competitiontribunal
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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: VAR252Mar16

In the matter between:

AMEC FOSTER WHEELER SA (PTY) LTD Applicant

and

THE COMPETITION COMMISSION Respondent

Panel : Norman Manoim (Presiding Member)
: Andreas Wessels (Tribunal Member)
: Mondo Mazwai (Tribunal Member)
Heard on : 01 June 2016
Reasons Issued on : 13 July 2016

Reasons for Decision

Introduction

[1] This application was brought in terms of Tribunal Rule 42 for a variation of a condition, imposed upon Amec Foster Wheeler South Africa (Pty) Ltd ("Amec FW") by the Competition Commission ("the Commission") in an intermediate merger between Foster Wheeler M&M Ltd ("FW") and MDM Engineering Group Ltd ("MDM").

Background

[2] The abovementioned intermediate merger was notified to the Commission on 23 June 2014. The Commission noted that the merging parties had predicted a number of retrenchments of skilled and semi-skilled employees based on a duplication of roles, but that their inability to exchange competitively sensitive information pre-

merger, prevented them from determining with precision the identity and number of employees affected.

[3] The Commission concluded that this provided evidence that the merging parties had not followed a rational process in arriving at the number of employees to be retrenched as a result of the proposed transaction and that a balancing exercise had not been engaged upon. For these reasons, the merger was conditionally approved by the Commission on 12 September 2014.

[4] The conditions imposed by the Commission were as follows:

> *"3.1 The Merged Entity shall not, as a result of the merger, retrench any employees in South Africa for a period of 3 (three) years from the Approval Date.*
>
> *3.2 Within the context of paragraph 3.1 above, retrenchments do not include voluntary separation agreements, voluntary early retirement packages and unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, No. 66 of 1995, as amended."*

[5] The conditions also make provision for variation:

> *"4.9 The Merged Entity may, for as long as any of the above Conditions remain in force, approach the Commission to revise the above Conditions on the basis that changes in the market, economic and regulatory conditions justify such revision."*

[6] Amec FW accepted the conditional approval and did not approach the Competition Tribunal ("Tribunal") for a consideration of the merger as provided for in section 16 of the Act, read with Tribunal Rule 32.

[7] On 9 December 2015, Bowman Gilfillan, the legal representatives of Amec FW, informed the Commission that Amec FW intended to approach the Tribunal to have the conditions varied. The Commission's response was that the merging parties

should launch the application in order to trigger the Commission's obligation to investigate the allegations made in the application.[1]

[8] On 9 March 2016, the merging parties brought a formal application in terms of Tribunal Rule 42 to vary the conditions before the Tribunal. The crux of this application was that economic circumstances had changed following the conditional approval of the merger and that the merged entity was experiencing a reduction in revenue and profitability that threaten its ability to remain sustainable.

[9] On 11 May 2016, having investigated the allegations in the merging parties' application, the Commission filed a notice with the Tribunal indicating that it did not intend opposing the variation order sought by the merging parties. This was primarily based on the fact that competitors of the merging parties contacted by the Commission had confirmed that the Engineering, Procurement, Construction and Project Management ("EPCM") services industry was under pressure due to declining mining projects and the weak oil and gas sector resulting from low prices of oil and gas.

[10] Furthermore, according to the Commission, the merging parties had demonstrated that the envisaged retrenchments were merger-specific as they were a consequence of duplications arising due to additional human capital that was acquired as a result of the merger.

Jurisdiction

[11] At the hearing on 1 June 2016, the parties were questioned by the Tribunal as to why the matter was before the Tribunal and not the Commission, given the provision for variation in the Commission's conditions. The Applicant conceded in this regard that the merger condition makes provision for a direct approach to the Commission to alter the conditions, but explained (as in paragraph 7) that upon informing the Commission of its intention to launch the application in the Tribunal, the Commission's response was that the Applicant should launch the application to the Tribunal for the matter to be decided.

[12] It was evident in this case that the Commission was uncertain on how to proceed with the amendment application and this led to the merging parties on its advice, incorrectly approaching the Tribunal at first instance. The Competition Act ("the Act")

[1] Transcript page 1 lines 18-21.

gives the Commission the power to approve, prohibit or conditionally approve intermediate and small mergers.[2] The Act is, however silent on whether the Commission would also have the jurisdiction to amend conditions it has imposed. However, the power to impose a condition on intermediate and small mergers, must logically, absent any statutory provision to the contrary, include the power to amend these conditions subsequently. We are thus of the view that the Commission would have the jurisdiction to revisit its own conditions in intermediate and small mergers, at least in circumstances where the conditions provide for it do so. We do not need to address the issue of whether the Commission would have such power if the conditions had not provided for it to amend the conditions.

[13] In light of the approach taken by the Commission, we consider it instructive to set out the following on the question of the Tribunal's jurisdiction:

a. In circumstances where an application is brought by way of consideration under section 16 read with Tribunal Rule 32 to amend conditions to an intermediate merger (or reverse a prohibition decision by the Commission, as the case may be), the Tribunal would naturally have jurisdiction over the matter.

b. However, in circumstances where the Commission imposes conditions in an intermediate merger in which it reserves the right to revisit its own conditions, and where no consideration application is brought under section 16, the Tribunal would not have the required jurisdiction to amend the conditions.

c. Where a dispute between the Commission and the merging parties regarding a variation or amendments to merger conditions imposed by the Commission arises in circumstances described in (b) above, then the Tribunal would have jurisdiction in terms of the general powers provided for in Tribunal Rule 42 to amend the conditions.

[14] In this case, the Commission had reserved its right in an intermediate merger to amend its own conditions in clause 4.9 of the conditions, as set out above. As also mentioned, the Commission indicated that it was satisfied with the reasons for the amendments and did not oppose them.

[2]Section 13(5)(b) in the case of small mergers and 14(1)(b) in the case of intermediate mergers.

[15] In light of this we directed the Commission to issue amended conditions and stipulate the applicable date for the amended conditions.

Ms Mondo Mazwai

13 July 2016
DATE

Mr Norman Manoim and Mr Andreas Wessels concurring

Case Manager:	Mr Kameel Pancham
For the Applicant:	Adv Greta Engelbrecht instructed by Mr Judd Lurie of Bowman Gilfillan
For the Commission:	Mr Ziyaad Minty