



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM247Jan19

In the matter between

Mondi Plc

Primary Acquiring Firm

And

Mondi Ltd

Primary Target Firm

Panel	: Mr N Manoim (Presiding Member)
	: Ms Y Carrim (Tribunal Member)
	: Prof. I Valodia (Tribunal Member)
Heard on	: 10 July 2019
Order Issued on	: 10 July 2019
Reasons Issued on	: 13 August 2019

REASONS FOR DECISION (NON-CONFIDENTIAL)

Approval

- [1] On 10 July 2019, the Tribunal conditionally approved the proposed transaction in terms of which Mondi Plc ("MPLC") is acquiring control over Mondi Ltd ("MLTD"). MPLC and MLTD will hereunder be referred to as the 'Mondi group'.
- [2] The reasons for the conditional approval of the proposed transaction follow.

Parties to the transaction

- [3] The Mondi group operates under a dual listed company (DLC) structure comprising MLTD, a South African incorporated entity holding African assets, and MPLC, a United Kingdom (UK) incorporated entity holding non-African assets.
- [4] Put briefly, a DLC is a corporate structure in which two entities function as a single operating business, however the two entities continue to maintain separate legal personalities and stock exchange listings. MPLC and MLTD have the same shareholders and the same management structures.
- [5] The primary acquiring firm, MPLC is listed on the London Stock Exchange (LSE), and has a secondary listing on the Johannesburg Stock Exchange (JSE). The primary target firm, MLTD is listed on the JSE.
- [6] The Mondi group is not controlled by any firm or shareholder. Among its top five shareholders are South African entities such as the Public Investment Corporation and Coronation Asset Management.

Proposed transaction and rationale

- [7] MPLC intends to acquire the entire issued ordinary share capital of MLTD. Post-merger, MLTD will become a wholly owned subsidiary of MPLC.
- [8] The proposed transaction is essentially a restructure of the Mondi group in an attempt to simplify its structure, thereby dismantling the DLC structure and delisting MLTD on the JSE. MPLC will however still have a secondary listing on the JSE.
- [9] The structure of the transaction and its rationale was considered at an earlier hearing by another panel of the Tribunal and need not be repeated here.¹ That decision was to decide whether the merger was notifiable – with Mondi arguing it was not and the Commission and the Minister of the then Economic Development Department (EDD) arguing the contrary.² The panel found for the Commission and the Minister and held the transaction was notifiable.
- [10] This decision unlike the previous one deals with the merits of the merger by considering its impact on competition and the public interest.

¹ *Mondi Ltd and Mondi Plc v The Competition Commission* CT Case No: LM247Jan19/JUR262Feb19.

² The EDD has since been integrated into the Department of Trade and Industry.

- [11] Nevertheless relevant here about the change in structure, is the merging parties argument that the merger will not lead to any change in incentives of the merging firms as the same board will run the companies as is done pre-merger – what the merging parties refer to as a unified board.³ On the other hand the Minister's concerns were that the focus of the group, post restructure, would change. The South African operations he contended would cease to get the attention they got previously, a fact the merging parties dispute.

Impact on competition

- [12] Given that the proposed transaction is an internal restructure of the Mondi group, the proposed transaction does not result in any overlaps. Since no overlaps arise, the Commission found that the proposed transaction is unlikely to substantially lessen or prevent competition in any market. We find no reason to disagree with this finding.

Public interest

- [13] The Commission found that the proposed transaction is unlikely to result in any negative impact on public interest.
- [14] The Minister however raised public interest concerns. In essence, the Minister's concern is that the restructure will result in the scaling back of MLTD's South African operations.⁴ According to the Minister, this would have malign effects on employment within MLTD, on SA's export prospects, investment in SA and in SMMEs. The Minister is of the view that these effects will be felt in the KZN forestry region, particularly in Richards Bay. To that effect, the Minister tendered conditions that he believed would adequately mitigate the above public interest concerns. The conditions encompassed commitments to *inter alia*, invest in SA, initiate a development fund for SMMEs in the timber industry and a moratorium on any merger specific retrenchments.⁵
- [15] In response, the Mondi group submitted that it has no intention to scale back on MLTD's South African operations, and that there will be no negative impact on public interest. In the spirit of good faith, the Mondi group largely conceded to the Minister's conditions and committed to, *inter alia*, the following: (i) invest capital expenditure of at least R8 billion in its SA operations; (ii) refrain from effecting any merger-specific retrenchments for a period of two years; and (iii)

³ See submission by Mr. Wilson for the merging parties, transcript page 28.

⁴ See letter from the EDD on pages 562-566, Merger Record.

⁵ See pages 550-555, Merger Record.

to commit an additional [...] ⁶ over the next five years towards community engagement programmes and small business development.⁷

- [16] In addition to the conditions, Mondi proposed the modernisation of the Richard's Bay pulp-mill facility, thereby ensuring that it remains internationally competitive as Mondi's key producer of export-oriented products.⁸ Mondi opines that this will have positive ripple effects to both the upstream and downstream sectors in the KZN region. The Commission and the Minister accepted the above.
- [17] However, the Minister still proposed that the period of the moratorium on merger-specific retrenchments be extended from two years, as it was in the Commission's recommendation, to three years. At the hearing the Mondi group agreed to extend the moratorium by one year to three years to meet the Ministers' concerns. Consequently, although he still had reservations about the merger overall, the Minister and all parties, were *ad idem* regarding the change in the duration of the moratorium.⁹

CEPPWAWU

- [18] The representative of CEPPWAWU, Mr Bongani Skosana, appeared before us and wished to have the matter postponed. Mr Skosana intimated that CEPPWAWU would like time to consider the effects of the restructure on employment within MLTD. Further, Mr Skosana submitted that the proposed two-year moratorium on merger-specific retrenchments was inadequate.¹⁰
- [19] The Mondi group submitted in response that the postponement was unwarranted as CEPPWAWU had ample time to consider the effects of the merger on employment.¹¹ This is because the merger notification was provided to CEPPWAWU in January 2019, with an ancillary invitation to engage the Mondi group should the union have any concerns. The merging parties furnished proof that they had sent the notification to CEPPAWU and received an acknowledgement of receipt by an official. In addition, the Commission had also written to the union asking for a response, but although they had got a read receipt there had been no response. The union's representatives did not deny

⁶ Amount claimed as confidential.

⁷ See Annexure A below for detailed outline of the Conditions.

⁸ See page 538 of the Merger Record

⁹ According to Mr Maenetje who appeared for the Minister, *"Yes, I was instructed that I must place on record that the transaction is not in the public interest but that this is a compromise and it is for that reason that the Minister is not opposing."*

So I have got nothing further to submit to you other than that. The position as agreed with the Commission is accepted, yes, subject to what I was instructed to place on record, which I have". See Transcript page 26.

¹⁰ Transcript page 12, lines 10-11.



¹¹ Transcript page 6, lines 10-20.

that they had received the notification but argued that they were not aware of the conditions and wanted further time to consider them.

- [20] Mondi opposed the postponement arguing that it would serve no purpose given that it had given sufficient concessions on employment and was unwilling to engage further with the union on this issue. Furthermore, both the Mondi group and the Commission were of the view that the concerns raised by CEPPWAWU mirror the employment concerns raised by the Minister, and as such are entirely addressed by the conditions in particular since Mondi had agreed at the hearing to extend the moratorium from two to three years.
- [21] We held the same view as the Commission and the Mondi group, and therefore dismissed the postponement application by CEPPWAWU.
- [22] Since there is no competition concerns and the fact that the Minister's public interest concerns have been addressed by the conditions, the Commission recommended an unconditional approval.

Conclusion

- [23] 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, we believe the Minister's public interest concerns are significantly addressed by the undertakings made by the Mondi group. Accordingly, we approve the proposed transaction subject to conditions attached hereto as "Annexure A".

Mr N Manoim

13 August 2019

Date

Ms Y Carrim and Prof. Imraan Valodia concurring.

Tribunal Case Manager	: Kgothatso Kgobe
For the Merging Parties	: Adv. J Wilson SC and Adv. F Ismail instructed by Webber Wentzel
For the Commission	: L Quilliam, R Maphwanya and N Myoli
For the Minister	: Adv. H Maenetje SC instructed by Malatji & Co
For CEPPWAWU	: B Skosana

NON-CONFIDENTIAL

ANNEXURE A: Conditions

CC CASE NUMBER: 2019Jan0014

CT CASE NUMBER: LM247JAN19

MONDI PLC

PRIMARY ACQUIRING FIRM

AND

MONDI LIMITED

PRIMARY TARGET FIRM

MERGER CONDITIONS

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings —
- 1.1.1 **“Act”** means the Competition Act No. 89 of 1998;
- 1.1.2 **“Approval Date”** means the date referred to in the Form CT10 issued by the Tribunal;
- 1.1.3 **“Black-owned Business”** means a business directly or indirectly majority owned and controlled by Black Persons;
- 1.1.4 **“Black Person”** means person/s defined as “Black” in the Broad-Based Black Economic Empowerment Act No. 53 of 2003;
- 1.1.5 **“Commission”** means the Competition Commission of South Africa duly established under the Act;
- 1.1.6 **“Competition Authorities”** means a collective reference to the Commission and the Tribunal;
- 1.1.7 **“Days”** means any business day being a day which is not a Saturday, Sunday or an official public holiday in South Africa;

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- 1.1.8 “**EDD**” means the Economic Development Department of the Government or its successors;
- 1.1.9 “**Government**” means the government of South Africa;
- 1.1.10 “**Implementation Date**” means the date on which the Merger closes and MLTD becomes a subsidiary of MPLC;
- 1.1.11 “**Merger**” – means MPLC’s proposal to become the holding company of MLTD;
- 1.1.12 “**Merging Parties**” mean MLTD and MPLC;
- 1.1.13 “**Minister**” means the minister of the EDD;
- 1.1.14 “**MLTD**” means Mondi Limited, the primary target firm;
- 1.1.15 “**Mondi Group**” means MLTD and MPLC;
- 1.1.16 “**Mondi Zimele**” means Mondi Zimele Proprietary Limited which is the small business development initiative of MLTD. Mondi Zimele makes available equity, loans and business development support to small businesses within the Mondi Group value chain and surrounding communities.
- 1.1.17 “**MPLC**” means Mondi plc, the primary acquiring firm;
- 1.1.18 “**Small Business**” means a business generally regarded in South Africa as a small business, including SMMEs;
- 1.1.19 “**SMME**” means a business generally recognised as a small, medium or micro-enterprise, including those defined as “small business” under the National Small Business Act No. 102 of 1996;
- 1.1.20 “**South Africa**” means the Republic of South Africa; and
- 1.1.21 “**Tribunal**” means the Competition Tribunal of South Africa duly established under the Act.

2. ***SUB-SAHARAN AFRICA HEADQUARTERS***

- 2.1 The Merging Parties shall ensure that the investments of the Mondi Group in Sub-Saharan Africa will continue to be held under MLTD (or another South African holding company), that will accordingly remain the investment headquarter company of the Mondi Group for this region.
- 2.2 The Merging Parties shall ensure that at least one South African citizen will be a director on the MPLC Board at all times.

3. ***EMPLOYMENT COMMITMENTS***

- 3.1 The Merging Parties shall not retrench any MLTD employees as a result of the Merger for a period of 3 (three) years from the Implementation Date.
- 3.2 For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (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. ***RESEARCH COMMITMENTS***

- 4.1 The Mondi Group will continue over the next 5 (five) years to work with South African universities, colleges and/or other educational or public bodies conducting scientific research to support research and development in forestry, paper, packaging and associated sectors and to deploy funding to the aforementioned institutions to that end.

5. ***COMMITMENTS IN RESPECT OF COMMUNITY PROGRAMMES AND SMALL BUSINESS DEVELOPMENT***

- 5.1 The Mondi Group shall invest a total of [...] ¹ over and above its current investment plans, within a period of 5 (five) years from the Implementation Date towards, towards:

¹ Amount claimed as confidential.

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- 5.1.1 Programs aimed at developing communities, including where the Mondi Group conducts its business activities;
 - 5.1.2 Programs aimed at developing and providing support to Small Businesses within the Mondi Group; and/or
 - 5.1.3 The Mondi Zimele Programme and any other similar initiative aimed at supporting and developing particularly small-scale businesses of historically disadvantaged persons/groups as part of an integrated supply chain, supported by local contractors and growers.

6. COMMITMENTS IN RESPECT OF CAPITAL EXPENDITURE

- 6.1 The Merging Parties shall invest a total of R8 000 000 000.00 (eight billion Rand) in its South African operations over a period of 5 (five) years from the Implementation Date.

7. MONITORING

- 7.1 The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.
- 7.2 MLTD shall circulate a copy of the Conditions relating to employment to all its employees and their trade unions or employee representatives, within 10 (ten) Days of the Approval Date. As proof of compliance herewith, MPLC shall within 5 (five) days of circulating the Conditions, provide the Commission with an affidavit by the Chief Executive Officer attesting to the circulation of the Conditions and attach a copy of the said notice.
- 7.3 For a five (5) year period following the Implementation Date, the Merging Parties shall, within 90 (ninety) calendar days of each anniversary of the Implementation Date, provide a suitable and appropriately detailed annual report to the EDD and the Commission regarding its compliance of the above Conditions.
- 7.4 The report referred to in paragraph 7.3 above shall be accompanied by an affidavit attested to by the Chief Executive Officer of MPLC confirming the accuracy of the annual report and full compliance with these Conditions.

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- 7.5 The Commission may request any additional information from the Merging Parties which the Commission from time to time deems necessary for the monitoring of compliance with these Conditions.
- 7.6 An apparent breach by the Merging Parties of the Conditions shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Competition Tribunal read together with Rule 39 of the Rules for the Conduct of Proceedings in the Competition Commission.
- 7.7 All correspondence in relation to the Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

8. **VARIATION**

- 8.1 Either or both of the Merging Parties may at any time, on good cause shown, apply with or without the Commission's consent to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted, provided that "good cause" shall not include any circumstances giving rise to the request for variation which are reasonably capable of being mitigated in another manner, or which could reasonably have been foreseen at the Date of Approval of these Conditions. The Commission will not be precluded from opposing such application.
- 8.2 The Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted. The Merging Parties will not be precluded from opposing such application.