



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM079Jul19

In the matter between

CPG In Store (Pty) Ltd

Primary Acquiring Firm

and

The Merchandising Business of the Consumer
Packaged Goods Division of Imperial Logistics of
South Africa Group (Pty) Ltd

Primary Target Firm

Case No: LM115Oct19

And in the matter between

Vector Logistics (Pty) Ltd

Primary Acquiring Firm

and

The Cold Storage Business (CPG Cold Storage) of
The Consumer Packaged Goods Division (CPG
Division) of Imperial Logistics South Africa Group (Pty)
(Imperial Logistics)

Primary Target Firm

Panel	: E Daniels (Presiding Member)
	: Y Carrim (Tribunal Member)
	: A Wessels (Tribunal Member)
Heard on	: 11 September 2019 and 14 November 2019
Order Issued on	: 12 September 2019 and 14 November 2019
Reasons Issued on	: 10 December 2019

REASONS FOR DECISION

Introduction

- [1] On 12 September 2019 the Competition Tribunal ('Tribunal') conditionally approved a transaction in terms of which CPG In Store (Pty) Ltd ('CPG') acquired sole control of The Merchandising Business of the Consumer Packaged Goods Division of Imperial Logistics South Africa Group (Pty) Ltd (Imperial Logistics) hereon referred to as the 'merchandising business'.¹
- [2] Thereafter, on 14 November, the Tribunal approved a merger in which Vector Logistics (Pty) Ltd., (Vector) purchased the Cold Storage Business of the Consumer Packaged Goods Division of Imperial Logistics South Africa group hereon referred to as the 'cold storage business'.²
- [3] Both transactions were triggered by Imperial Holdings Ltd (Imperial Holdings) decision to exit its consumer-packaged goods division and relevant to the analysis in both mergers was the supposed financial difficulty faced by the division.
- [4] The reasons for the conditional approval and approval follow.

Merchandising transaction

Parties to the transaction

Primary Acquiring Firm

- [5] CPG is a recently incorporated entity in terms of the laws of the Republic of South Africa, CPG is a wholly owned subsidiary of Pack n Stack Investment Holdings (Pty) Ltd., ('Pack n Stack').

¹ This transaction will be referred to as the 'merchandising transaction'.

² This transaction will be referred to as the 'cold storage transaction'.

- [6] Pack n Stack is controlled by CA Sales Holdings (Pty) Ltd., which, in turn, is ultimately controlled by PSG group, a publicly listed company on the Johannesburg Stock Exchange.
- [7] Relevant to the current transaction, Pack n Stack offers sales, merchandising and field marketing services to brand owners, primarily in the fast-moving consumer goods industry (FMCG). In addition, Pack n Stack provides call centre and order support, retail and shopper research, and shopper engagement programmes.
- [8] CPG does not control any firms and was created specifically as a vehicle to facilitate an outsourcing agreement entered into between Pack n Stack and Imperial Logistics the seller of the merchandising business—by ringfencing the activities of the merchandising business from Pack n Stack’s own sales and merchandising business. In terms of the outsourcing agreement, CPG, and ultimately Pack n Stack, ran the day-to-day operations of the merchandising business.³

Primary target Firm

- [9] Pre-merger, the merchandising business was owned and controlled by Imperial Logistics which is a wholly owned subsidiary of Imperial Holdings Ltd, a company listed on the Johannesburg Stock exchange.
- [10] The merchandising business formed part of Imperial Logistics’ Consumer Packaged Good Division, which was created in 2017 by the merging of Imperial Retail Logistics (which focused on ambient warehousing and distribution), Imperial Cold Logistics (which focused on frozen warehousing and distribution) and Imperial Retail Solutions (which focused on sales and merchandising).
- [11] The merchandising business is defined as the business of retail execution that offers sales, merchandising and field marketing and technology solutions

³ The outsourcing agreement was entered in April 2019 and will be addressed under the rationale for the merger.

carried on by Imperial Logistics. It operates as an independent merchandiser, which is responsible for the distribution and packing of FMCGs from suppliers (brand owners) to retailers. As such, independent merchandisers may be employed by either the suppliers of FMCG or the retailers of such, dependant upon demand.

- [12] The provision of field sales and merchandising services broadly entails the efficient promotion of FMCG's at a retail level. This would include: ensuring that there is sufficient stock of a relevant product on the shelves of clients; ensuring that the product is presented in such a manner so as to maximise sales; and the execution of promotional activities at retail outlets such as demonstrations and/or point of sale adverts.
- [13] In addition to the above, the merchandising business, and independent merchandisers in general, are also responsible for ensuring that expired or damaged products are returned to the FMCG suppliers.
- [14] The merchandising business obtains contracts through tender or quotation processes which are undertaken by FMCG suppliers and retailers which have elected to outsource the merchandising and sale functions to third parties.

Proposed transaction and rationale

- [15] In terms of the transaction, Imperial Logistics rendered the merchandising business to CPG, ceding all its rights and delegating all the obligations of the merchandising business to CPG.
- [16] Prior to the transaction in question, the merchandising business was outsourced to Pack n Stack in terms of an agreement entered in April 2019 (outsourcing agreement).[. . .]
- [17] [. . .]
- [18] The merging parties indicated that the outsourcing agreement arose as a result of Imperial Logistics' acknowledgment that its consumer-packaged goods

division (of which the merchandising business formed part) was in financial distress and in an attempt to reduce the costs of the merchandising business. At the conclusion of the outsourcing agreement, [. . .]

[19] The merging parties submitted that despite entering into the outsourcing agreement, Imperial still considered the consumer packaged goods division to be unsustainable and thus released a SENS announcement in June 2019 in which it described the consumer packaged goods division as continually loss making and indicated that a decision had been taken to further rationalise the business by exiting and selling assets.

[20] In this context, the Imperial Group's submitted rationale painted the merchandising business as one in severe financial distress and held that despite numerous efforts to sustain the operations, it was faced with the options of either closing the merchandising business entirely or selling to a buyer which would retain a significant portion of the employees currently employed by CPG.

[21] The acquiring firm submitted that it would be better placed to ensure the continued viability of these operations and in that respect, it was understood that there are possible synergies which would be achieved through integrating the merchandising business into Pack n Stack's operations.

Relevant market and impact on competition

Relevant Market and market share analysis

[22] The Commission considered the activities of the parties and found that the proposed transaction presents a horizontal overlap in the market for the provision of field sales and merchandising services, as both Pack N Stack and CPG were active in such markets.

[23] In assessing the national market for the provision of field sales and merchandising services, the Commission estimated that post-merger, the merged entity would control a market share of 25% with an accretion of 9%.

This estimation was derived from revenue figures submitted by competitors of the merging parties and the Commission cautioned that its figures were overestimated as it had not contacted all players in the market.

[24] The merging parties submitted that the post-merger entity would control 18% of the market with an accretion of only 4%.

[25] The Commission considered both its own and the merging parties' submitted market shares in the context of strong competition faced from a number of other players in the market, most notably the Smollan Group which, on the commission's estimation, controls 66% of the market (62% on the merging parties' figures) and concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in the relevant market.

[26] We saw no reason to disagree with the Commission's finding on this issue.

Failing firm

[27] The Commission considered that the merging parties raised the failing firm defence within the meaning of section 12A(2)(g) of the Act as both a rationale for the transaction and as a counterfactual.

[28] The Commission conducted a thorough analysis of the merchandising business, importing the European Commission's analytical framework for the failing firm doctrine as approved in the Tribunal's assessments in *CTP Ltd and Another v Competition Commission*⁴ and *ISCOR Limited and Saldanha Steel (Pty) Ltd*.⁵ It concluded that the merchandising business was failing in the broad sense that that this was sufficient to justify the approval of the merger.

[29] In the hearing, Mr Norton, for the merging parties, took the Tribunal to several Imperial Holdings board documents and financial results which seemed to

⁴ *CTP Ltd and Compact Disc Technologies (a division of Times Media (Pty) Ltd) v Competition Commission* [2016] 1 CPLR 105 (CT) para 21.

⁵ *Iscor Ltd and Saldanha Steel (Pty) Ltd* 67/LM/Dec01 [2002] ZACT 17 (4 April 2002).

indicate that for a period before the outsourcing agreement, CPG faced financial distress.⁶

- [30] Whilst we take judicial notice of the apparent financial distress of the merchandising firm, given that on our assessment of the market shares the proposed merger was not likely to substantially prevent or lessen competition, we find it unnecessary for the purpose of the competition analysis to make a conclusive finding on whether the merchandising business was indeed a failing firm and leave this question open.

Public interest considerations

Pre-merger retrenchments

- [31] The Commission, in its investigation, found that there had been retrenchments in the merchandising business in 2017 and 2018 and that in 2019, 39 employees had resigned from the merchandising business.
- [32] The Commission assessed these retrenchments and found them to have been caused by the merchandising businesses' loss of client contracts. Recall that the merchandising business operates largely on a contractual basis, with independent merchandisers competing against one another for contracts with suppliers. These contracts, on the merging parties' submissions, are conventionally two to five years in length but may be terminated by suppliers during the lifespan of the contract for various reasons including poor performance. In 2017 the merchandising business lost four contracts, in 2018 a further one.
- [33] The merging parties submitted that approximately 85% of the costs of the merchandising business is associated with employment costs and thus the loss of contracts had necessitated the retrenchments.

⁶ Transcript of Proceedings LM079Jul19 p12-19.

- [34] The merging parties argued that the pre-merger retrenchments could not be considered merger specific because discussions around the proposed merger only started on 07 June 2019 after the SENS announcement on 03 June 2019 and thus temporally the retrenchments in 2017 and 2018 were too far removed to be considered as merger specific.
- [35] The Commission submitted that it may be argued that merger discussions commenced at the time of the Outsourcing Agreement in April 2019. However, it did not require a finding on the precise date because, regardless of the date on which the merger discussions began, a clear conclusion could be drawn that the historic retrenchments were caused by a loss of contracts in the merchandising business and thus such could not be considered merger specific.

Post-merger retrenchments

- [36] The merging parties submitted that in addition to the historic retrenchments there was a possibility of post-merger retrenchments. These retrenchments could be separated into two categories. The first being up to 600 non-merger specific retrenchments which might occur as a result of lost contracts and the second was 21 merger-specific retrenchments arising as a result of the overlap of operational structures between the merging firms. We deal with both categories below.
- [37] Regarding the 600 potential retrenchments, the merging parties submitted four notices of contract cancellation Imperial Logistics had received from clients in 2019. The Commission noted that such lost contracts would amount to roughly 50% of the merchandising businesses work and concluded that, as a result, it was likely that retrenchments may be necessary to ensure the sustainability of the merchandising business.
- [38] It is not necessary for the Tribunal to rule on the necessity of the retrenchments, but rather it is incumbent on us to first determine whether the proposed retrenchments are merger specific. Clearly, whilst the proposed retrenchments may occur close to the conclusion of this deal, such cannot be said to be caused

by the merger and thus lack the merger specificity required to engage the Tribunal's jurisdiction.

[39] Turning then to the 21 retrenchments which are merger specific. In assessing merger specific retrenchments, the Tribunal is required to assess: (i) whether a rational process has been followed to arrive at the determination of the number of jobs that are to be lost, i.e. whether there is a rational link between the number of jobs proposed to be shed and the reasoning for such reduction; and (ii) whether the merger specific job losses could be justified by an equally weighty and countervailing public interest.

[40] The merging parties submit that the merchandising business is decentralised, requiring the duplication of administrative positions in various parts of the country, whereas Pack N Stack operates on a centralised basis which would mean that it is better able to manage operations in multiple locations from a centralised location. Accordingly, if the operational model of Pack n Stack is adopted, the merging parties submit that up to 21 positions may become redundant. To facilitate the assessment of such retrenchments, the merging parties submitted a list of 21 employees likely to be affected by the transaction, all of which were administrative in nature. The parties submitted that whilst such positions had been identified, they remained an estimation, as a detailed assessment of the impact on the transaction had not yet been fully made.

[41] The merging parties have been candid in that the 21 employees identified as possibly facing retrenchment were identified as a result of an initial assessment of the potential synergies that could be obtained between the two firms.

[42] Such potentiality is a factor which would weigh against an unconditional approval, as it impacts on the ability of the Tribunal to conclude with finality on whether a rational process was followed to arrive at the number of jobs lost.

[43] The Commission proposed the imposition of a condition which required that no more than 21 employees may be retrenched as a result of the merger. Whilst this condition did not resolve the difficulty of the identity of the merger specific

retrenchments, it would have the function of bringing certainty to the number of such retrenchments.

[44] Turning to the second consideration, namely whether the merger specific job losses could be justified by an equally weighty and countervailing public interest consideration, we were again taken to the SENS announcement released by Imperial holdings as well as an extract of its audited results for the year ended 30 June 2019 in which the entire packaging division had been written off. These documents, as narrated by Mr Norton indicated that Imperial Holdings had taken the executive decision to exit the merchandising business. If the merger were not to be approved, the counterfactual presented to us was the total shuttering of the business and the wholesale retrenchment of some 2883 employees.

[45] We were convinced of Imperial Holdings' intent to exit this market and its audited results seemingly made provision for the expense of retrenchment of the entire workforce of the merchandising business.

[46] In this context, we also considered that the merging parties had tendered two further conditions to the merger. The first entailed the establishment of a fund, the purpose of which was to assist in the re-skilling of the employees retrenched either as a result of the loss of contracts or as a result of the merger itself.

[47] The second was that for a period of 12 months, if any positions became available in the acquiring firm, the acquiring firm would use reasonable endeavours to give preference to those employees who had been retrenched either by virtue of the loss of contracts or by the merger itself.

[48] The proposed conditions thus had the effect of bringing certainty to the number of jobs to be lost, mitigating the effects of non-merger specific job losses and providing the potential for employment of the affected employees.

[49] An approval with such conditions would also see the avoidance of the loss of 2883 jobs and this, to us, counted as a sufficiently weighty and countervailing public interest consideration to approve the merger subject to the conditions provided.

Employee concerns

- [50] During its investigation of the merger, the Commission contacted several trade unions which represented the workers at the merchandising business. The only trade union to raise concerns around the transaction was the Agricultural Food and Allied Democratic Workers Union (AFADWU).
- [51] In its submissions, AFADWU raised concerns related to the fact that since the outsourcing agreement had taken place, certain employee benefits had not been maintained to the same standard as such had been at the merchandising business.
- [52] AFADWU raised three broad merger related concerns both prior to the hearing in a written submission and at the hearing where they were represented by Mr Monwabisi Konafana, an AFADWU co-ordinator who made oral submissions.
- [53] The first concern raised was that members of the employee's pension fund had not been consulted regarding the fundamentals of the transfer of their pension/ provident funds. This lack of consultation was made worse by the fact that, on Mr Konafana's oral submissions, employees had not received a provident fund statement since 2017.
- [54] The second concern was that the employees had been contributing to a compulsory funeral fund which had not yet paid benefits to any of the families of deceased employees. The third was that whilst the merchandising business had previously paid out an amount of R2000 to the bereaved family of those employees who had passed on whilst in the employ of the firm, AFADWU submitted that this no longer occurs under the outsourcing agreement and raised concerns that this would not take place into the future.
- [55] These concerns were raised by AFADWU acknowledging an ongoing dispute before the CCMA related to AFADWU's organisational rights at the merchandising business. We did not consider this any further than to acknowledge such context.

- [56] In response to the first concern, the merging parties confirmed that they are under a legal obligation to ensure that when employees are transferred in terms of section 197 of the Labour Relations Act, that all benefits are maintained on equal or better terms. Ms Barnes, the 'Chief People Officer' of Pack n Stack confirmed that the employees transferred would enjoy benefits equal to the ones enjoyed under Imperial. In order to facilitate such, all transferred employees would need be placed in a ring-fenced fund in the acquiring firm because the benefits enjoyed by them were better than the ones currently enjoyed by the employees of the acquiring firm. The merging parties further tendered to ensure that the employees would receive their benefit statements within 14 days.
- [57] With regard to the second concern, Ms Barnes again confirmed that the funeral benefits afforded to the employees under the acquiring firm would not differ from those afforded to the employees under Imperial. Mr Konafana thereafter raised a series of specific instances regarding certain members with different payments reflecting on their payslips. Whilst we are unable to resolve every concern related to individual instances, Ms Barnes, at our request, made herself available after the hearing to resolve such matters with Mr Konafana.
- [58] With regard to the *ex gratia* R2000 payment to bereaved families, the merging parties submitted that this was not a term of employment from Imperial's perspective and thus could not be considered a binding term which the merchandising business had to uphold.
- [59] On our consideration, none of the concerns raised by AFADWU warranted the prohibition of the merger and could be managed with a greater sense of transparency and accountability, which the hearing created.

Conclusion in the merchandising transaction

- [60] In light of the above, we concluded that the transaction presented no competition concerns and whilst there was the potential for merger specific retrenchments, the number of such conditions and the potential impact would

be limited on the conditions provided. In this context, the negative impact of the proposed merger specific retrenchments was outweighed by the benefit of the retention of a large percentage of the workforce which, absent this transaction, would be facing retrenchment.

[61] We thus approved the merger subject to the conditions provided.

Cold Storage transaction

Parties to the transaction

Primary Acquiring Firm

[62] Vector Logistics is a company incorporated in accordance with the company laws of the Republic of South Africa. It does not control any other firms and is a wholly owned subsidiary of RCL Foods Limited (RCL). RCL is a public company with 71,14% of its share controlled by Remgro limited. RCL has three principles operating subsidiaries: Vector Logistics, RCL Foods Sugar & Milling, and RCL Foods Consumer (Pty) Ltd. Collectively the acquiring group manufactures a wide range of branded and private label food products which it distributes through its route to market supply chain specialist, Vector Logistics.

[63] Vector provides integrated supply chain logistics for the distribution of both ambient and chilled frozen goods for the acquiring group as well as for FMCG retail, wholesale and food services sector. Of relevance to this merger assessment are the acquiring group's cold chain logistics activities which include bulk cold storage, primary transport, principle secondary distribution, and customer secondary distribution.

Primary target Firm

[64] The cold storage business, as indicated in paragraph [10] above formed part of the broader Imperial Logistics Consumer Packaged Goods division.

[65] The cold storage businesses provided refrigerated warehouses and transportation of perishable FMCG's by refrigerated vehicles. The key customers of the cold storage division include manufacturers, distributors wholesalers and retailers of perishable food products.

Proposed transaction and rationale

[66] In terms of the transaction, Vector Logistics will acquire sole control over the cold storage business , acquiring , inter alia, the following assets:

- 66.1 Three refrigerated warehouses situated in Linbro Park (Gauteng), Bloemfontein (Free State), and Polokwane (Limpopo);
- 66.2 Customer contracts, lease agreements, debtors' books and IT logistics systems;
- 66.3 All employees situated at the warehouses, all of whom will transfer to Vector in terms of the s197 of the Labour Relations Act) and;
- 66.4 Approximately 397 vehicles.

[67] Not included in the sale, as the tribunal heard at the merger hearing, is the Durban warehouse. Mr Hewitt of Imperial Logistics indicated that whilst all efforts had been made to find a willing buyer for such a warehouse, its condition rendered it too much of an unattractive purchase. On Hewitt's submissions, the Durban warehouse will close upon its lease running to a conclusion in May 2020.⁷

[68] In terms of rationale, the acquiring group submitted that the proposed transaction would present significant efficiency benefits for Vector, [. . .]

Relevant market and impact on competition

Relevant Market and market share analysis

⁷ Tribunal Transcript of Proceedings LM115Oct19 14 November 2019 p42.

- [69] The Commission considered the activities of the parties and found an overlap insofar as both the merging parties provide cold chain logistics to manufacturers, distributors, wholesalers and retailers of perishable FMCG's across South Africa. The Commission considered the Tribunal's jurisprudence and opted not to examine each component of the supply chain separately, but rather to assess the market as a whole.
- [70] In terms of relevant market shares, the merging parties submitted that the acquiring group has approximately 2% and the cold chain business holds approximately 0,2% of the provision of distribution services nationally. The Commission did not provide its own market share analysis, indicating that there was a paucity of information on the market and the imminence of the exit of the cold storage business weighed heavily on its ability to investigate the market shares further.
- [71] The Commission did however indicate that in its interaction with market participants, there appeared to be several alternatives for the provision of cold chain logistics, including Supergroup, Value Logistics, Unitrans Logistics, Bidvest, Barloworld, Logistics, and Sequence Logistics among others. The Commission, in its consultations with the customers of the cold storage business found that customers had generally no concerns about the merger because of the presence of several credible alternatives.
- [72] At the merger hearing, the merging party representatives submitted that in the negotiation phase of this transaction, Imperial Logistics had received a first bid for the cold storage logistics businesses, but when a customer of the division was unable to come to terms with the proposed purchaser, the deal fell through. This, we felt was an additional indication of the strength of the bargaining power customers may possess in the market and supported the Commission's thesis that regardless of the market shares in the market, the countervailing power of customers was bolstered by the presence of several credible alternatives to the cold storage business.

[73] In addition, the Commission submitted that the fact that the cold chain business was a component of a failing firm, and that the counterfactual to the merger was the wholesale exit of the cold chain business, meant that the proposed transaction would not result in a significant lessening of competition.

[74] Again, we did not feel the need to rule on whether the cold storage business was a failing firm, but we took judicial notice of the fact that Imperial Logistics, in both its projected intent and conduct pointed towards the fact that it sought to exit the market. In the light of such findings, we agreed with the Commission's finding that the merger was unlikely to present a significant lessening of competition.

Public interest considerations

[75] The Commission, in its investigation, found that it was unlikely that the merger would result in any employment concerns. It found that the proposed transaction would have a net positive effect on employment as it was likely to result in the saving of approximately 522 jobs.

[76] The merging parties submitted that absent the merger, and in the context of Imperial Holdings' stated intent to exit the consumer-packaged goods business, the 522 employees of the cold storage business would most likely face retrenchment absent the merger.

[77] The merging parties confirmed that the 522 employees would be transferred to the Vector in terms of section 197 of the Labour Relations Act as a result of the proposed transaction.

Conclusion in the Cold Storage Division transaction

[78] Considering the above, we concluded that the transaction was unlikely to significantly prevent or lessen competition in the relevant market. In addition,

the transaction did not present employment concerns, nor did it raise any additional public interest concerns.

[79] We thus approved the merger in terms of our order.

Mr Enver Daniels

10 December 2019
Date

Ms Y Carrim and Mr AW Wessels concurring.

Tribunal Case Manager : Alistair Dey-Van Heerden.

For the Merging Parties : Anthony Norton and Anton Roets of Nortons Inc.

For the Commission : Wiri Gumbie and Zanele Hadebe.

For AFADWU : Monwabisi Konafana