competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019018

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

Primary acquiring firm(s)

And

NASHUA MOBILE (PTY) LTD
IN RESPECT OF ITS MOBILE TELEPHONE
NETWORKS (PTY) LTD SUBSCRIBER BASE

Primary target firm(s)

Panel	: Yasmin Carrim	(Presiding Member)
	: Andreas Wessels	(Tribunal Member)
	: Medi Mokuena	(Tribunal Member)
Heard on	: 26 September 2014	
Order Issued on	: 29 September 2014	
Reasons Issued on	: 31 October 2014	

Reasons for Decision

Approval

[1] On 29 September 2014 the Competition Tribunal ("Tribunal") unconditionally approved the acquisition by Mobile Telephone Networks (Pty) Ltd ("MTN") of the MTN subscriber base of Nashua Mobile (Pty) Ltd.

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

Background

[3] It may be assistive here at the outset, as something of a backdrop against which to view this transaction, to briefly explain the merging parties' respective positions in the mobile telecommunications value chain and their pre-merger relationship.

[4] In South Africa there are a handful of mobile network operators ("MNOs") of which MTN is the second largest.[1] All of South Africa's MNOs are vertically integrated entities involved in operating mobile networks (at the upstream level) and the provision of a broad range of mobile communication services to end-users (at the downstream level).[2]

[5] By contrast, Nashua Mobile (Pty) Ltd ("Nashua") does not operate at the upstream, mobile network level. Nashua is known as a Service Provider ("SP") and essentially acts as a retail and distribution channel for each of the MNOs. Since the SPs are not operative at the upstream level, they compete with the MNOs only at the downstream level, i.e. at the level of retailing mobile telecommunication services.

Parties to the Transaction

Primary acquiring firm

[6] The primary acquiring firm is MTN. MTN is a provider of both fixed and mobile voice and data services; mobile messaging services; mobile handsets; certain value added services; and subscription services at both wholesale and retail level. MTN is, as are all of South Africa's MNOs, a vertically integrated entity and is operative at each level in the mobile telecommunications market; from network operation level right through to the provision of telecommunication service to end-users.

[7] MTN is wholly owned by Mobile Telephone Networks Holdings (Pty) Ltd which is, in turn, a wholly owned subsidiary of the MTN Group Ltd. The MTN Group

[1] The MNOs operative in South Africa are Vodacom (Pty) Ltd, MTN, Cell C, Virgin Mobile and Telkom Mobile.
[2] Virgin Mobile operates as a virtual MNO.

Ltd is listed on the Johannesburg Securities Exchange Limited ("JSE") and is not controlled, directly or indirectly, by any entity.[3]

Primary target firm

[8] The primary target firm is Nashua in resect of its MTN subscriber base. Worded differently, what is being acquired is each and every Nashua subscriber who makes use of MTN's service(s) as an MNO.

[9] Nashua Mobile is a wholly-owned subsidiary of Reunert Limited ("Reunert"), a public company listed on the JSE with its shares widely held.

Proposed Transaction

[10] The proposed transaction is just one of seven separate yet interrelated transactions, each of which flows from Nashua's decision to exit the market.[4]

[11] The specific transaction currently at hand involves MTN assuming Nashua's position in respect of each contract concluded between Nashua and Nashua's MTN subscribers. That is to say, all MTN subscribers who were previously in a contractual relationship with Nashua Mobile will now be in such a relationship with MTN.

Rationale

[12] In order to fully comprehend the merging parties' respective rationales in this proposed transaction, an understanding of the way in which the industry has changed over the years is necessary.

[13] When mobile telecommunication services were first introduced in South Africa, the MNOs were required to make infrastructure investments of significant proportions with no certainty that such investments would reap the

[3] MTN Group Limited's shares are widely dispersed with just a single entity holding more than 6% in MTN, namely the Government Employees Pension Fund C/O Public Investment Corporation that holds roughly 14%.
[4] The hearings for the Vodacom & Nashua, MTN & Nashua, and Altech & Cell C transactions were held together at the Competition Tribunal on 26 September 2014

abundant rewards they have subsequently experienced. The MNOs were thus exposed to substantial risk and were, understandably, averse to exposing themselves to further risk by assuming the credit risk associated with individual contract customers.[5] The MNOs thus considered the existence of SPs at the intermediary level as a valuable route to market and a mechanism through which to reduce their risk exposure.[6]

[14] With the unprecedented success experienced by the industry, the introduction of prepaid products and regulatory developments over time, the MNOs now invest heavily in the retail level and consider offering services directly to end-users as core to their business models.[7]

[15] MTN submits that it no longer considers Nashua's offering as an important route to market and it believes the "*service provider business model is becoming inefficient and obsolete*." MTN considers the transaction as the mere manifestation of the "*natural continuation of the vertical integration of the service provider function…*"[8]

[16] Nashua is acutely aware of the changes the market has undergone and acknowledges that offerings directly to end-users – a territory previously inhabited primarily by SPs – now falls squarely within the competencies of the MNOs. Further, the margins available at the retail level of the mobile telecommunications market in South Africa have been declining consistently since 2008.[9] Nashua submits that since its offering is, to a large extent, mirrored by that of the MNOs it does not envisage this trend changing in the near future.

---

[5] Note that during the initial phases of mobile telecommunications in South Africa, pre-paid as a concept was not yet in existence. Thus, the only route to market for MNOs was through the conclusion of post-paid contracts or through the use of an SP which would assume the risk associated with the conclusion of such contracts. See paras 3.4 and 3.5 of the Report on Competitive and Public Interest Aspects Aspects (sic): in the Large Merger between Mobile Telephone Networks (Pty) Ltd and MTN subscriber base of Nashua Mobile (Pty) Ltd ("Competitiveness Report").

[6] Ibid

[7] The RBB Economics Report entitled: Nashua Mobile/ Vodacom, Nashua Mobile/ MTN- Competitive Assessment ("RBB Report") at para 19.

[8] See paras 3.11 and 3.12 of the Competitiveness Report, appearing at page 60 of the Record

[9] See page 59 of the Record and pages 24 and 25 of the transcript.

[17] While Nashua's survival in the market is not under immediate threat, its long-term viability is uncertain and it has elected to exit the market now rather than later, while it is still in a position to offer favourable severance packages to its employees and some returns to shareholders.[10]

[18] In addition to the gradual shifts in market conditions which in and of themselves are threatening Nashua's ability to compete, the contractual terms which govern the relationship between Nashua and the MNOs ("the Service Provider Agreements"), are currently up for renegotiation. Nashua does not consider the terms currently on offer to be adequately favourable so as to enable it to compete on a long-term basis.

Relevant Market

[19] The merging parties submit that concluding definitively on the relevant product market is unnecessary since howsoever one defines the market, the proposed transaction raises no substantial competition concerns.

[20] The Commission however, proposes that the effect of the transaction be assessed on the "market for the resale of MTN post-paid subscription and services."

[21] Notwithstanding their dissimilar submissions regarding relevant product market, both the Commission and the merging parties consider the geographic market to be national in scope.

[22] We are of the view that even if we were to consider the transaction on the basis of the Commission's analysis, the competition effects would be unlikely to raise any concerns.

[10] See the testimony of Mr Taylor at pages 64 and 65 of the transcript.

Competition Analysis

[23] According to the Commission's analysis the merged entity will have a market share of between 30% and 40% with the transaction accounting for accretion of between 0.1% and 1.5%. The Commission considered this accretion to be minimal and unlikely to raise any competition concerns.

[24] The Commission also found that pre-merger, the SPs have very little ability to influence pricing to end-users. The question then became whether the merging parties compete vigorously on service and whether the removal of Nashua from the mobile telecommunications arena would reduce service levels to end-users.

[25] Nashua submitted that its service levels to customers had, in certain respects, fallen behind market trends. As an example it pointed to the fact that while subscribers of the MNOs could manage many aspects of their accounts online or through automated call centre facilities Nashua still relied on older, more expensive and less efficient methods. In order to improve its service levels it would need to make significant investments in IT infrastructure which it was unwilling to make because of the anticipated downward pressure on margins. The MNOs submitted that they are intent on continuously improving their offering from a service perspective and they in fact compete robustly with one another on service.[11] Further, the MNOs are required, by the End-User and Subscriber Service Charter Regulations[12], to provide high levels of service. In light of the above, we are satisfied that the proposed transaction will not result in a substantial lessening of service levels in the relevant market.

[26] The Commission then assessed the extent to which the proposed transaction, and the subsequent removal of Nashua, would adversely impact on inter-brand competition. The finding in this respect was that Nashua currently accounts for a very small, and declining, percentage of all post-paid subscribers. The parties also confirmed that the sale of the subscriber base

[11] Ms Burger- Smidt of Werksmans Attorneys, MTN's legal representative at page 52 of the transcript.
[12] Issued by the Independent Communications Authority of South Africa (ICASA) in 2009

did not enable any individual MTN customer to switch to another MNO simply because the terms and conditions for that individual customer were still governed by the contract it had concluded with MTN and Nashua.[13]

[27] In light of the above, we are largely in agreement with the submissions of both the Commission and the merging parties insofar as the proposed transaction will not result in a substantial lessening of competition in the relevant market. That is not, however, the end of the matter. The Tribunal is enjoined, as in all merger proceedings before it, to consider the likely effect of the proposed transaction on the public interest.

Public Interest

[28] The merging parties were at pains to impress upon the Tribunal that the proposed transaction does not constitute the sale of a business as a going concern, and that Nashua Mobile's employees would thus not be transferred to the acquiring firm.[14] The Tribunal is acutely aware of the fact that approving the proposed transaction necessarily results in Nashua exiting the market and many of Nashua's employees facing retrenchment.

[29] At first we were uncertain as to the exact number of employees adversely affected by the transaction since the figures provided by the merging parties were somewhat inconsistent. At the hearing of 26 September 2014, the position regarding employment effects was clarified by counsel for the merging parties.

[30] While we deem the employment effects of the proposed transaction to be significant, we are mindful of the fact that Nashua has elected to exit the market. We have also taken cognisance of the substantial commitments made by Nashua in respect of minimising the adverse effects on employment.

---

[13] There was a back to back agreement between Nashua and MTN in relation to the terms and conditions of the service provided to the customer.
[14] *Inter alia* para 8.2 of the Competitiveness Report which appears at page 65 of the Record

[31] Nashua has undertaken to redeploy as many affected employees within the Reunert Group as possible and expects this figure to be between 100 and 150. The severance packages Nashua has offered all of its employees ("the Severance Packages") appear to be particularly generous, being between three and five times more than they would be in terms of the Labour Relations Act.[15] It also appears that many employees preferred to accept the Severance Packages than a transfer to the acquiring firm.[16] Further, the merging parties have established support structures which provide affected employees with, *inter alia*, psychological and financial counselling; assistance in updating their curricula vitae; having their curricula vitae circulated within the Reunert Group and afforded preferential consideration in the event of vacancies arising; and letters of reference.

[32] It is also necessary to remark here that Nashua has provided specific undertakings in respect of all affected unskilled employees, i.e. those deemed most vulnerable and least likely to find alternative employment were they to be retrenched as a result of the transaction. Nashua has undertaken to redeploy each affected unskilled employee within the Reunert Group.

[33] In addition to the Severance Packages, our fears regarding adverse employment effects have been further allayed by MTN having given certain undertakings which also go towards mitigating employment concerns. These undertakings are set out fully in the Tribunal's Order and Merger Clearance Certificate dated 29 September 2014.

Conclusion

[34] In conclusion we find that the transaction results in minimal market share accretion and will not alter the structure of the market. The proposed transaction is unlikely to result in a substantial prevention or lessening of competition in the relevant market, howsoever defined.

---

[15] Act No. 66 of 1995.

[16] See page 14 of the transcript.

[35] While we do consider the employment concerns elucidated above to be significant, these have been ameliorated by the employment related undertakings put forward by both Nashua and MTN.

[36] For the reasons set out above, we approve the proposed transaction unconditionally.

31 October 2014

DATE

MS YASMIN CARRIM

Mr Andreas Wessels and Ms Medi Mokuena concurring

Tribunal Researcher:	Shannon Quinn
For the target firm:	Adv David Unterhalter SC instructed by Norton Rose Fulbright
For the acquiring firm:	Ahmore Burger-Smidt of Werksmans Attorneys
For the Commission:	Grashum Mutizwa, Mogau Aphane and Grace Mohamed.