard Bank either had to request an extension or notify the merger, neither of which it had done. Therefore the issue for determination for the Tribunal was whether an administrative penalty was appropriate and if so, the quantum thereof by having due regard to the factors set out in sections 59(3) and 59(2) of the Act.

[14] At the hearing the Commission persisted with the administrative penalty sought in its application, being R 1 000 000 on the basis that Standard Bank had contravened the Act.[4]

[15] The Commission relied on the methodology for calculating an administrative penalty that was used in the matter between *the Competition Commission and Aveng Africa Limited t/a Steeldale and Others* ("the Aveng case")[5]. That matter concerned a contravention of section 4(1)(b) of the Act. In that case the Tribunal developed the methodology by having regard to the European Commission Guidelines[6] ("the EC Guidelines") in relation to contraventions of Article 81 and Article 82,[7] as recommended by the CAC in *SPC, Contrite v Competition Commission,*[8] but adapting some features of the approach to meet the requirements of our Act.[9]

[16] Standard Bank submitted that its failure to seek an extension of the twelve month period was a *bona fide* error and that when it became aware of its failure, it acted responsibly and openly and contacted the Commission promptly. The Commission

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[4] Commission's heads of argument paragraph 41 page 11.
[5] Case no. 84/CR/Dec09 and 08/CR/Feb11.
[6] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C210/02).
[7] Relating to the abuse of dominance and cartels.
[8] Case no, 106/CAC/Dec2010
[9] *Aveng* paragraphs 132 and 133.

was made aware from early on that Standard Bank intended to dispose of Autocast as soon as it was able to find a purchaser. The additional period for which it had held the shares was relatively short and it ought not to be mulcted with an administrative penalty at all or one that was merely, for these reasons, symbolic.

The relevant provisions of our Act

[17] Section 13A(1) of the Act provides as follows:

"*(1) A party to an intermediate or a large merger must notify the Competition Commission of that merger in the prescribed manner and form.*"

[18] Section 13A(3) of the Act provides as follows:

"*(3) The parties to an intermediate or large merger may not implement 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.*"

[19] Section 59(1)(d)(i) and (iv) of the Act provides as follows:

"*(1) The Competition Tribunal may impose an administrative penalty only—*

(d) if the parties to a merger have—

(i) failed to give notice of the merger as required by Chapter 3;

(iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act."

[20] Section 59(2) of the Act provides as follows:

"*(2) An administrative penalty imposed in terms of subsection (1) may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.*"

[21] Section 59(3) of the Act provides as follows:

"*(3) 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 respondent;

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."

[22] In section 59(1) the Tribunal is granted the power to impose administrative penalties for contraventions of the Act. This power as reflected in the use of the word "may" is a discretionary one which must be exercised with due regard to the facts of each case.

[23] In section 59(1), the Tribunal's discretion is directed to having regard to the factors listed in section 59(3) and subject to limitations in section 59(2) that any penalty imposed not exceed 10% of the firm's annual turnover in the Republic during the firm's preceding financial year, for all three types or species of contraventions which include contraventions of Chapter 2,[10] Chapter 3[11] and a contravention of or failure to comply with an interim or final order of the Tribunal or the Competition Appeal Court.[12] Unlike in the US or the EU where distinctions are drawn between Chapter 2 (prohibited conduct) and Chapter 3 type (merger control) contraventions,[13] the Act does not prescribe different sanctions for different contraventions. Instead it has granted the Tribunal the discretion to make such a distinction when we have regard to the *nature, duration, gravity and extent* of the contravention as provided in section 59(3)(a).

[24] As mentioned above, the Commission relied upon the methodology developed in the *Aveng* case to advance their computation of the penalty. This methodology, however, was applied in the context of a cartel case, namely a section 4(1)(b) contravention.

[25] We have recently stated, in *The Competition Commission of South Africa and Deican Investments (Pty) Ltd and New Seasons Investments Holdings (Pty) Ltd*[14] ("Deican Investments") that when we have regard to the nature, duration, gravity and extent of the contravention, as required by section 59(3)(a) of the Act, the fact that this is a Chapter 3, and not a Chapter 2 contravention must be given significant weight, so that

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[10] Section 59(1)(a) and (b).
[11] Section 59(1)(d).
[12] Section 59(1)(c).
[13] *Ibid.*
[14] *The Competition Commission of South Africa and Deican Investments (Pty) Ltd and New Seasons Investments Holdings (Pty) Ltd* FTN151Aug15.

a meaningful distinction is drawn between the two types of contraventions. If this is not a cartel or abuse of dominance then we are alerted to the possibility that this contravention would require a somewhat different or even lesser sanction depending on the specific facts of the matter. We then turn to consider aggravating and mitigating factors by having regard to the remaining provisions of section 59(3).

Assessment

[26] With regards to the nature of this contravention, we note that it is a failure to notify and not a contravention of Chapter 2. Standard Bank was required to notify the transaction upon the expiry of the twelve month period as prescribed by the Practitioner Update, and would have at least been liable for the prevailing filing fee of R350 000. The prevailing filing fee provides us with a rational "base" or "minimum floor" from which to compute an appropriate penalty.

[27] We then consider whether there are any aggravating or mitigating factors by having regard to the other factors listed in 59(3). If there are aggravating factors, the penalty would increase, bearing in mind the upper limit of 10% of turnover in section 59(2). Mitigating factors would have the effect of reducing the fine, if appropriate and then finally the assessment turns to whether the fine falls below the upper limit of 10% of the respondent's turnover.

[28] When viewing the facts of the current case it was accepted by the Commission that the transaction was unlikely to have resulted in any significant negative competitive or public interest effects and that it was unlikely that the merger resulted in any loss or damage to the relevant market.[15] This however, is considered by us as a neutral factor.[16]

[29] The Commission further accepted that there was no indication that Standard Bank derived any profit from the alleged contravention.[17] This was a case that involved a contravention of a technical nature and the contravention was of a short duration (approximately nine months).

[30] With regard to the degree of co-operation with the Commission, the Commission accepted that Standard Bank had co-operated with the Commission by providing

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[15] Commission's heads of argument paragraph 27 page 7.
[16] *The Competition Commission of South Africa and Deican Investments (Pty) Ltd and New Seasons Investments Holdings (Pty) Ltd* FTN151Aug15.
[17] Commission's heads of argument paragraph 29 page 8.

information to the Commission when the Commission was unaware of Standard Bank's conduct, and where such information may be used in an investigation against it.[18] The Commission itself accepted that this conduct is to be encouraged and, as a result, should be considered a mitigating factor when determining an appropriate penalty.[19]

[31] Standard Bank further submits that the failure to request an extension of the twelve month period in the Practitioner Update, and subsequently the failure to notify, was a *bona fide* error and that this should be regarded in mitigation. The Commission acknowledged that there were no *mala fides* in this case but submitted that when taken into account in determining a penalty, this should not be a significant mitigating factor and should rather be neutral.[20] We accept that Standard Bank was not *mala fide*, however it must be kept in mind that Standard Bank has an investment banking division that in the ordinary course of business acquires and disposes of shares in other companies and as such, should be more alive to the requirements and stipulations of the Practitioner Update and the Act itself.

[32] A mitigating factor is that Standard Bank has taken the following steps to ensure compliance with the Practitioner Update and to prevent similar contraventions in future:

a. Standard Bank's external legal advisors have provided competition law compliance training to key employees of the investment banking division of Standard Bank that are involved in risk mitigation transactions. The training covered the general principals of merger control, and specifically dealt with the application of the Practitioner Update and the fact that the exemption under it was limited to a twelve month period.

b. A bi-monthly meeting is held by the legal team that serves the corporate and investment banking division of Standard Bank. Within these meetings there have been regular discussions of the issue that arose with Autocast and the need to ensure compliance with the Practitioner Update.

c. A note was prepared on 13 October 2015, that expressly requests employees involved in risk mitigation transactions where Standard Bank acquires control over the business or assets of a debtor, to diarise the transaction to ensure that at least three months is allowed for requesting an extension, if necessary. In addition,

[18] Respondent's heads of argument paragraph 23 page 6.
[19] Respondent's heads of argument paragraph 23 page 7.
[20] Transcript 3 June 2016, pages 23-14.

employees are advised to inform external counsel to diarise transactions in which they are involved.[21]

[33] Finally, as a mitigating factor, it should be noted that Standard Bank had not been found to contravene the Act previously.

[34] On balance it is found that there is one aggravating factor, namely a degree of negligence on the part of Standard Bank in failing to comply with the requirements of the Practitioner Update. In mitigation, it is accepted that Standard Bank did indeed report the failure to request an extension in terms of the Practitioner Update voluntarily; has not been found to have contravened the Act previously and contravened the act for a relatively short duration.

[35] In light of the above circumstances we find that an administrative penalty not exceeding R350 000 is appropriate. The fine has been kept to the "base" amount of the filing fee given that the three mitigating factors outweigh the single aggravating factor.

[36] Now we turn to examine whether the amount of the penalty for Standard Bank exceeds 10% of the turnover of that firm.

[37] It was submitted that Standard Bank's total income was approximately R61 000 000 000, 10% of which would amount to R6 100 000 000. The administrative penalty of R350 000 does not exceed R6 100 000 000.

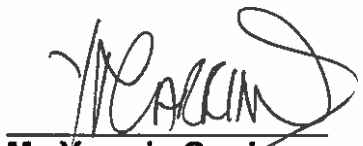
Order

[38] The respondent, Standard Bank, has contravened section 13A(1) and 13A(3) of the Competition Act.

[39] Standard Bank is fined an amount of R350 000.00 (three hundred and fifty thousand rands).

[40] The aforesaid penalty must be paid to the Commission within 20 business days of this order.

[21] See affidavit of Mark Robert Kyle paragraph 7.



Ms Yasmin Carrim

05 July 2016
DATE

Ms Mondo Mazwai and Ms Andiswa Ndoni concurring

Case Manager:	Kameel Pancham
For the Commission:	Layne Quilliam
For the Respondent:	Jean Meijer of Bowman Gilfillan Inc.