COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018713

In the matter between:

BB Investment Company (Pty) Ltd	Acquiring Firm
And	
Adcock Ingram Holdings (Pty) Ltd	Target Firm

Panel	:	Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Fiona Tregenna (Tribunal Member)
Heard on	:	06 August 2014
Order issued on	:	19 August 2014
Confidential reasons issued on	:	21 August 2014
Public reasons issued on	:	28 August 2014

(Public version)

Reasons for Decision

Approval

1. On 06 August 2014 the Competition Tribunal (the "Tribunal") heard a proposed transaction between BB Investment Company (Pty) Ltd ("BB") and Adcock Ingram Holdings (Pty) Ltd ("Adcock").

2. There are no competition concerns arising from the proposed transaction. However, the transaction raises employment concerns which came about as a result of Adcock embarking on a restructuring exercise. In this exercise, Adcock identified a total number of 51 positions as being redundant. Since the Commission was satisfied that Adcock followed a rational and fair process in identifying the redundant positions, it decided

that a moratorium on the retrenchment of the 51 employees was not warranted.

3. The Commission was however informed by the controller of BB, i.e. Bidvest Group Ltd ("Bidvest") that it intends to implement a turnaround strategy upon completion of the proposed transaction that may institute further retrenchments over and above the 51 positions. Consequently, the Commission saw the need to safeguard any further negative effects on employment that may be introduced by Bidvest post-merger. The Commission therefore recommended that we approve the proposed transaction subject to a condition that will limit the number of retrenchments at Adcock to only 51 employees identified and for a period of three years. This condition was opposed by the merging parties on the ground that the retrenchments are not merger-specific.

4. After hearing and considering submissions from both the Commission and the merging parties, we have decided to approve the proposed transaction subject to the condition that Adcock will not retrench any employees for a period of one (1) year from date of approval of this transaction. Our reasons for arriving at this decision are set out below in the section headed Public Interest.

The Parties and their activities

5. The primary acquiring firm is BB Investment, a wholly-owned subsidiary of Bidvest. Bidvest is a public listed company and is not controlled by any single firm. Its largest shareholders are the Public Investment Corporation (15.75%), Lazard Asset Management LLC Group (3.21%), Government Singapore Investment Corp (2.28%), Vanguard Emerging Markets Fund (1.81%) and Old Mutual Investments Group SA (1.72%). Bidvest controls a number of firms in South Africa and globally.[1]

[1] See Record pages 902 – 908 for a list Bidvest's subsidiaries.

6. Bidvest is a large global company involved in a diverse range of activities spanning trading, logistics and distribution. These activities include *inter alia* automotive dealerships, consumer products electrical, financial services, freight, industrial, office products, rental products and travel and aviation.

7. The primary target firm is Adcock, a public company listed on the Johannesburg Stock Exchange. Adcock is not controlled by a single firm and its largest shareholders are BB Investment (34.59%), Public Investment Corporation (25.17%), Prudential Portfolio Managers South Africa (6.59%), Retail Investors and Holdings (3.29%), Visio Capital Management (Pty) Ltd (3.26%) and Mazi Capital (Pty) Ltd 3.13%. Adcock controls a number of firms in South Africa, and Africa and India.[2]

8. Adcock is a healthcare business based in South Africa, with operations in India, Zimbabwe, Ghana, Kenya and agents in Botswana and Namibia. Adcock has two principal businesses, namely, a pharmaceutical business and a hospital products and services division. The pharmaceutical business manufactures and sells a range of branded and generic prescription and over-the counter products in a broad range of therapeutic classes such as analgesics, allergy, cardiovascular, dermatology, ear/nose/eye, feminine health, gastrointestinal and central nervous system. The hospital products and services division manufactures and sells a wide range of life-saving and life-enhancing products used in hospitals, clinics, blood transfusion centres, kidney dialysis units, laboratories and by patients at home.

Proposed transaction and rationale

[2] See pages 1073 and 1074 of the record for a list of Adcock's subsidiaries.

9. On December 2013 BB, acting on behalf of a Consortium[3], made an offer to acquire 34,5% of Adcock's issued share capital (excluding A and B ordinary shares and treasury shares), which offer was accepted. The merging parties submitted that this 34,5% shareholding compromises a non-controlling shareholding for purposes of competition law.

10. According to BB, it is now intending to acquire sole control of Adcock as contemplated in sections 12(2)(a) and/or 12(2)(b) and/or 12(2)(c) of the Act and that this transaction is in contemplation of this intent.[4]

11. Although the parties informed the Commission that the 34,5% that was acquired between December 2013 and January 2014, comprises a non-controlling shareholding for purposes of competition law, the Commission alleges that Bidvest may have implemented the acquisition before obtaining approval in contravention of section 13A(3) of the Act. The Commission states that the issue of prior implementation will be the subject of a separate investigation. However the issue of prior implementation is relevant at least to the consideration of the public interest issue and we discuss this aspect more fully below in the public interest section.

Competition Analysis

12. The Commission found that there is no horizontal overlap in the activities of the merging parties as neither Bidvest nor any of its subsidiaries are involved in any activities which are similar or can be

[3] The consortium is a joint venture comprised of Community Investment Holdings (Pty) Ltd (CIH") and BB. According to the merging parties, CIH currently holds a 10% undivided beneficial interest in the consortium and the balance (90%) is held by BB. For convenience we will refer to the consortium as Bidvest in this decision.

[4] According to the merging parties, CIH will not be acquiring additional interests which confer on it control over Adcock.

considered substitutable with the manufacturing of pharmaceutical products.

13. There is however a vertical relationship between the activities of the merging parties as Bidvest supplies pharmaceutical labels and cartons to Adcock. The Commission found that this vertical relationship is unlikely to lead to any input or customer foreclosure concerns as the supply of these products to Adcock amounts to less than 1% Bidvest's total revenue. Further, the Commission found that both Bidvest and Adcock are constrained by other players in the markets for pharmaceutical labels and cartons and the market for the manufacturing of pharmaceutical products respectively.

14. The Commission also considered whether this transaction could lead to the exchange of commercially sensitive between the CIH's healthcare companies, namely, Dismed Critical, Dismed Pharmaceuticals and Adcock as the executive chairperson of CIH (Dr. Anna Mokgokong) is now also a board member of Adcock. The Commission however concluded that the information exchange concern is unlikely to be harmful to competition as Adcock's and Dismed Critical and Dismed Pharmaceuticals' market shares are low – 9% and less than 1% respectively and approximately 90% of the pharmaceuticals manufacturing market is controlled by other competitors.

15. We therefore conclude that the merger gives rise to no competition concerns. There are no overlaps between the products and services of the acquiring firm and the target and the vertical relationships are insignificant.

Public interest Analysis

16. As outlined earlier the case raises a public interest issue around employment. The Commission has recommended that the merger be approved subject to a condition limiting merger specific retrenchments

for a period of three years. Excluded from this moratorium are 51 retrenchments contemplated by what we shall describe as the 'prior management'.

17. The merging parties oppose the imposition of a condition. They argue that the imposition if a condition will inhibit the flexibility of management to deal with the fortunes of a firm currently experiencing difficult trading circumstances.

18. The dispute between the parties was heard by us on 6 August 2014. At the hearing we heard oral evidence from one witness, Mr Kevin Wakeford, who testified on behalf of the merging parties. The Commission did not lead any witnesses.

Commission's argument

19. The Commission argues that the merging parties, contrary to what they claim, have in all likelihood already implemented the merger. Wakeford, the new chief executive officer, is the merging parties' appointee and is doing their bidding by his new proposals for retrenchment. This makes the retrenchments merger specific. Further, the merging parties have not adequately consulted their employees about the new retrenchment proposals. By contrast certain prior retrenchments (51 in total) contemplated, although not implemented by the prior management, were the product of a rational, and in any event, non-merger specific, process. The remedy they have crafted recognises this, exempts the 51 posts from the moratorium and applies it only to future 'merger specific' retrenchments.

Merging parties' argument

20. The merging parties' main argument is that the retrenchments are not merger specific and hence there is no justification for the imposition of any public interest remedy. According to Bidvest, Wakeford's proposals

cannot be attributed to the agency of Bidvest, as Bidvest is not yet a controller. Rather, Wakeford is the appointee of a 'pre-merger board' and the proposals represent his views on what Adcock needs to do to turn around its fortunes. Nevertheless, the merging parties, through Wakeford's testimony, still sought to justify the retrenchments on the grounds that Adcock is financially troubled [**deleted confidential information**].

21. Thus as we understand it the merging parties have adopted two lines of argument to justify not having a public interest condition imposed – the non-merger specificity of any retrenchments that might take place and in the alternative, even if found merger specific, that they are justified.

Analysis

Has there been prior implementation?

22. Before we go on to consider the first point in dispute over whether the proposed retrenchments are merger specific, we need to consider a prior issue of whether the merger may already have been implemented as the Commission suggests. If there has been prior implementation then Wakeford's proposals on the Commission's version of events are the product, not of a pre-merger board, but the post-merger aspirations of Bidvest, anxious to implement its strategy for Adcock as early as possible.

23. It is common cause that during 2013 Adcock was the subject of takeover proposals by two rival bidders. One, led by a Chilean company CFR, had the backing of Adcock's then board of directors led by its chairman Dr Mokhele and its managing director Dr. Jonathan Louw. The other led by Bidvest, and supported by a key shareholder the Public Investment Corporation (PIC), was eventually to prevail.

24. The Bidvest bid has involved two stages. First it offered to acquire up to 34,5% of the issued share capital of Adcock. This first stage has been attained. The second stage, which is the transaction contemplated in the present merger filing, is to acquire further shares beyond the 34,5%, which presumably, depending on the take up of the offer, would take Bidvest's holding to above 50%.[5]

25. However there needed to be a break between the stages. In the minutes of Bidvest's Acquisitions Committee in November 2013, Mr Brian Joffe, Bidvest's chief executive officer, indicated [**deleted confidential information**].[6] There is no dispute that the second stage requires notification and hence the transaction before us. What is in dispute is whether Bidvest has acquired some form of control over Adcock as a result of the first stage of the transaction.

26. At the same November meeting Joffe states:

"[**Deleted confidential information**]"[7]

27. Between December 2013 and January 2014, Bidvest acquired sufficient shares to secure a 34,5% holding. [**Deleted confidential information**].[8]

28. When the merger was eventually notified on 1 April 2014, the Commission queried these references [**deleted confidential information**] with the merging parties' attorneys. Their reply was that the reference to [**deleted confidential information**] must be taken to be a reference to the acquisition of control as contemplated in the filing.[9] Expressed differently, the merging parties contend this is a reference to the stage two part of the acquisition, not the first stage.

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[5] Merging parties' filing paragraph 2.3 record page 568.

[6] See Minutes, dated November 29, 2013, record page 152.

[7] Ibid, Record page152.

[8] Ibid, record page 157.

[9] Letter from Edward Nathan Sonnenbergs ("ENS") dated 29 April 2014, page 161.

29. However this explanation is unlikely. The minutes clearly indicate that [**deleted confidential information**]. It is not hard to see why Bidvest was in such a hurry. As Joffe emphasised at the Acquisitions Committee meeting in January 2014, there [**deleted confidential information**].

30. In a meeting of the Acquisitions Committee dated 2 January 2014, [**deleted confidential information**].[10]

31. This suggests that [**deleted confidential information**], did not mean the acquisition as contemplated in stage 2 – a process that would take some time given that it was only filed in April and would take beyond that till the merger was cleared and an offer could be made – but the acquisition of material influence over the board in the short term, i.e. after stage 1.[11]

32. The fact that there was no filing in respect of stage 1 does not mean that Bidvest no longer intended to [**deleted confidential information**] urgently. All it signifies is that for some reason it had decided not to notify stage 1 to the Commission.

33. However even if the language used in the minutes is open to a different interpretation, events that took place subsequently in February, support the Commission's interpretation of Bidvest intentions rather than that of Bidvest's attorneys.

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[10] Minutes of Bidvest Acquisitions Committee dated February 4, 2014, Record page 156.

[11] Note as well at the 2 January Acquisitions Committee meeting, [**deleted confidential information**]. These extracts are more consistent with the version of the Commission, i.e. [**deleted confidential information**]. (See Record pages 154 and 171). [**deleted confidential information**] (See record page 176).

34. In a meeting of the acquisition Committee of Bidvest on February 4, Joffe advised that [**deleted confidential information**].[12]

35. On the Adcock side, Louw reports to his board on 17 February 2014, that [**deleted confidential information**].[13]

36. On the 18th February, Bidvest and the PIC each wrote to the Adcock board making the following demands. That the board appoint Joffe, Lindsay Ralphs (Bidvest), Dr. Anna Mokgokong (CIH) and Roshan Morar (PIC) as directors of Adcock and remove Dr. Mokhele as chairperson and director of the company, alternatively just as chairperson. The demand was that these steps take place by 5pm that day failing which the PIC and Bidvest, who indicated that between them enjoyed over 55% of the equity in Adcock, would demand the company call an annual general meeting to give effect to these resolutions and that failing that they would go to Court to get an order requiring the company to convene such a meeting. (Although each wrote its own letter to the Adcock board, the essential content is identical.)[14]

37. It is not clear from Adcock minutes how the board felt about this demand. However we can infer from subsequent actions it took that it acquiesced. On the following day Dr. Mokhele resigned as a director and chairperson. Joffe was appointed a director and chairman of the board with effect from 25 February 2014.[15] The board did not appoint all four of the persons suggested, but this appears to be based on technical reasons not any unwillingness to co-operate (the board could not appoint more than half its number; any more appointments must be left to a shareholders meeting).[16]

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[12] Record page 157.

[13] Record page 150.

[14] Record pages 118 – 121.

[15] See record page 177 and Adcock six monthly statement page 10.

[16] The appointments were made by Adcock's Nominations Committee (a committee comprising three board members)

38. We know that at least from 31 January, when the Adcock Board was informed that one of the key institutional shareholders had sold its stake to Bidvest, that they too realized the writing was on the wall for the CFR bid and their advisors recommend they persuade CFR to drop its bid.[17] Bidvest's attorneys also state that 31 January is the date that Bidvest had achieved its shareholding of 34%.[18]

39. The first board meeting Joffe attended was held on 24 February 2014. The board accepted the recommendation of the Nominations Committee and after a short meeting Joffe was invited in to attend.[19]

40. Joffe then proceeded to address the board. Whilst he noted [**deleted confidential information**].

41. Notably he deferred for later consideration a board suggestion over who should be appointed as the head of the audit committee. The board had proposed a candidate to head the audit committee during the first phase of the meeting when Joffe was not yet present. Later minutes show that this nominee did not get appointed and Mr. Michael Sacks, who had been proposed by Joffe, did. [20]

42. The following day another meeting of the Adcock board was held. The minutes reflect that Joffe was now chairing the meeting.[21] Joffe proposed at this meeting that Sacks be appointed as chair of the audit committee and not the board's pre-Joffe nominee. This proposal gets accepted. Also accepted was Joffe's suggestion that those nominees of

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[17] Record page 176.

[18] Submission from ENS dated 23 May, 2014, paragraph 3.24, Record page 23.

[19] Record page 126.

[20] Sack's appointment became effective on 25 February 2014.

[21] There is a separate resolution in the record confirming Joffe's appointment as a director and Chairperson but it is formal and contains no record of discussion. See record page 177.

PIC and Bidvest, who could not be appointed because of the technical difficulties mentioned earlier, be allowed to attend as invited members until a general meeting could be held to appoint them.[22]

43. At the next meeting of the Adcock board held on 19 March, Sacks is now in attendance as a board member and included in the meeting are two of the 'directors in waiting', Ralphs and Morar, by telecon. Two significant things happen at this meeting relevant to the issue of management control. The Board, chaired by Joffe, resolves to terminate Dr. Louw's contract as chief executive officer and nominates one of its members to enter into termination discussions with him. (He resigns with effect from 1 April.) At the same meeting even though Louw is not yet effectively 'terminated' the board resolves to "suggest" Kevin Wakeford as the new chief executive officer and instructs its Nominations Committee to meet with him.[23]

44. Although Wakeford and two internal candidates are interviewed by the Nominations Committee for the job, Wakeford is the one appointed. There are no minutes of the reasons for preferring Wakeford. Wakeford's appointment becomes effective on 3 April 2014, three days after the termination of Louw's contract.

45. The choice of Wakeford is not without significance. Up until his appointment as chief executive officer of Adcock, Wakeford had worked for the Bidvest group for eleven years, most recently as chief executive officer of Bidvest's travel and aviation division.[24]

46. Wakeford commenced his employment with Adcock on 3 April 2014 and testified that he attended his first board meeting soon thereafter on 8

[22] Minutes of Adcock Board dated 25 February 2014 record page 128.

[23] Ibid, record page 131.

[24] Wakeford witness statement paragraph 1.5.

April 2014. At that board meeting he announced that the present retrenchment plan be put on hold until he had had time to evaluate it.[25]

47. Attorneys for the merging parties contend that neither Joffe's appointment as Adcock's chairman nor Wakeford's as CEO were done by Bidvest.[26] They also contend that no voting pool arrangement exists between Bidvest and any other shareholder. When Wakeford was appointed, Joffe was the only Bidvest appointee on the board, as Ralphs was only appointed with the other new directors at a meeting of shareholders on 10 April 2014.[27]

Analysis of material influence issue

48. In terms of the Act control over a target firm can be inferred from various outcomes. Some of these are the traditional company law notions of control – ability to have a majority at general meetings or board level and it appears these notions are the ones the merging parties rely on to assert that Bidvest does not at present control Adcock. However they do not deal with section 12(2)(g) which is the provision that the Commission rely on. In terms of this provision a shareholder may be deemed to control a firm if it *"has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)"*. This provision looks at whether a firm has *de facto* rather than *de jure* control over a target firm.

49. In this respect it may well be that since at least sometime after 31 January, Bidvest was able to exert a material influence over Adcock at least insofar as the limited public interest issue we have to consider in this decision is concerned. Bidvest was able to procure the removal of those associated with the prior board hostile to it, Mokhele and Louw,

[25] Wakeford witness statement paragraph 6.4.

[26] Record page 162, letter from ENS to the Commission dated 29 April 2014.

[27] Letter from ENS dated 23 May 2014, record page 23.

and to insert its own chief executive officer as the chairman of Bidvest at the first board meeting he attended. At this meeting Joffe announced what he expected from the company including the policy of decentralisation.

50. Shortly thereafter Louw's employment is terminated and he is replaced by a former Bidvest executive, Kevin Wakeford. The same holds for the fate of the erstwhile nominee for chair of the audit committee who was replaced by Joffe's candidate. It got around the technicality of not having the rest of its nominees appointed by the board, by having them accepted as invitees to board meetings until the requisite general meeting could be convened. True Bidvest did not affect any of these changes described by exercising a voting majority. But it did not need to. Other members of the board more than likely were aware of Bidvest's influence and its alliance with the PIC to demand the appointment of four directors. At no stage in the minutes is there any indication of resistance to these proposals nor does the board even fight to retain its prior candidate for head of the audit committee. They appreciated, after the end of a protracted fight for control between CFR and Bidvest, who had won, and unsurprisingly, went with the victor's suggestions.

51. We conclude that the present record shows that on a balance of probabilities, Bidvest has already acquired material influence over Adcock. Secondly, that the material influence extended to the removal of Louw and the appointment of Wakeford as a person likely to carry out Bidvest's strategy for turning around Adcock's fortunes. This conclusion is entirely consistent with what Joffe told his Acquisitions Committee that Bidvest needed to do - as the minutes quoted earlier show - urgently acquire management control of Adcock.

52. The retrenchment proposals associated with Wakeford, which we discuss more fully below, represent a decisive break with the approach of the 'Louw era' and are a product of the material influence of Bidvest.

53. This does not mean we have made a finding that Bidvest has already implemented the merger in contravention of the Act, which is not an issue that we are presently required to decide. Rather, the conclusion is based purely on the evidence in the current record in order to decide whether public interest issues that follow are merger specific in the sense they are the product of the influence of the acquiring firm.

Are the retrenchments proposed merger specific?

54. The public interest requirements in section 12 (A) (3) of the Act are implicated only if the "*merger will have an effect on...*" the various factors which are then listed, amongst which, relevant to this case, is employment. This requirement has been interpreted in the case law as founding jurisdiction to intervene on public interest grounds if the effect is 'merger specific'.

55. What does merger specific mean?

56. It means conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller.

57. But firms are dynamic institutions. Not every change that results post-merger is necessarily attributable to the merger. Such an approach is far too mechanistic. Thus, we can conceive of changes in a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific.

58. Translated to considerations of the public interest effect on employment, the practice thus far has been to distinguish, post-merger, between employment loss associated with the merger nexus, referred to as 'merger specific' employment loss and those in the second category of

non–merger specificity, often referred to as 'operational' employment loss.

59. The Competition Act intervention is jurisdictionally premised on the former 'merger specific', but not the latter 'operational kind', which is considered to be purely the sphere of labour law.

60. Most cases where we have imposed conditions relating to employment have involved firms with overlapping activities. Here the nexus is more easily established because the inference of merger specificity is highly probable, when merging firms are engaged in overlapping activities. Why would the firm continue to employ two people to do the same job, post-merger, when employing one would suffice?

61. The nexus becomes more complicated evidentially, but not conceptually, and this distinction is important not to lose sight of, when the target firm and its acquirer do not have overlapping activities, as in the present case.

62. Does this mean that in the absence of merger created overlaps we can never determine that employment loss is merger specific? We think such an approach would be going too far. It may well be that a particular controller may be more likely to shed jobs than others and hence have an incentive to cut jobs than might another firm or the target firm's management prior to the merger.

63. In *Walmart* the Tribunal decided that an acquiring firm's history as being hostile to collective bargaining justified imposing a condition on the merged firm to protect existing collective bargaining rights.[28]

[28] See the Tribunal decision in *Wal-Mart Stores Inc. and Massmart Holdings Limited, CT 73/LM/Dec10*. See paragraphs 59-65 and 70 of that decision.

64. This case was taken on appeal and one of the issues related to the protection of employees who had been retrenched prior to the notification of the merger. Despite this not being a case where there was evidence of redundancies, and where the merger had not been implemented, the Court nevertheless ordered their reinstatement holding:

"A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would, accordingly, be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision".[29]

65. Although in *Walmart* the employees in question had already been retrenched, the CAC's reasoning would apply equally to contemplated retrenchments. We recognise however that the evidence would need to be robust to justify such a conclusion.

66. In competition analysis in mergers we typically compare the pre-merger counterfactual with that of the post-merger scenario. Such an approach seems equally sound in evaluating the public interest provided any inferences sought to be drawn are arrived at carefully.

67. On this approach, pre-merger management plans in operation already or proposed may be useful to compare to the plans the firm has post-merger if available. If the differences are stark, and particularly if the change in plans takes place within a short period of time, then it is reasonable to infer that the post-merger plans of the acquirer reflect a

[29] See paragraph 140 of the Competition Appeal Court's ("CAC") decision in *SACCAWU, the Minister of Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc & Massmart Holdings Limited, Case no: 110/CAC/Jun11 and 111/CAC/Jun11.*

different set of incentives to those of the pre-merger management and hence can be considered merger specific.

Evidence regarding proposed retrenchments

68. In the present case we have such evidence. Prior to the 24th February 2014, the Louw management had embarked on a retrenchment exercise termed [**deleted confidential information**]. In terms of this proposal there were to be at most 51 retrenchments, [**deleted confidential information**].

69. In May 2014, the Commission met with Adcock to consider the present notification. It requested details of the number of employees to be retrenched and their positions. A list of 51 posts was given to the Commission.[30] This figure the Commission was told would represent a saving of nearly R [**deleted confidential information**] rand annually. At that stage the total staff complement, the Commission was advised, was about 2 227. Thus the proposed retrenchments represented 2,3% of the total workforce. The Commission was told however that there would be further retrenchments post-merger pursuant to Bidvest's turnaround strategy for Adcock. But says the Commission in its recommendation, the details of these plans and the number of employees affected "*have not been submitted*".[31]

70. It is this evidence that the Commission relied on when it wrote its recommendation and formulated the condition it proposed.

71. Further details of the need for additional retrenchments emerged in Wakefield's witness statement which was filed by the merging parties for the purpose of our hearing, but only after the Commission had filed its recommendation.

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[30] See Table 4 of the Commission's recommendation.

[31] Commission recommendation page 21.

72. In his witness statement Wakeford explains the need for further retrenchments and whilst he hints at areas where these might take place, he does not commit himself to their extent or when they might take place. The burden of the statement is to emphasise Adcock's current financial woes, its need to embark on a turnaround strategy and his promotion of decentralisation as a strategy.

73. As noted earlier Wakeford had at a board strategy meeting on 8 April - his first board meeting since his appointment - asked for any existing retrenchment plan to be put on hold until such time as he had had an opportunity to evaluate them.[32] The plan he is referring to is [**deleted confidential information**], the plan devised under Louw's leadership envisaging a maximum of 51 retrenchments.

74. He testified that he has since re-evaluated this plan and only 18 of the proposed 51 staff have been retrenched. Thus [**deleted confidential information**] is no more and to the extent the Commission relied on it to come to its conclusion, through no fault of its own as we later consider, it was relying on outdated information.

75. The reason for this change is the difference in strategy between the Louw and Wakeford management. [**Deleted confidential information**].[33]

76. Wakeford testified in contrast he favours a decentralised structure in which each unit pays its way. The reason for this is that units do not piggy back on the costs of other parts of the firm leading to inefficiencies. However he sees [**deleted confidential information**] central plank to the company's success and not [**deleted confidential information**]. [**Deleted confidential information**] requires a strong [**deleted confidential information**] team but these were precisely the

[32] Wakeford witness statement paragraph 6.4.

[33] Transcript, pages 26 -27.

positions that the Louw plan saw as a possible area for retrenchments. Hence the difference in retrenchment outcomes (18 as opposed to 51) reflects Wakeford saving jobs in [**deleted confidential information**] that Louw would have shed.

77. Wakeford says he presented his strategy to the board on 26 May and that the decentralisation plan was accepted by the board. It is not clear, as we have not been given sight of these minutes, whether the board was told of the extent of retrenchments contemplated by the decentralisation exercise. As Wakeford conceded during the hearing, just because a firm decentralises its functions it does not follow that this necessarily entails job losses.[34]

78. Wakeford's witness statement identifies six autonomous business units to be created. Whilst his witness statement goes further in detailing the retrenchment process contemplated under his watch, it was still not as detailed as that recounted in his oral evidence. Wakeford mentions in his statement that [**deleted confidential information**].[35]

79. He also mentions in his witness statement that the present [**deleted confidential information**].

80. Other proposals are contemplated, but there is no categorical conclusion. The central message of Wakeford in his witness statement is that there are "*... many options depending on how things transpire at Adcock...*"[36]

81. What Wakeford is seeking, as articulated in the witness statement, is "*total flexibility*" to devise a plan rather than providing clarity about what the plan is.[37]

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[34] Transcript page 44.
[35] Ibid, witness statement paragraphs 6.5.5 and 7.3.3.1
[36] Ibid paragraphs 7.4-5
[37] Paragraph 7.6

82. However when Wakeford gave his oral evidence, much more information of what that plan might be, emerged. [**Deleted confidential information**]. The total job losses envisaged amounted to a possible loss of [**deleted confidential information**] jobs or [**deleted confidential information**] of the current work force.[38]

83. Both in terms of actual numbers and percentage of the work force this number is substantial.[39]

84. However the comparison with the planned retrenchments of 51 or 2,4% of the workforce under [**deleted confidential information**] is so glaring, as to lead one to legitimately draw the inference that the difference in these orders of magnitude can no longer be explained by operational requirements, but a change in policy that is merger specific. There is no other reasonable way to account for this difference given the fact that [**deleted confidential information**] and the Wakeford proposals were devised within a few months of one another and that [**deleted confidential information**] was premised at least on some, if not all, of the pessimistic financial results, which were already known to the Louw management at the time, and on which Wakeford relies on for his own plans.[40]

85. In his oral testimony Wakeford presents his plan as his own strategy and not that of Bidvest. He went to great pains to emphasise that his

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[38] We have calculated this percentage based on numbers that Wakeford confirms are correct. Transcript 69-70.

[39] In *Metropolitan Holdings Limited and Momentum Group Limited, CT 41/LM/*Jul10 the potential retrenchments were estimated around 1000.

[40] In the board minutes of 31 January the Louw plan is presented. In these minutes it is recorded that the six monthly financial performance would be a 20% negative variance to those published in the same period in the prior financial year. See minutes paragraph 6.2. The Louw plan – it is common cause that this is a reference to [**deleted confidential information**], is presented as then management's response to the financial situation as seen then.

witness statement is of his own creation **[deleted confidential information]** and that Joffe had no part in its preparation "although he had been copied in on it" in an email. [41]

86. It does however appear that the policy of decentralisation on which the new strategy underpinning most of the proposed retrenchments is premised, was part of the strategy even before Wakeford assumed office. Firstly we have the comments made by Joffe at his first board meeting on 24 February, noted earlier, about the need to have *"... accountable business units"*. We do not know the extent to which the message was transmitted to employees down the line as reflecting a Bidvest objective, but it appears highly probable that it did.

87. At the meeting of 8 April where Wakeford attends for the first time, employees who head proposed units were asked to present them to the board for a strategy session. In one presentation a slide is headed **[deleted confidential information]**.[42]

88. Wakeford when cross-examined on this by the Commission said he had no direct knowledge of why the slide had this heading but speculated that this was because Bidvest was the *"premier example of decentralised strategies in the country"*.[43]

89. But this answer does not explain why there is a reference to the board requiring alignment nor if Wakeford did not give the employees instructions on what to present, where they got the idea from, unless it was already understood prior to his arrival at Adcock which suggests the idea was not his own creation.

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[41] Transcript page 65.

[42] Record page 532. The minutes of the meeting are at pages 133-40 of the record. The reference to AI is presumably meant to be Adcock Ingram.

[43] Transcript page 95.

90. Further Wakefield in his witness statement says that when he arrived at the company "*a process of decentralising the company had commenced.*"[44]

91. There is also further evidence that the idea of restructuring into decentralised units predates Wakeford in a **[deleted confidential information]** document. Whilst **[deleted confidential information]** was the creature of Louw as presented at the Board in January this document appears to have had subsequent iterations, as it is dated 28 March 2014 i.e. after Louw's termination had been decided upon and just three days before his formal departure is noted. Here there is reference to restructuring in the form of decentralisation. In other words it appears that this strategy precedes Wakeford, but is subsequent to Joffe's appointment as chair in February and after Louw's termination has been decided. No documents were put before us to show that decentralisation as a policy had been initiated by the board prior to Joffe's appointment as chair. Indeed in his oral testimony Wakeford indicated the prior management had favoured centralisation.[45]

92. Furthermore it seems unlikely that Wakeford would embark on such a far reaching plan of restructuring as a new chief executive officer that he had not yet put to the board without the understanding that it had the support of the company's most influential shareholder. When that shareholder is his erstwhile employer in a company where that shareholder has the advantage of its chief executive as chairman of the board, the inference becomes even stronger.

93. Given our finding that the Wakeford plan is reflective of the material influence of Bidvest, the putative aspirant controller, and that it is starkly different from a contemporaneous pre-merger plan that we can accept

[44] Wakeford witness statement paragraph 6.4.

[45] Transcript page 43.

was operational in nature, we find that the planned retrenchments are on a balance of probabilities merger specific.

If merger specific, are they justified

94. The mere fact that retrenchments are merger specific does not condemn them. As we held in *Metropolitan* once substantiality and merger specificity are established, the onus shifts to the merging parties to justify the retrenchments as not being contrary to the public interest.[46]

95. In *Metropolitan* we set out some of the grounds in which a firm embarking on merger specific retrenchments may justify them. These justifications include that the merger:

95.1 is required to save a failing firm;

95.2 is required, because pre-merger, the merging firms will not be competitive unless they can lower their costs to be equally as efficient as their rivals and only the merger can bring about these savings through the contemplated employment reduction; or

95.3 will lead to lower prices for consumers because of the merged firm's lower cost base and that this lower cost base can only come about or is materially dependent upon, the contemplated employment reduction.

96. Wakeford's evidence was that the retrenchments he was proposing could be justified on the basis that the firm was ailing **[deleted confidential information]**.

97. This entailed shedding **[deleted confidential information]**. Fourth many pharmaceutical products that Adcock manufactures (Wakeford estimates **[deleted confidential information**)] are subject to

[46] See Metropolitan paragraphs 68 and 69.

government pricing in terms of the single exit pricing policy. [**Deleted confidential information**].[47]

98. Wakeford might be correct that all these retrenchments could be justified on one or more of the grounds set out in *Metropolitan*. The problem is that the merging parties have failed to properly consult with affected employees about these retrenchments, ostensibly it seems because they regard them as operational not merger specific. Presumably this is because the merging parties are anxious about suggestions that Bidvest had implemented the transaction prematurely and did not want the retrenchments proposals to appear to be the result of Bidvest's strategy for Adcock and hence be seen as merger specific.

99. What is evident from the filings is that the merging parties were eager to create the impression that there were no merger specific retrenchments contemplated. We see this from the filing with the Commission where the following is stated: *"...no merger specific retrenchments or redundancies are expected to occur by virtue of the implementation of the proposed transaction".*[48]

100. Whilst the merging parties in the same document do acknowledge that *"in the interests of full disclosure, Adcock wishes to disclose that some non-merger specific retrenchments may well arise in respect of certain corporate positions"* this disclosure [**deleted confidential information**] understates the position finally articulated by Wakeford at the hearing.

101. Then in a communication to the South African Chemical Workers Union ("SACWU") a trade union representing some of its employees, the merging parties appear to give them comfort on this by stating the same to them.[49]

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[47] See Wakeford witness statement paragraph 3.6.
[48] See merger filing record page 583.
[49] See letter from ENS to SACWU dated 11 April 2014 record pages 148-9.

102. That SACWU understood it in this limited way is evident from one of the emails we have on record from it, where an organiser tells the Commission his concerns relate to skills improvement and plans to sustain the business in the future.[50] There is no mention of concerns over proposed retrenchments. In the end the union did not participate in the proceedings further, presumably because it had no reason to believe, from the assurances given that [**deleted confidential information**] retrenchments were being contemplated.

103. However the lack of proper consultation was not confined to employees. The Commission whose function it is to investigate merger related issues was also not properly apprised of the rationale and scale of retrenchments now contemplated. As noted they were not contained in the original filing and there was much confusion as to whether [**deleted confidential information**] (whose one incarnation is dated 28 March 2014) was the current proposal around retrenchments. Even Wakeford's witness statement, filed after the Commission had already made the recommendation, is non-specific on the extent of retrenchments needed and this only emerged during this oral testimony, as we have discussed above.

104. The result is that the merging parties' version of justification has not been put to employees or the Commission in order for them to interrogate two issues of fundamental importance – whether they are merger specific and whether they are justified.

105. We have already determined on the facts before us that the retrenchments are probably merger specific. We cannot determine that the merger specific retrenchments are justified merely on the merging parties say so. There is, at least, prima facie, some reason to doubt whether the firm's present ailments are of an on-going nature. For

[50] Record page 651.

instance the financial woes are of recent vintage and in the previous financial year the firm was profitable. Furthermore, Wakeford conceded that if the expenses entailed by Adcock in the takeover battle (an amount of approximately R [**deleted confidential information**] million) are removed from the accounts the past six month period the firm would not have made a loss.[51]

106. Further, views as to whether the firm should not engage in certain strategies in favour of others, is a matter for debate. Some of the slides that appear in the presentation to the board in April show an optimistic view of trends in the pharmaceutical industry.[52] This is not to suggest that Wakeford is wrong in his pessimism or the need for [**deleted confidential information**] restructuring. Rather that these issues are not as clear-cut as he would make out and others might take a different view.

107. Had there been proper consultation and debate on these issues we would have been in a more informed position to decide this point. The failure to consult adequately has deprived us of this opportunity.

108. The legislature regarded consultation with employees as a high priority in the merger process and hence made it a statutory obligation to do so before a merger is implemented in terms of section 13A(3). This legislative policy is also reflected in the granting to employees a right to appeal a merger decision - a right not even granted to the Commission.

109. The right to consultation is the right to receive proper information about the proposed retrenchments and this should even extend to

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[51] See transcript pages 87-8. The R [**deleted confidential information**] million amount appears in the minutes of the April 8 meeting and is given by the financial director. See record page 135.

[52] The slide headed " [**deleted confidential information**]" sets out what it sees as drivers for growth. See record pages 267-8.

whether the firm considers contemplated retrenchments as operational as the employees have the right to dispute this and the opportunity to make submissions on this point to the Commission and Tribunal, if they hold a contrary view. In a case before the Labour Appeal Court, where the question was whether the dismissal of an employee who had been retrenched for operational grounds was fair, the Court made the following instructive comment on the adequacy of consultation that we think would apply equally to the consultation process in terms of the Competition Act. The court observed:

"There also rests a duty on the employer to provide the employee or its representatives with relevant and sufficient information that would place them in a position to make the informed representations and suggestions on the subjects specified for the consultation".[53]

110. We find that the merging parties have not discharged the burden of justification as the process of consultation has not been properly followed and prima facie there is at least some evidence in the record that had it been, the merging parties view may have been contested, by either the employees, the Commission or both.

Remedy

111. Having come to a conclusion that the retrenchments are substantial, likely to be merger specific and not been justified, because of a failure to properly notify them and consult on them, the imposition of a remedy is justified in the public interest.

[53] See *Super Group v Dlamini and one other* 2012, Labour Appeal Court Case number 77/10 paragraph 25.

112. The Commission as noted earlier proposed the imposition of a moratorium on merger related retrenchments for a period of three years excluding the 51 contemplated by the Louw management.

113. The condition relating to the exclusion is now academic. The evidence of Wakeford is that this is no longer contemplated and that of the 51, 18 were retrenched and this has already taken place.[54]

114. The moratorium on merger specificity is problematic for two reasons. The distinction between merger specific and operational retrenchments is unclear in the present merger and secondly, the time period of the moratorium seems disproportionate.

115. The Commission when asked at the hearing what type of retrenchment would be deemed merger specific was unable to answer this and instead argued that this could be left for assessment at the time it occurred. However it was unable to explain why at some later date one could be in a better position than now to make a determination. Wakeford testified that this would create inevitable uncertainty and the potential for conflict going forward.[55] We agree with him. However that does not mean that there should be no remedy imposed as suggested by the merging parties in final argument.

116. The merging parties are responsible for the fact that the prior implementation has led to a blurring of issues so retrenchments that are merger specific and those that are operational are impossible to distinguish. For that reason we have concluded that the mergers proposed under the Wakeford plan are deemed merger specific. Since

[54] Transcript page 107.

[55] See Transcript 113. Asked why he thought a prohibition on merger specific retrenchments would affect the business he stated: *"Personally if you had to ask me as the chief executive I would prefer to have nothing in, for the simple reason that I wouldn't want to have to get into the debate about whether it was or it wasn't irrespective of what I have communicated here today".*

no other evidence of retrenchments has been place before us, given that [**deleted confidential information**] is not in place any longer, all presently contemplated retrenchments are part of the Wakeford plan.

117. This being the case and to avoid any doctrinal confusion going forward we have placed a moratorium on all future retrenchments as opposed to the narrower merger specific conceptualisation of the Commission.

118. However we have shortened the period considerably and the moratorium applies for only one year. The reason for this is an acceptance that as time proceeds the distinction between operational and merger specific elides and on the facts of this case, given the absence of overlaps, a period of one year seems appropriate. Within a course of one year future events that we detail below may turn out unfavourably for the firm and may require it to downsize to remain competitive.

119. However there is also no reason to have any period less than one year. We have had regard to the fact that in the course of the year, several significant events will take place which may turn out to favour Adcock:

119.1. The next ARV tender from the government will take place in March 2015. [**Deleted confidential information**].[56]

119.2. Although the manufacture of products that are subject to the SEP system, is always vulnerable to what pricing increases the government allows, the pricing is subject to annual review [**deleted confidential information**].[57]

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[56] [**Deleted confidential information**]. See minutes of Adcock Board meeting dated 8 April 2014, record page 133. [**Deleted confidential information**]. [**Deleted confidential information**] who spoke of profitably producing ARVs - record page 138.

[57] At the April meeting Hall refers to SEP pricing as annual. [**Deleted confidential information**].

119.3. Whilst some presenters at the April board meeting were pessimistic, others such as [**deleted confidential information**], sounded optimistic and bullish about prospects.[58]

119.4. Wakeford has not yet implemented his decentralisation plan or presented his proposals to the board which suggests that the plan is not yet ready for implementation either as a means of acceptance by the company at board level and divisional level nor if accepted ready for execution.[59] [**Deleted confidential information**].

119.5. The prejudice to Adcock of the one year period is thus minimal. When asked pointedly by one of the panel on what time period he saw the restructuring taking place he was not able to give a definitive answer, because, as he explained, one would need to speak to a variety of stakeholders including government and explore options. On the other hand the benefit felt to individual employees by a moratorium is of much greater impact, especially those whose alternative employment opportunities in the present economy are likely to be limited.

119.6. A moratorium also allows for a proper period of consultation with employees and allows those who anticipate they may be affected, the time to consider alternatives.

120. We have left in the condition the clarification that the Commission had provided for that the moratorium does not extend to voluntary retrenchments. Also, as we have no jurisdiction over employees who are not employed in South Africa, we have clarified that the moratorium does not apply to them.[60]

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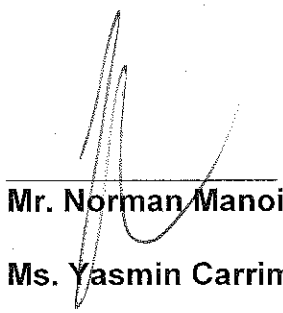
[58] Ibid.April board meeting pages 138-139. See comments of [**deleted confidential information** ()] and [**deleted confidential information** ()] in particular.

[59] See witness statement paragraph 7.3.2.4 and transcript page 69.

[60] Wakeford indicates in his witness statement [**deleted confidential information**]. See Wakeford witness statement paragraph 7.3.5.

Conclusion

121. The proposed transaction raises no other public interest concerns. We have therefore approved the merger subject to the employment condition set out in the attached order.



28 August 2014

Mr. Norman Manoim **Date**

Ms. Yasmin Carrim and Professor Fiona Tregenna concurring

Tribunal researcher : Ipeleng Selaledi

For the merging parties : Adv David Unterhalter SC instructed by Edward Nathan Sonnenbergs

For the Commission : Grashum Mutizwa and Maya Swart