COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018457

In the matter between:

BUCKET FULL (PTY) LTD Primary Acquiring Firm

And

CARTONS AND LABELS BUSINESS OF NAMPAK PRODUCTS LIMITED Primary Target Firm

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Panel	: Dr T Madima (Presiding Member)
	: Ms A Ndoni (Tribunal Member)
	: Prof F Tregenna (Tribunal Member)
Heard on	: 2 July 2014
Order Issued on	: 9 July 2014
Reasons Issued on	: 6 August 2014

Reasons for Decision

Approval

[1] On 9 July 2014, The Competition Tribunal ("**Tribunal**") conditionally approved the acquisition by Bucket Full (Pty) Ltd for all the issued shares in Cartons and Labels Business.

[2] The reasons for approving the proposed transaction follow hereunder.

Parties to the transaction

[3] The primary acquiring firm is Bucket Full (Pty) Ltd ("**Bucket Full**"), a wholly owned subsidiary of CTP Limited ("**CTP**"). CTP is in turn a wholly owned subsidiary of CAT Publishers and Printers Limited ("**CAT Publishers**"). CAT Publishers is wholly owned by Caxton and CTP Publishers and Printers Limited ("**CAT**").

[4] CAT is a publically traded company and listed on the Johannesburg Securities Exchange ("**JSE**"), it is solely controlled by Mr Moolman through his shareholdings in other companies. It is through these companies that Mr Moolman can vote a majority at CAT and appoint or veto the appointment of the majority of the directors at the firm. Mr Moolman therefore exercises sole control over CAT. Major shareholders of CAT include; Caxton Limited, Publically held (including directors and management), Element One Limited and Allan Gray (Pty) Ltd.

[5] The primary target firm is Cartons and Labels Business, a division within Nampak Products Limited ("**Nampak Products**"). Nampak Products is a publicly traded company which is listed on the JSE.[1] Nampak Products is a wholly owned subsidiary of Nampak Limited ("**Nampak**") which is the parent company of the Nampak Group. The Cartons and Labels Business does not directly or indirectly control any other firm. Major shareholders of Nampak include; Allan Gray Investment Council, Public Investment Commission, Fidelity International Limited, Sanlam Investment Management, Red Coral, Black Management Trust, Abax Investments, The Vanguard Group Inc., Capital Group Companies and Stanlib Asset Management.

Proposed Transaction

[1] Allan Gray Investment Council, Public Investment Commission, Fidelity International, Sanlam Investment Management and Red Coral.

[6] Bucket Full will acquire the Cartons and Labels Business as a going concern. Post-merger, the Cartons and Labels Business will be solely controlled by Bucket Full.

Rationale

[7] There has been a general decline in the cartoons and labels industry in addition, operations and pricing pressures have further forced a number of industry players to consolidate their operations or radically rationalise operations. The merging parties have also been affected by declines in business; therefore, electing to consolidate their companies. The CAT Group views the Carton and Labels Business as complementary to its current packaging business which will grow the CAT Group's geographic presence. The consolidation will also enable the CAT Group to leverage its expertise and experience in the paper and board market to achieve economies of scale and thus realise efficiencies within the Cartons and Labels Business.

[8] The acquisition is also a critical part of the CAT Group's diversification strategy from its traditional printed media business. This will ensure long-term sustainability and growth for the CAT Group and this affords it an opportunity to re-invest the proceeds in other developments. CAT intends to invest in the combined packaging businesses to ensure that all operations are properly equipped with the latest technology to ensure the sustainability of these businesses.

[9] Similarly for Cartons and Labels Business, the industry is in a mature and declining market vulnerable to imports from low cost trading nations. Cartons and Labels Business requires a broader industry consolidation as the business has been ailing for a number of years. Cartons and Labels business' major customers are global multi-nationals. Numerous restructuring initiatives have been implemented in the past but due to on-going demand, Nampak Products has decided to dispose of this business to enable consolidation and to create economies of scale required to remain globally competitive and

sustainable. Nampak Products is also required to commit significant capital into its future investments in Africa.

Relevant Market and Impact on Competition

[10] The CAT Group is a publisher and printer of books, magazines and newspapers for itself and on behalf of third parties. It is a commercial printer and manufactures a range of packaging products and labels. CAT Group's business activities can be divided into; publishing, printing, distribution, advertising, ink importation and manufacturing, optical disk replication, digital publishing, stationery and packaging and labels. Relevant for this transaction are the following business activities:

- General Folding Cartons ("**GFCs**")
- Cigarette Cartons
- Wet glue paper beer labels

[11] Nampak manufactures a diverse range of metal, glass, paper and plastic packaging products. The manufactured products include; lithographic printed GFCs, gravure printed cigarette cartons, gravure printed paper beer labels, cigarette cork tipping material and lithographic laminated cartons.

[12] The proposed transaction does result in horizontal overlaps in three product markets. The first is in the market of manufacturing lithographic printed GFCs. GFCs are predominantly used in the Fast-Moving Consumer Goods ("**FMCG**") sector by suppliers to package a range of products such as food packaging, detergents, beverages, confectionary and household products. The second is in the market of gravure printed cigarette cartons which are only used in the tobacco industry and the third is in the market of long-run gravure wet glue paper beer labels.

[13] The relevant geographic market is national with potential competition from imports in the, (i) market of manufacturing lithographic printed GFCs, (ii) the

market for gravure printed cigarette cartons; and (iii) the market for wet glue paper beer labels.

GFC market

[14] The merged entity will have a market share of approximately 40.1%, this represents a 34.1% accretion for CTP's market share. The market shares indicate that the Cartons and Labels Business has lost a 14% market share in the last 5 years to competitors other than CTP. Other competitors in the market include; Golden Era which has a market share of 36%, Shave & Gibson 13.8%, Transpaco 5.4%, Triumph 4.2% and Keypack 0.5%. The Commission is of the view that there are a number of smaller players in the market such as Propoint, Masterpack and Magnum and an estimated 10% market share belongs to these small players. It must be noted that competitors have sufficient spare capacity to meet an increase in demand, should the merged entity decide to increase the price of GFCs.

[15] A distinction must be drawn between multi-national and large-national customers on the one hand and small and medium-sized customers on the other hand. These are all customers of the merging parties. Each of these customers has varying degrees of countervailing power, including, multi-nationals using tenders for their regional requirements which attracts bids from international suppliers. This results in these customers being able to play these suppliers against one another. They use international benchmarking practices in order to negotiate lower prices from the merging parties. Whilst small and medium sized national firms indicate that there are sufficient alternative suppliers, which they can switch to in the event of a price increase by the merging parties. The Commission is therefore of the view that the merged entity is unlikely to unilaterally increase the prices of GFCs.

[16] The co-ordinated effects are unlikely to facilitate or create co-ordination amongst GFC suppliers as there is significant asymmetry between the market shares and between the market shares of GFC competitors. Customers have countervailing power which reduces the ability for suppliers to co-ordinate

their competitive behaviour, as customers are able to monitor and interrogate costs and price increases. The barriers to entry on a small scale are relatively low and there are no regulatory barriers, evidence suggests that small scale entries are able to grow their business and compete with incumbent firms. New and second hand equipment is also readily available. Unlike barriers to entry at a larger scale which is much higher and significant capital investment is required.

Cigarette Carton market

[17] The merged entity will have a market share of approximately 77.5%, CTP has a market share of 14.3% and Nampak has a market share of 63.2%. The proposed transaction will result in CTP being the dominant competitor in the market. This is a highly concentrated market with only 2 other competitors namely, Rotoprint which has a market share of 17.1% and Golden Era which has a market share of 5.4%. Despite this the Commission still considers the transaction unlikely to raise competition concerns as the large customers of the merging parties have countervailing power.

[18] BAT SA, the merging parties largest customer accounts for 96% and 86% sales respectively for CTP and Nampak. The balance of sales is acquired by BAT Kenya and BAT Nigeria. BAT SA uses international benchmarking exercises and global tenders in order to compare the prices of different suppliers. The Commission is of the view that the above conduct is a legitimate threat and is likely to constrain the merged entities. BAT SA is not concerned about the proposed merger; it has a long term supply agreement in place until 2016 relating to the pricing and quality supply from the merged entity.

[19] The Commission is also of the view that BAT SA has additional countervailing power which includes; (i) BAT SA suppliers are required to provide a cost breakdown, (ii) BAT SA manages and negotiates the price of raw input material which is supplied to the merging parties directly with the raw material suppliers, and (iii) BAT SA indicated that it can procure cigarette cartons from

international suppliers. The Commission concluded that the proposed transaction is unlikely to result in unilateral effects.

Wet glue beer labels market

[20] The merged entity will have a market share of approximately 63%, CTP has a market share of 43% and Nampak has a market share of 19%. The proposed transaction will result in CTP being the dominant competitor in the market. This market is also highly concentrated with only 2 other competitors, Spear with a market share of [redacted] and Topfer.[2]

[21] SAB is also a significant customer to both the merging parties, accounting for 78% sales for CTP and 89% for Nampak. SAB controls the market share position of all the suppliers by deciding how much of their purchases to allocate to each supplier. SAB imports 19% of its wet glue paper beer labels and has indicated that it is constrained from importing more than 20% due to BBBEE codes and the foreign exchange risk. SAB has raised a concern that the proposed merger is likely to result in unilateral effect, however, the Commission disagrees as SAB has sufficient alternative options for the supply of wet glue paper beer labels and it also exercises countervailing power.

[22] Spear is the only other local SA supplier of wet glue paper beer labels and has excess capacity of approximately [redacted]%. It has also indicating that it can easily increase its total capacity in one of three ways; firstly, by increasing their current shift from [redacted], secondly by adding a third finishing line at [redacted] and thirdly by investing in [redacted]. Spear also indicated that it can reallocate unused capacity that was originally allocated to SAB to its other customers if demand from other customers increases.

[2] The Commission was unable to obtain Topfer's sales figures and therefore unable to determines Topfer's market share.

[23] NBL is the only other common customer between the merged entities. It has raised no concerns as it can make use of alternative labelling methods (self-adhesive labels) and other wet glue paper beer label suppliers.

[24] According to the Commission SAB can switch some of its demand to imports and Spear to discipline the merged entity in the event of uncompetitive price increases. The Commission concludes that SAB appears to have alternative options of wet glue beer label supply for its most popular beer brands. It is also satisfied that the procurement methods of SAB show that it has countervailing power which is likely to disrupt any anti-competitive behaviour that may be caused by the merged entities. The Commission is of the view that co-ordinated effects are unlikely to disrupt asymmetry in the market shares of the merged entity and its suppliers.

Public Interest

[25] The are a number of issues relating to employment; the first is whether the retrenchments are merger related, the second is the actual number of the non-merger specific employment retrenchments, and the last issue is how many years the moratorium should be in place for . The merging parties called the following witnesses to testify in this regard: Mr Morris and Mr Holden.

Employment issues

[26] The Cartons and Labels Business has indicated that it intends retrenching 151 employees irrespective of the merger due to the current declining profitability. CTP submits that it would need to retrench 122 employees due to poor financial performance of the target firm, duplication of employment positions resulting from a consolidation of manufacturing facilities and investment in more efficient equipment. The merging parties claim these retrenchments are not merger specific and are necessary in order to lower the employee costs of the target firm in order to become globally competitive and as efficient as its rivals.

[27] The Commission is of the view that there is sufficient evidence to support the view that all of the claimed non-merger specific retrenchments are in fact as a result of the merger. In support of this view the Commission referred to internal documents reflecting that the target company prepared budgets for retrenchments and e-mail correspondence between the merging parties at negotiation stage showing that the acquiring firm was not willing to proceed on the basis of the high employment costs at the target firm and had planned to make significant retrenchments.

[28] The Commission finds that the 115 merger specific retrenchments are significant and are of semi or unskilled employees. This poses a problem as there is a general decline in the cartons and labels industry. It is therefore unlikely that these employees will find alternative employment in the short term. Thus the merger specific retrenchments are substantial and are of concern.

[29] The Commission also finds that the parties could not provide evidence showing that they would be in a worse competitive position should they not lower their cost through retrenchments.

[30] The Commission was unable to demonstrate that the retrenchments were merger specific. The evidence produced by the Commission such as emails and correspondence was not sufficient to prove that the retrenchments were decided as the result of the merger.

Non-merger related retrenchments

[31] The Commission is of the view that only 66 employees should be non-merger specific retrenchments; it asserts that the number provided by the merging parties of 88 employees is incorrect and calculated erroneously. The Commission relies on documents received from the merging parties to reach the conclusion that any other retrenchments would be related to the merger. It highlights that CTP went into the negotiations with Nampak knowing that the

size of the business of the target firm was not going to work and retrenchments would need to occur.

[32] According to the Commission, CTP would be compensated for the retrenched employees. The merging parties dispute the allegations made by the Commission. Nampak indicated that the division had made substantial losses in 2013 because of the weak economy and as a result one of the initiatives identified by management in a decision reached in May/June 2013 was retrenchment. These retrenchments are not related to the proposed merger.

[33] Mr Morris, the group executive at Nampak responsible for a portfolio of their divisions indicated that the 88 employee retrenchments were non-merger specific and a decision was taken before discussions of the merger took place.

[34] After hearing numerous submissions from both parties the Tribunal was of the view that clause 3.2 of the conditions in annexure "**A**" should be deleted which reads, "*Clause 3.1 excludes the retrenchment of 66 Non-Management Employees, who would have been retrenched by the Cartons and Label Business irrespective of the Merger*". It was of the view that the hearing does not have jurisdiction to address non-merger related retrenchments and the parties should rather address any retrenchments that will result from the merger if approved.

The Moratorium

Commission's view

[35] The Commission is of the view that a 3 year moratorium should be imposed on the conditions. They contend that a 2 year moratorium period is academic, in the sense that the time that it takes to implement the merger can be significant and the retrenchments or the moratorium then for a period of 2 years becomes insignificant, it is not sufficiently long enough to protect the employees.

[36] The Commission has also indicated that the 3 year period should remain in place if the Tribunal regards the recommendation. The Commission has indicated that the process that CTP has followed in identifying the number of employees that it intends to retrench as a result of this merger is not rational. The Commission indicates that this raises concern as it is unclear what the impact on merger specific retrenchments may be once this merger has been implemented. Therefore a 3 year moratorium is necessary and justifiable in the circumstances.

Merging parties view

[37] Mr Holden, the executive director of Caxton group, indicated that any extension of that 2-year to 3-year period creates risk for the contemplated merger. He indicated that they will further not be able to affect the cost-savings or rationalisation as quickly as they would have liked to. He further indicated that an extension will not sit favourably with customers and this could potentially have a negative influence on the business. The merging parties need the moratorium to be as short as possible but as a compromise they are willing to accept a 2 year moratorium.

[38] The merging parties further indicate that there are measures in place such as clause 4.4 of the conditions, which stipulates that, "*The merging parties have to submit a report to the Commission annually on the anniversary of the merger implementation date. This report must confirm the number of employees retrenched as a result of the merger*". The merging parties proposed that clause 4.4 could be amended to include that when the merged entities engage in any section 189[3] process in terms of the Labour Relations Act, they would inform the Commission.

[3] Employers may dismiss employees based on their operational requirement as defined in section 213 of the Labour Relations Act.

[39] The merging parties referred to the CAC *Walmart and Massmart*[4] decision, where in deciding the moratorium, it was stated that one is involved in quite a complicated balancing exercise economically. On the one hand, there is a clear consumer benefit to allowing these retrenchments to occur and you save costs.[5] Those will be passed on in the form of better pricing to customers, promoting consumer welfare. However on the other hand, there is a detriment to the interest of the employees. You are therefore faced with the challenge of employees losing their jobs or consumers benefiting from price reductions.

[40] CAC held that it is a difficult exercise but the ultimately onus lies with the Commission, who must be in a position to persuade the Tribunal that the condition that it is proposing is necessary to address the public interest. There must thus be evidence to support a more extensive moratorium.

[41] In the *Walmart* decision which eventually imposed a 2 year moratorium, there was no reason in the circumstances to go for a more extensive remedy as proposed by the trade unions and by the Minister. The merging parties submit that the Tribunal must follow a similar approach in this instance. The merging parties are of the view that there is no need for a moratorium at all.

[42] The merging parties also referred to the *Metropolitan and Momentum*[6] decision where a 2 year moratorium was imposed. In that case the Tribunal justified that 2-year proposal *inter alia* on the basis of stating that it would take these merging parties 3 years to realise the synergies anyway. According to the merging parties what is of importance is the period that the merged parties would take in order to realise the synergies. The merging parties argue that similar to the *Momentum* decision, 2 years is more than sufficient to accommodate the welfare assessment in this scenario. This is not a question of law but ultimately a question of economies and facts.

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[4] 110/CAC/Jun11 and 111/CAC/Jun11
[5] Ibid at par 112-119
[6] 41/LM/Jul10 and 58/CAC/DEC05

[43] After hearing and considering submissions from both parties, the Commission has failed to provide sufficient evidence to support its argument that the Tribunal must impose a 3 year moratorium. The Commission have been unable to discharge the onus required. The merging parties have provided sufficient evidence to satisfy the Tribunal that a 2 year moratorium will be sufficient even though they are of the view that no moratorium is required at all. We will therefore accept the compromise of 2 years.

Conclusion

[44] In light of the above, I approve the proposed transaction subject to the condition that the merged entity shall not retrench any employees for a period of two years from the effective date as a result of the proposed transaction.

Dr T Madima

6 August 2014
DATE

Prof F Tregenna and Ms A Ndoni concurring

Tribunal Researcher:	Moleboheng Moleko and Derrick Bowles
For the merging parties:	Adv. Jerome Wilson – Bowman Gilfillan
For the Commission:	Mr Werner Rysbergen and Mr Hardin Ratshisusu