



## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: LM018Apr17**

In the matter between

**Steinhoff Doors and Building Materials (Pty) Ltd**

**Primary Acquiring Firm**

And

**Building Supply Group (Pty) Ltd**

**Primary Target Firm**

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Panel	: Mr Norman Manoim (Presiding Member)
	: Ms Yasmin Carrim (Tribunal Member)
	: Prof. Fiona Tregenna (Tribunal Member)
Heard on	: 27 September 2017
Order Issued on	: 27 September 2017
Reasons Issued on	: 12 October 2017

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### REASONS FOR DECISION

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#### Approval

- [1] On 27 September 2017, the Competition Tribunal ("the Tribunal") conditionally approved the large merger between Steinhoff Doors and Building Materials (Pty) Ltd ("SDBM") and Building Supply Group (Pty) Ltd ("BSG"), hereinafter collectively referred to as the merging parties.
- [2] The reasons for conditional approval follow.

## **Parties to the transaction**

### *Primary Acquiring Firm*

- [3] SDBM is ultimately controlled by Steinhoff International Holdings Limited ("SIH"), hereinafter collectively referred to as the 'Acquiring group'. The Acquiring Group engages in a number of business operations consisting of, but not limited to, furniture, electronic goods and building materials in Southern Africa through numerous retail operations.

### *Primary Target Firm*

- [4] BSG is a holding company of the MacNeil group of companies and the Tiletoria group of companies and holds a number of other subsidiaries. BSG and its controllers and subsidiaries shall be collectively referred to as the 'Target group'. The Target group engages in the provision of building materials, plumbing, doors and ironmongery in the Gauteng, KwaZulu Natal and Western Cape Province.

## **Proposed transaction**

- [5] In terms of the Transaction Agreement, SDBM will acquire the entire shareholding of BSG from its shareholders. SDBM will therefore assume control over BSG.

## **Relevant markets and Impact on competition**

- [6] The Commission considered the activities of the merging parties and identified a horizontal overlap in the following markets: (i) the national market for the wholesale of tiles and sanitary ware; (ii) the national market for the wholesale of building materials, hardware and related products; and (iii) the market for the retail of tiles and sanitary ware in Cape Town, specifically in Paarden Eiland.

- [7] The Commission also found the presence of a vertical relationship between the merging parties as the Target group supplies the Acquiring group with taps and general plumbing products.
- [8] In its investigation the Commission found that the merged entity will have post-merger market shares of 12.12%, 12.5% and 24.4% in the each of the respective relevant markets. The Commission was of the view that the post-merger market shares are relatively low and that the merged entity will continue to face competition from other players. Further, the Commission found that the merged entity will not have the ability to impose an input foreclosure or customer foreclosure strategy as there are several other market participants able to constrain the merged entity.
- [9] In light of the above, the Commission concluded that proposed transaction is unlikely to substantially lessen or prevent competition in any market. We accordingly agree with the Commission's findings.

#### **Public interest**

- [10] When considering the public interest issues, the Commission found that the proposed transaction raised employment concerns as the proposed transaction would lead to retrenchments due to a duplication of roles and positions between the merging parties. From the documents submitted, it emerged that the merging parties had not conducted a due diligence analysis that identified the exact number of employees that would be affected by the merger. However a preliminary assessment was conducted by them which contained a summary of the relevant affected business units within BSG and a description of the category of employee in each business unit which are potentially affected.<sup>1</sup> From the preliminary assessment, the Commission confirmed that a total of 27 out of 722 employees of BSG would be affected. Of these 27 employees, 6 are skilled, 14 are semi-skilled and 7 are unskilled. The Commission further enquired whether alternatives were sought to mitigate retrenchments, however,

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<sup>1</sup> Pg. 825 of the Merger Record and in reference to 'Annexure G' on pg. 1046 of the Merger Record.

the merging parties furnished no evidence that a rational process was undertaken to mitigate the job losses.

- [11] The trade union, United Association South Africa (UASA), contacted the Commission<sup>2</sup> and expressed its concerns in relation to the merging parties not having performed a due diligence analysis in order to particularly isolate the potentially affected employees, and that no other measures had been taken to ensure that affected employees are retained. UASA proposed that there be a moratorium on all merger related retrenchments.
- [12] In its recommendation the Commission proposed a three year moratorium be imposed on all merger related retrenchments irrespective of the skill level of the employees. The Commission considered that there was insufficient justification for the retrenchment of 27 employees, which the Commission termed a “thumb-suck” figure, arguing that a rational process was not followed in arriving at the figure.
- [13] At the hearing it emerged that the merging parties regarded the condition as too burdensome. Ms Irvine who appeared for the merging parties submitted that the required consultations with employees and their representatives together with the necessary steps to be undertaken under section 189 of the Labour Relations Act 66 of 1995 (LRA) had not been conducted. It would be inappropriate to do such an exercise at this point as the exact number of affected employees were unknown and it would not be possible at that stage to identify the affected employees or what outcome the consultations with affected employees and trade unions would be. Further, it was submitted that the merging parties do not want to commence the consultations process as they would want to first acquire the business, subject to a reasonable condition that protects employees. Within a years’ time, the merging parties will then be in a position to commence the consultation process as the exact number of affected employees would be known. For the Commission to simply characterise the preliminary assessment as a ‘thumb suck’ she said, was incorrect. The

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<sup>2</sup> Outlined in full in UASA’s CC5 form.

assessment was the best that the merging parties could do without having conducted a comprehensive due diligence analysis. She proposed a variation of the conditions but the Commission was not agreeable to this. A further problem was that the UASA was not present at the hearing, apparently under the impression that the Commission's recommendation had been agreed to by the merging parties.

- [14] After hearing both the Commission and the merging parties the Tribunal granted them an adjournment to see if they could find a compromise solution.
- [15] They returned to indicate that they had and that the compromise met the concerns of UASA whom they had in the interim contacted.
- [16] The compromise solution provides for a moratorium on merger related retrenchments for three years of unskilled and semi-skilled employees. Insofar as skilled employees are concerned the condition limits merger related retrenchments in this period to 9 employees
- [17] We accordingly agreed to this. The condition is captured in the conditions annexed hereto as Annexure A.
- [18] Furthermore, the proposed transaction does not raise any other public interest issue.

## Conclusion

[19] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no further public interest concerns, apart from those addressed above, arise from the proposed transaction. The public interest concerns that do arise are adequately safeguarded by the proposed conditions. Accordingly, we approve the proposed transaction with conditions marked as **Annexure 'A'**.

  
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**Mr Norman Manoim**

**12 October 2017**

**Date**

**Ms Yasmin Carrim and Prof. Fiona Tregenna concurring**

Tribunal Researcher : Mr Ndumiso Ndlovu.

For the Merging Parties : Ms Heather Irvine of Falcon & Hume Attorneys Inc.

For the Commission : Ms Boitumelo Makgabo and Ms Lindiwe Khumalo.

**STEINHOFF DOORS AND BUILDING MATERIALS (PTY) LTD / BUILDING SUPPLY  
GROUP (PTY) LTD**

**CC CASE NUMBER: 2017MAR0122**

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**CONDITIONS**

**1. Definitions**

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Acquiring Firm"** means Steinhoff Doors and Building Materials (Pty) Ltd;
- 1.2. **"Approval Date"** means the date referred to in the Tribunal's merger clearance certificate (Form CT15);
- 1.3. **"BSG"** means Building Supply Group (Pty) Ltd;
- 1.4. **"Commission"** means the Competition Commission of South Africa;
- 1.5. **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.6. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.7. **"Conditions"** mean these conditions;
- 1.8. **"Implementation Date"** means the date, occurring after the Approval Date, on which the merger is implemented by the merging parties;
- 1.9. **"Merging Parties"** mean SDBM and BSG;
- 1.10. **"Proposed Transaction"** means the acquisition of control over the BSG business by SDBM;
- 1.11. **"SDBM"** means Steinhoff Doors and Building Materials (Pty) Ltd;
- 1.12. **"Target Firm"** means BSG; and
- 1.13. **"Tribunal Rules"** mean the Rules for the Conduct of Proceedings in the Tribunal.

## **2. Recordal**

- 2.1. On 23 March 2017, the Merging Parties filed a large merger transaction with the Commission. Following its investigation of the Proposed Transaction, the Commission is of the view that there are public interest issues, which arise as a result of the Proposed Transaction, which relate to employment.
- 2.2. The Merging Parties have advised that the Proposed Transaction may have an impact on the employees that are currently employed in the Target Firm. Potentially Affected Employees consist of skilled, semi-skilled and unskilled employees.
- 2.3. Given the above, the Commission has found that the Proposed Transaction is likely to raise public interest concerns and therefore recommends the imposition of these Conditions as set out below.

## **3. Conditions to the approval of the merger**

- 3.1. For a period of 3 years from the Implementation Date the Merging Parties shall not retrench, as a result of the Merger:
  - 3.1.1. any unskilled or semi-skilled employees; and
  - 3.1.2. more than 9 skilled employees.
- 3.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; or (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) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

## **4. Monitoring of compliance with the Conditions**

- 4.1. The Merging Parties shall:
  - 4.1.1. Inform the Commission of the Implementation Date within five days of it



becoming effective;

- 4.1.2. The Merging Parties shall circulate a copy of the employment Conditions to all their employees and registered trade unions and/or employee representatives within 5 (five) business days of the Approval Date.
- 4.1.3. As proof of compliance thereof, a senior official of the Merging Parties shall submit an affidavit attesting to the notification referred to in paragraph 4.1.2 above, and provide a copy of the notice to the Commission within 5 (five) business days of the circulation of the conditions.
- 4.2. Thirty-six months after the Implementation Date, the Merging Parties shall submit a final report to the Commission confirming that no retrenchments have occurred, in accordance with clause 3.1 above.
- 4.3. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of these Conditions, this will be dealt with in terms of Rule 39 of Commission Rules read together with Rule 37 of the Tribunal Rules;
- 4.4. The Merging Parties may at any time, on good cause shown, approach the Tribunal for the conditions to be lifted, revised or amended.
- 4.5. All correspondence in relation to these Conditions should be forwarded to [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za)