

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM202Feb21

In the matter between:

NMI Durban South Motors (Pty) Ltd

Primary Acquiring Firm

And

The Barloworld Motor Retail Business

Primary Target Firm

Panel: AW Wessels (Presiding Member)
Y Carrim (Tribunal Panel Member)
T Vilakazi (Tribunal Panel Member)

Heard on: 21 May 2021

Decided on: 21 May 2021

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Signed by: Andreas Wessel Wessels
Signed at: 2021-05-21 13:20:13 +02:00
Reason: I approve this document

Andreas Wessel Wessels

Presiding Member
Mr Andreas Wessels

21 May 2021

Date

Concurring: Ms Yasmin Carrim and Dr. Thando Vilakazi



competitiontribunal
SOUTH AFRICA

Merger Clearance Certificate

Date: 21 May 2021

To: Lulama Mtanga Legal Consultancy

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Case Number: LM202Feb21

NMI Durban South Motors (Pty) Ltd And The Barloworld Motor Retail Business

You applied to the Competition Commission on **17 February 2021** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- no conditions.
- the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- it was granted on the basis of incorrect information for which a party to the merger was responsible.
- the approval was obtained by deceit.
- a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

Tebogo Mputle



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NMI Durban South Motors (Pty) Ltd

Primary Acquiring Firm

And

The Barloworld Motor Retail Business

Primary Target Firm

Panel: AW Wessels (Presiding Member)
Y Carrim (Tribunal Panel Member)
T Vilakazi (Tribunal Panel Member)

Heard on: 21 May 2021

Order issued on: 21 May 2021

Reasons issued on: 02 June 2021

REASONS FOR DECISION

- [1] On 21 May 2021, the Competition Tribunal (“Tribunal”) conditionally approved the acquisition by NMI Durban South Motors (Pty) Ltd (“NMI DSM”) of the motor retail business of Barloworld South Africa (Pty) Ltd (“Barloworld SA”) and the business conducted by other members of Barloworld in respect of the motor retail sector (“the Barloworld Motor Retail Business”). Barloworld SA is a wholly owned subsidiary of Barloworld Limited (“Barloworld”).
- [2] The proposed transaction involves NMI DSM acquiring the assets and assumed liabilities related to the Barloworld Motor Retail Business and a number of subsidiary companies that comprise of the Barloworld Motor Retail Business.
- [3] NMI DSM is active in the retail sale of new and used vehicles, as well as vehicle servicing and parts. NMI DSM owns various dealerships¹ and represents the following brands: Mercedes-Benz, Jeep, Smart, Fuso, Freightliner, Western Star, GWM, Haval, and Mitsubishi.
- [4] The activities of Barloworld Motor Retail Business include trading in new and used vehicles, after-sales services (which include the service of vehicles and the sales of parts and accessories), finance and insurance products, and the provision of customer

¹ Mercedes Benz Umhlanga; Mercedes Benz Pinetown; NMI DSM Umhlanga; Mercedes Benz Commercial Vehicle Durban; Garden City Motors Shelley Beach; Garden City Motors Pietermaritzburg; Garden City Motors Mbombela; Garden City Commercial Motors Mbombela; and NMI DSM Mbombela.

services and other ancillary services. It represents *inter alia* the following brands: Mercedes Benz, Toyota, Volkswagen, Audi, BMW, Ford and Mazda.

Competition assessment

- [5] The Competition Commission (“Commission”) identified a geographic overlap in the retail activities of the merging parties in KwaZulu-Natal. NMI DSM has dealerships in Port Shepstone, Durban and Pietermaritzburg, whilst the Barloworld Motor Retail Business is active in Durban and Pietermaritzburg.
- [6] The Commission assessed the impact of the proposed transaction on the following relevant product and (potential) geographic markets:
- (i) the sale of new passenger vehicles (“PVs”) within 100 km of the Barloworld Motor Retail Business dealership in Durban;
 - (ii) the sale of new light commercial vehicles (“LCVs”) within 100 km of the Barloworld Motor Retail Business dealership in Durban;
 - (iii) the sale of new PVs within 100 km of the Barloworld Motor Retail Business dealership in Pietermaritzburg;
 - (iv) the sale of new LCVs within 100 km of the Barloworld Motor Retail Business dealership in Pietermaritzburg;
 - (v) the sale of new PVs within the KwaZulu-Natal province; and
 - (vi) the sale of new LCVs within the KwaZulu-Natal province.
- [7] The Commission found that post-merger the merger parties’ market shares in the abovementioned (potential) relevant markets will range between 5% to 30%. Further, the merger parties will continue to face competition from numerous dealerships in all the affected relevant markets.
- [8] The Commission further found that the merger does not raise any concerns regarding the provision of after-sale services, parts and accessories. It noted that most dealerships normally sell maintenance plans with the new vehicles which entails that the cost of servicing the vehicle is included in the purchase price. With respect to used vehicles or vehicles that are no longer under the warranty and service plan, the Commission noted that a customer has a choice of purchasing the spare parts from OEM-approved dealerships or independent workshops, motor body repairers or panel beaters who offer after sale replacement spare parts. The Commission further noted that there are several independent players who offer different spare parts and accessories for different brands and model of cars. This includes AutoZone, Grandmark International, Goldwagen, Allparts, Masterparts, Gaydons, Kotwals, Kapico and Midas.
- [9] In relation to the effect of the proposed transaction on inter-brand competition, the Commission identified a number of alternative competitor dealerships per brand of vehicle available in KwaZulu-Natal within 100 km of the Barloworld Motor Retail Business dealerships. According to the Commission the number of competing dealerships in KwaZulu-Natal are an indication that the proposed transaction is unlikely to lead to a substantial reduction or dilution of inter-brand competition. We found no reason to disagree with the Commission’s findings.
- [10] No third parties raised concerns regarding the effects of the proposed transaction on competition.

[11] We concur with the Commission's conclusion that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

[12] In relation to employment, the merger parties made an unequivocal undertaking that there shall be no retrenchments as a result of the proposed transaction.

[13] The Minister of Trade Industry and Competition (DTIC) raised public interest concerns relating to the effect that the proposed transaction may have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.

[14] To address the concerns raised the merger parties tendered certain conditions relating to post merger participation in a Supplier Development Programme ("SDP") for a certain period. Barloworld currently has such a programme. The Barloworld Supplier Development Programme affirms that black owned and women owned qualifying small enterprises are afforded the maximum opportunity to participate in providing products and services to Barloworld.

[15] The Tribunal approved the proposed transaction subject to the following conditions relating to SDP participation:

- (i) Barloworld SA and NMI DSM shall ensure that the merged entity continues to participate in the Barloworld Supplier Development Programme for a period of 2 (two) years following the implementation date;
- (ii) during the abovementioned period, the merged entity shall develop its own SDP which will replace the target firm's participation in the Barloworld's Supplier Development Programme; and
- (iii) in furtherance of above condition, the merged entity shall contribute a minimum of a certain percentage of its profit after taxation to the SDP.²

[16] The above conditions will remain in place for a period of 10 years following the implementation date of the transaction. This will encompass the period of two years for the condition in (i) above and a further period of 8 years for the conditions in (ii) and (iii) above.

² See conditions for further details. A non-confidential version of the conditions is available.

[17] The imposed conditions address any potential public interest concerns. The set of conditions is attached as Annexure A.

Andreas Wessel Wessels

Mr Andreas Wessels

Ms Yasmin Carrim and Dr Thando Vilakazi concurring

2 June 2021

Date

Tribunal Case Manager: D Mogapi

For the Merging Parties: L Mtanga and N Khumalo of Lulama Mtanga Legal
Consultancy

For the Commission: R Ncheche, R Maphwanya and A Mfuphi

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ANNEXURE A

IN THE LARGE MERGER BETWEEN

NMI DURBAN SOUTH MOTORS (PTY) LTD

AND

THE BARLOWORLD MOTOR RETAIL BUSINESS

CT CASE NUMBER: LM202FEB21

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings -

1.1.1. **“Acquiring Firm”** means NMI Durban South Motors (Pty) Ltd;

1.1.2. **“Approval Date”** means the date referred to on the Tribunal’s merger clearance certificate (Form CT 10);

1.1.3. **“Barloworld”** means Barloworld Limited;

1.1.4. **“Barloworld SA”** means Barloworld South Africa (Pty) Ltd or the Seller, which is only mentioned herein as the Seller of the Target Firm;

1.1.5. **“Beneficiaries”** mean the motor retail business Small Medium and Micro Enterprises that have been accepted as participants and that are currently participating in the SDP operated by Barloworld;

1.1.6. **“Commission”** means the Competition Commission of South Africa;

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- 1.1.7. “**Conditions**” mean the conditions set out herein;
- 1.1.8. “**Days**” mean any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.1.9. “**DTIC**” means the Department of Trade, Industry and Competition;
- 1.1.10. “**Implementation Date**” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.1.11. “**Merged Entity**” means NMI DSM and The Barloworld Motor Retail Business;
- 1.1.12. “**Merger**” means the acquisition of control by the Acquiring Firm over the Target Firm;
- 1.1.13. “**Merging Parties**” mean NMI DSM and The Barloworld Motor Retail Business;
- 1.1.14. “**NMI DSM**” means NMI Durban South Motors (Pty) Ltd or the Acquiring Firm;
- 1.1.15. “**SMMEs**” mean Small Medium and Micro Enterprises;
- 1.1.16. “**Supplier Development Programme**” means a programme within Barloworld which affirms that black owned and women owned qualifying small enterprises are afforded the maximum opportunity to participate in providing products and services to Barloworld.
- 1.1.17. “**Target Firm**” means The Barloworld Motor Retail Business;
- 1.1.18. “**The Barloworld Motor Retail Business**” means the motor retail business of Barloworld SA and the business conducted by other members of Barloworld in respect of the motor retail sector;
- 1.1.19. “**Tribunal**” means the Competition Tribunal of South Africa.

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2. CONDITIONS

- 2.1. The Seller and the Acquiring Firm shall ensure that the Merged Entity continues to participate in the Barloworld Supplier Development Programme for a period of 2 (two) years following the Implementation Date;
- 2.2. During the period mentioned in item no. 2.1. above, the Merged Entity shall develop its own Supplier Development Programme which will replace the Target Firm's participation in the Barloworld's Supplier Development Programme.
- 2.3. In furtherance of condition 2.2 above, the Merged Entity shall contribute a minimum of **[Confidential]**% of its profit after taxation to the Supplier Development Programme¹ and subject to the following, that:
- 2.3.1. If the Supplier Development Programme spend exceeds **[Confidential]**% of net profit after taxation for a financial year, then the amount by which the contribution exceeds **[Confidential]**% shall be carried forward;
 - 2.3.2. If the Supplier Development Programme spend falls short of **[Confidential]**% of net profit after taxation in a financial year, the shortfall shall be made up for in the following year;
 - 2.3.3. The **[Confidential]**% of net profit after taxation Supplier Development Programme spend is aligned to the annual financial reporting period, is calculated at the annual financial reporting period and shall be based on the annual financial statements for that period; and
 - 2.3.4. Over the 10-year duration of the condition, the **[Confidential]**% of net profit after taxation Supplier Development Programme spend commitment shall be fulfilled in line with the principles set out in 2.3.1 – 2.3.3.

¹ Annexure A - Supplier Development Programme submitted by the Merging Parties on 29 March 2021.

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3. DURATION

3.1. These conditions will remain in place for a period of 10 years following the Implementation Date. This will encompass the period of two years for condition 2.1 and a further period of 8 years for conditions 2.2 and 2.3.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1. The Merged Entity shall inform the Commission in writing of the Implementation Date within 5 (five) Days of it becoming effective.

4.2. The Seller and the Acquiring Firm shall circulate a copy of the Conditions to the Beneficiaries within 5 Days of the Approval Date.

4.3. As proof of compliance thereof, the Seller and the Acquiring Firm shall within 10 Days of circulating the Conditions, provide the Commission with an affidavit by a director employed by each of the Seller and the Acquiring Firm attesting to the circulation of the Conditions and attach a copy of the notice sent.

4.4. The Merged Entity shall submit a detailed written report within 5 Days after the anniversary of the Implementation Date and for a period of 10 years, to the Commission and the DTIC, confirming compliance with clause 2 of the Conditions. The report must be accompanied by an affidavit which must be deposed to by a Director and/or Chief Executive Officer of the Merged Entity attesting to the contents of the report.

4.5. Any of the Beneficiaries who believe that the Seller and the Acquiring Firm have not complied with or have acted in breach of the Conditions may approach the Commission.

4.6. In the event that the Commission discovers that there has been an apparent breach of these Conditions, this 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.

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5. VARIATION

5.1. The Merged Entity and the Seller or the Commission may at any time, and on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted.

6. GENERAL

6.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za