



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM078Jul15

In the matter between:

MPACT LIMITED

Primary Acquiring Firms

MPACT RECYCLING (PTY) LTD

And

REMADE HOLDINGS (PTY) LTD

THE PROPERTY COMPANIES

Primary Target Firms

Panel	: Andreas Wessels (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 04 May 2016
Order Issued on	: 04 May 2016
Reasons Issued on	: 01 June 2016

Reasons for Decision

Conditional approval

[1] On 04 May 2016, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction involving Mpact Limited, Mpact Recycling (Pty) Ltd, Remade Holdings (Pty) Ltd and the Property Companies.

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

Parties to proposed transaction

Primary Acquiring Firms

[3] The primary acquiring firms are (i) Mpact Limited ("Mpact"); and (ii) Mpact Recycling (Pty) Ltd ("Mpact Recycling"). Mpact is incorporated in terms of the laws of South Africa

and is a public company listed on the Johannesburg Securities Exchange (JSE). Mpact Recycling is a subsidiary of Mpact.

- [4] Mpact (formerly Mondi Packaging South Africa) is a paper and plastics packaging manufacturer with operations in South Africa, Botswana, Mozambique, Namibia and Zimbabwe. Its business involves the production of paper and plastic packaging products and the recycling of both paper and plastic.
- [5] Mpact's paper business comprises three parts, each of which operates at a different level of the paper and paper packaging value chain:
 - a. Mpact Recycling is active in the collection and purchase of pre- and post-consumer recyclable paper through various paper pickup programmes including commercial, kerbside, school, church, community, housing complex and office programmes. Mpact Recycling also purchases recyclable paper from recyclable material traders.
 - b. Mpact's paper manufacturing operations produce a range of intermediate paper products such as cartonboard and containerboard. In addition, it holds distribution rights to sell Baywhite, a premium quality white top kraftliner produced by Mondi Limited. Mpact manufactures paper from a combination of recyclable paper and (a relatively smaller amount of) virgin material.
 - c. Mpact's corrugated and converted paper products operations involve the production of printed and unprinted converted corrugated and other paper products, including corrugated packaging, corrugated boxes, die-cut cases, folded glued cases, trays, point-of-sale displays, converted paper products for the quick service restaurant (QSR) sector, as well as paper bags and sacks.
- [6] The recycling division comprises a number of Mpact owned sites. It also supports local entrepreneurs by providing them with the necessary resources (i.e. technical advice, balers and a ready customer) in order to enable them to participate in the recovery process.
- [7] Mpact's plastics business is currently only active at the downstream level of the plastic packaging value chain. It produces the following groups of plastic packaging products from a combination of virgin material and recycled pellets and flakes: (i) PET preforms, bottles, jars and related closures; (ii) plastic fast-moving consumer goods (FMCG) containers; (iii) plastic containers; and (iv) styrene and PET trays, as well as cling film.

Primary target firms

- [8] The primary target firms are (i) Remade Holdings (Pty) Ltd ("Remade"); and (ii) the Property Companies, i.e. number of property companies¹. Remade is incorporated in terms of the laws of South Africa.
- [9] Remade is the largest independently owned operator and trader in South Africa of recyclable material. It is primarily a recyclable material trader and buys and sells various grades of recyclable material including paper, plastic, glass and e-waste. It provides various waste management services, specialising in the minimisation of waste streams and the collection of recyclable waste materials. Remade also provides various ancillary services, such as on-site waste management solutions; confidential shredding; assisting with the implementation of office and school recycling programmes; assisting with the facilitation of hazardous waste solutions; and reporting and information management.
- [10] Remade currently operates mainly in Gauteng, where it has seven branches, and in the North West, where it has two branches. In addition, Remade has a total of seven buy-back facilities located across Gauteng.

Proposed transaction and rationale

- [11] Mpact intends to acquire 100% of the shares in each of the Property Companies and Mpact Recycling intends to acquire 100% of the shares in Remade. Following the implementation of the proposed transaction the Property Companies and Remade will be solely controlled by Mpact and Mpact Recycling respectively.
- [12] The acquiring firms submitted that the proposed transaction will, broadly speaking, enable it to implement its strategic objectives. Furthermore, Mpact envisages that the proposed transaction will result in a number of efficiencies.

Impact on competition

- [13] The Competition Commission ("Commission") identified a horizontal overlap between the merging parties' activities with respect to the supply of recyclable paper and recyclable PET (i.e. plastic bottles).

¹ For the details of these property companies see *inter alia* pages 07 and 23 of the Merger Record.

- [14] The Commission furthermore found a vertical relationship with respect to Remade's upstream operations as a supplier of recyclable paper and recyclable PET and Mpact's downstream operations as a manufacturer of containerboard, cartonboard and plastic packaging (including a new recycled PET ("rPET") facility²).
- [15] The Commission concluded that the horizontal relationship between the merging parties was unlikely to substantially prevent or lessen competition in any relevant market. The Commission advanced the following reasons for this: (i) Mpact mainly collects recyclable paper and recyclable PET for its own downstream operations; (ii) Mpact is less likely to supply the open market in the foreseeable future due to its expansion plans of the Felixton Mill³ and, as stated above, its entry plans with respect to recyclable PET; and (iii) given the rationale of the proposed transaction and the merging parties' submissions, Remade's collection will be incorporated into Mpact's internal supply over the next two years. This means that the merged entity will not supply significant volumes onto the market in the near future.
- [16] The Commission also assessed the possibility of post-merger customer foreclosure and found no likely concerns resulting from the proposed transaction in this regard. The main reason advanced by the Commission for this is that the proposed transaction is associated with an increase in Mpact's internal demand for recyclable PET (due to entry in the downstream market) and paper (due to expansion), which will increase Mpact's requirements for recyclable paper and recyclable PET greater than Remade's current total sales volumes. Also, the Commission did not receive any concerns relating to customer foreclosure during its investigation of the proposed transaction.
- [17] We concur with the above conclusions and do not discuss unilateral effects or customer foreclosure any further in these reasons.
- [18] The only theory of harm advanced by the Commission in relation to the proposed transaction was that of input foreclosure. We discuss this below.

² Mpact has recently invested in a facility for converting recovered PET bottles into rPET pellets for use in its downstream production of PET bottles and preforms.

³ Mpact is planning to significantly expand the capacity of its paper mill in Felixton by the end of 2017, which will result in a significant increase in its recycled paper requirements.

Vertical concerns: input foreclosure

- [19] As stated above, the Commission advanced a theory of harm of post-merger input foreclosure by the merged entity of rival firms given that Remade operates upstream with respect to the supply of recyclable paper and recyclable PET and Mpact operates downstream as a manufacturer of containerboard,⁴ cartonboard and plastic packaging. The Commission was concerned that the merged entity potentially would be in a position to foreclose (downstream) manufacturing rivals of raw materials needed in their production processes. These inputs are (i) recyclable PET; and (ii) recyclable paper.
- [20] The Commission noted that the following third parties raised concerns with regards to the post-merger availability of recyclable paper: Dynamic Fibre Moulding South Africa ("DFMSA"); Neopak Recycling (Proprietary) Limited ("Neopak") and Corruseal Group (Proprietary) Limited ("Corruseal"). The Commission further noted that Extrupet (Proprietary) Limited ("Extrupet") raised concerns in relation to the post-merger availability of recyclable PET.
- [21] After investigating the proposed transaction the Commission found that the transaction was likely to raise input foreclosure concerns in relation to the post-merger availability of both recyclable PET and recyclable paper. The Commission communicated these concerns to the merging parties during December 2015, as well as its intention to recommend certain supply conditions to the Tribunal to remedy these concerns.
- [22] Given the Commission's identified competition concerns, the merging parties entered into supply negotiations with the customers that they currently (directly) supply with the relevant inputs.⁵ These customers are (i) Extrupet; (ii) Neopak; and (iii) SAPPI Southern Africa Limited ("SAPPI") / Enstra Paper (Proprietary) Limited⁶ ("Enstra"). These negotiations resulted in the conclusion of three supply agreements, i.e. between the merging parties and each of Extrupet, Neopak and SAPPI/ Enstra.

⁴ Recovered paper is a key input in the manufacturing of containerboard.

⁵ Certain of the above-mentioned market players who raised concerns are not direct customers of the merging parties.

⁶ Enstra was sold to Corruseal by SAPPI and this transaction was approved by the Commission in October 2015.

- [23] We shall first discuss potential foreclosure of recyclable PET as a result of the proposed transaction and thereafter potential foreclosure of recyclable paper as a result of the proposed transaction.

Post-merger availability of recyclable / recovered PET as input

- [24] As stated above, with regards to the post-merger availability of recyclable PET, the Commission received concerns from Extrupet, a recovered PET customer. Extrupet submitted that Remade is a large supplier of used PET bottles and other used PET materials. Extrupet was concerned that Remade would not supply it with these inputs after the conclusion of the proposed transaction and that it would be unable to find alternative sources of supply of these inputs to replace the (lost) purchases from Remade.
- [25] The Commission noted that the market for the supply of recovered PET is not as advanced as the market for the supply of recovered paper. According to the Commission's findings the former market is characterised by many small players that do not have adequate equipment to supply large volumes of recovered PET bottles. Considerable volumes of recovered PET are sourced from primary sources rather than from aggregators such as Remade. Some recyclers who generally specialize in paper recycling also recycle PET. Remade is a good example of this.
- [26] The Commission further noted that only Extrupet and Mpact Polymers use clear grade PET⁷ to manufacture food grade rPET in South Africa.
- [27] The Commission concluded that the merged entity will have the ability and incentive to foreclose its downstream rival, Extrupet, given *inter alia* Mpact's current market conduct (i.e. certain inducement strategies⁸ and the offering of free bailing machines to collectors⁹), its entry into the (downstream) market for the manufacturing of bottle grade PET and its (planned) production capacity in that market.
- [28] As stated above, given the input foreclosure concerns raised by the Commission in relation to recyclable PET, the merging parties concluded a supply agreement with Extrupet. The concluded agreement has a duration of five years. The Commission was satisfied that this supply agreement sufficiently addresses the vertical anti-competitive

⁷ According to Remade's website "PET clear" include clear cold drink bottles and mineral water bottles.

⁸ Mpact allegedly seeks to bundle its purchases of paper and PET waste.

⁹ Mpact offers bailing machines for free to collectors of plastic waste.

effects, i.e. the input foreclosure effects that are likely to arise from the proposed transaction. We concur with the Commission's view and do not discuss this issue any further.

Post-merger availability of recyclable paper as input

[29] After conducting its investigation the Commission found that Remade was dominant¹⁰ in the collection and supply of recovered paper in Gauteng while Mpact was dominant in the (downstream) market for the manufacture and supply of containerboard. Given this as well as the fact that Mpact had predicted an increase in its own future demand for recyclable paper, given its decision to expand capacity at its Felixton mill, the Commission was of the view that the merged entity would have the ability to foreclose rivals in downstream manufacturing market(s) that require recyclable paper as an input in their production processes.

[30] In considering the merged entity's incentive to foreclose rivals, the Commission undertook to analyse the potential upstream and downstream profits that would arise from such a strategy. The Commission found that Mpact currently makes minimal sales of recovered paper to third parties. Given that Mpact was found to [...] ¹¹ containerboard, of which recovered paper forms a key input, the Commission was of the view that the merged entity would have the incentive to foreclose rivals.

[31] As stated above, given the input foreclosure concerns identified by the Commission in relation to recyclable paper, the merging parties concluded supply agreements with (i) Neopak; and (ii) SAPPI/ Enstra. These concluded supply agreements each has a duration of two years.

[32] Although these supply agreements relate to a different input than the aforementioned recyclable PET, the Commission was of the view that these supply agreements should also have durations of five years (see paragraph 28 above). The merging parties however opposed this recommendation of the Commission, although they had no objection to the Tribunal approving the proposed transaction subject to the two-year supply agreements concluded with respectively Neopak and SAPPI/Enstra. Thus, the

¹⁰ We note that there was a dispute between the Commission and the merging parties in relation to Remade's exact market share in the collecting / recovery of paper in Gauteng. However, it is clear that Remade is by far the single largest collector of recyclable paper in Gauteng.

¹¹ Certain information claimed as confidential by the merging parties has been removed from the public version of our Reasons for Decision.

only issue in dispute between the Commission and the merging parties was that the Commission recommended that the supply agreement with each of the aforementioned two recyclable paper customers should have a duration of more than two years (i.e. five years).

[33] At the hearing of 04 May 2016 the Tribunal requested the Commission to elucidate on its proposed duration of the supply agreements with each of the recyclable paper customers. We however note that the Commission did not call any customer as a witness to support its position.

[34] We further note that the Tribunal invited the above-mentioned customers to participate in the hearing and put forward additional written and/or oral submissions. Unfortunately none of these customers took up the Tribunal's invitation to participate in the hearing.

[35] The Tribunal furthermore at the hearing requested the merging parties to provide the basis upon which the supply agreements were concluded with each of the customers. The Tribunal, more specifically, questioned the merging parties in relation to the terms of each supply agreement, including the duration of each agreement, how this was negotiated with each customer, the volumes to be supplied to each customer in terms of the concluded agreement and the price(s) to be charged to each customer in terms of the concluded agreement.

[36] The merging parties put up a witness who had been privy to the negotiations with the customers in question and who was able to give evidence on the factual background upon which these supply agreements were concluded.¹² In testimony Mr Ralph Peter von Veh, the Managing Director of Converting at Mpact, explained his understanding of the customers' rationale for requiring supply agreements of a certain duration. He furthermore testified that the paper customers had indicated that a [...] of supply of the relevant inputs.¹³ There was no evidence to the contrary.

[37] Although we concur with the Commission's finding that the proposed transaction raises input foreclosure concerns in relation to the supply of recyclable paper, we found no cogent evidence in support of the Commission's recommendation that the supply period of the concluded supply agreements should be extended from a duration of two years (as offered by the merging parties) to a duration of five years. No cogent evidence was put up to show that the customers in question would not be able to find alternative

¹² See Transcript, pages 92 to 98.

¹³ Transcript, pages 92 to 98.

sources of supply of recyclable paper during the two year supply period provided for in each of the concluded supply agreements.

[38] Given the above, the Tribunal approved the proposed transaction subject to the condition that the merging parties must comply with the terms of the concluded supply agreements with customers. These supply agreements refer to the agreements between the following parties: (i) Mpact Recycling and Extrupet dated April 2016; (ii) Remade and Neopak dated March 2016; and (iii) Remade and Sappi and Enstra dated April 2016. This supply condition adequately addresses and is proportional to the vertical competition concern, i.e. the input foreclosure concern associated with the proposed transaction.

Public Interest

Employment

[39] The merging parties stated in their merger filing that the proposed transaction was unlikely to result in any adverse effects on employment for a period of at least two years post its implementation.¹⁴ However, the merging parties envisaged that following this period they may combine their businesses in certain geographic regions which may trigger retrenchments of certain employees.

[40] In order to mitigate the above, the Commission proposed that the merger should be approved subject to a two-year moratorium on merger-specific retrenchments from the date of implementation of the proposed transaction.

[41] The merging parties had no objection to the proposed transaction being approved subject to Commission's recommended condition on employment.

[42] We concur with the Commission's recommendation and have approved the proposed transaction subject to the condition that the merging parties shall not retrench¹⁵ any

¹⁴ Merger Record, page 10.

¹⁵ For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vi) any decision not to renew or extend a contract of a contract worker.

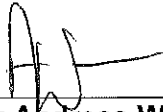
employees as a result of the proposed merger for a period of two years from the implementation date of the proposed transaction.

Other public interest

[43] The proposed transaction raises no other public interest concerns.

Conclusion

[44] In light of the above, we conclude that the proposed transaction is likely to substantially prevent or lessen competition in that it raises input foreclosure concerns. The proposed transaction furthermore raises employment concerns. However, these competition and employment concerns are adequately addressed by the imposed conditions. For the sake of convenience we attach the set of conditions that we have imposed on the approval of the proposed transaction marked as "**Annexure A**".



Mr Andreas Wessels

01 June 2016

DATE

Ms Andiswa Ndoni and Ms Medi Mokuena concurring

Tribunal Researcher: Karissa Moothoo Padayachie

For the merging parties: Anthony Norton and Anton Roets of Nortons Inc.

For the Commission: Kholiswa Mnisi, Qhawe Mahlalela and Ngoako Moropene