Metropolitan/Momentum merger

No job losses says Competition Tribunal

It is not common for competition authorities in South Africa to strongly take into account employment issues in their decisions. **Nandi Mokoena** however outlines a decision in the recent Metropolitan/Momentum merger that forcefully took job losses into account.

Does the Tribunal ... have any mandate to pronounce on jobs, or is it overweening its position to curry political favour?'

This is the question a reporter asked me shortly after the Competition Tribunal issued its decision in the merger involving Metropolitan Holdings and the Momentum Group. As a consultant to the Tribunal, I had to think that I was representing them not me, so my answer had to be factual. My mind though was reeling at the thought that anyone could suggest the Tribunal would conditionally approve a merger, a decision with major implications for the merging parties, the market and employees, in order to score political points.

Well anything's possible and government agents may well 'overstep the mark sometimes' the reporter went on to say, but thankfully in this case I could assure him that the Tribunal was acting well within its mandate by simply pointing him to section 12A(1) of the Competition Act.

JOB DECISIONS UNCOMMON

Section 12A(1) requires the Tribunal to consider public interest grounds when assessing a merger. The Act lists four public interest grounds, one of them being employment. What this means is that before the Tribunal approves or prohibits a merger, it must consider the impact that it would have on employment.

In fact the way the Act is written, a merger which might otherwise result in market efficiencies can be prohibited or approved solely on the basis of a substantially negative or positive effect on employment. But in South Africa, this has never happened. The Tribunal has not yet approved or prohibited a merger solely on the basis of employment.

The South African competition regime has received much criticism for including public interest grounds in competition law. It has been criticised on the grounds that firms should be free to structure their deals in ways that work best for them and that markets should be free to decide the efficiency or otherwise of a merger. It has also been censured on the grounds that employment concerns are well catered for in labour law and thus have no place in a competition assessment. Surprisingly, it is in the more 'liberal' overseas markets that public interest grounds have been used to prohibit or approve mergers.

Anyone who followed the developed world's response to the recent economic recession might know that during this time, the United States and United Kingdom approved significant bank mergers in the public interest.

The US conducted 'emergency consolidations' by, amongst others, combining the Bank of America and Merrill Lynch and in this way created the world's second largest bank by market value. According to the president of the American Antitrust Institute, Foer, in March 2009 these decisions were too important to leave to competition law and had to be made quickly.

And in the UK, Lloyds TSB bank was allowed to purchase HBOS, the country's largest mortgage lender, for £12-billion. The transaction was said to potentially amount to a substantial lessening of competition in certain markets by the UK's competition authority.

Such public interest decisions were made even before the recession in 2006.

For example, when a state-owned Arab company, DP World, tried to take over the management of some US port facilities, the result was an uproar in the US congress. The deal caused such a furore in the US that the House of Representatives held a vote on legislation to block the DP World deal resulting in an overwhelming majority voting for blocking the deal.

While the Competition Tribunal of South Africa has never approved or prohibited a merger solely on employment grounds, it has however in the past imposed employment-related conditions on the implementation of a merger.

There are three examples where this happened.

The first was the Tiger Brands/Ashton Canning merger of 2005 where the transaction was expected to result in the retrenchment of about 45 permanent employees and about 1 000 fewer seasonal workers getting contracts. In this case the Tribunal approved the merger subject to a condition which limited unemployment amongst the seasonal workers and also created a training fund for affected workers.

The second case concerned the Lonmin/Southern Platinum merger of 2005 in which the transaction was expected to result in a maximum of 400 job losses. Here the Tribunal approved the deal subject to a moratorium on retrenchments and the re-training of affected employees.

The final case was the Metropolitan/Momentum merger in 2010 where the Tribunal placed a two-year moratorium on retrenchments. The merging parties had wanted to retrench up to 1 000 employees as a result of the merger.

MERGER

In the Metropolitan/Momentum merger, the merging parties argued before the Tribunal that they had committed to certain cost savings, through the merger, to their shareholders. These cost savings depended, in part, on the merged entity retrenching a maximum of 1 500 employees from both firms representing about 9.5% of both firms' employees.

The merging parties later reduced this retrenchment figure to 1 000. They again argued that the proposed job losses were necessary and were a last resort in their endeavour to achieve cost savings.

In addition to reducing the number of possible job losses, the merging parties also offered to provide support, such as core skills training, to those who would be retrenched and were unskilled and semi-skilled employees, outplacement support and counselling, and to use their best endeavours to redeploy employees within the merged entity.

The Competition Commission, which was the first body to consider the merger, accepted the merging parties' undertakings and recommended to the Competition Tribunal that the merger be approved subject to the implementation of these support measures.

Nehawu (National Education & Allied Workers Union) which represented about 6% of Momentum's employees however did not accept the merging parties' undertakings. It argued that the merging parties had failed to properly justify the need for any job losses and had not substantiated how they arrived at the 1 000 retrenchment figure.

In arguing its point, Nehawu disputed the merging parties' claims that they had treated job losses as a last resort. It was of the view that the merging parties saw retrenchments as the easy way out and had not sufficiently explored alternative ways to achieve cost savings. Consequently, Nehawu asked the Tribunal to prohibit the merger or to approve it without any job losses.

Having heard the merging parties' arguments, the Commission's view and Nehawu's, the Competition Tribunal decided to approve the merger but subject to the condition that the merging parties could not retrench any employees, as a result of the merger, for two years after the merger implementation date.

It is important to highlight that the Tribunal has not yet issued its reasons for the ruling but, for the time being at least, Nehawu members (and non-members) no longer face the prospect of losing their jobs in the next two years. The merging companies could however still appeal.

The reporter who asked me about the Competition Tribunal pronouncing on jobs was not the only one who believed that an assessment of the effect of a merger on the market should not be combined with an assessment of the effect of the merger on employment. Dave Lewis, former chairperson of the Competition Tribunal, said if this question were posed in a university classroom the answer would probably be that the two assessments don't belong together. But in the real world, he went on to say, 'I think that we have little choice but to grapple with public interest considerations'.

Lewis added that, in a country like South Africa, 'a competition statute that simply ignored the impact of its decisions on employment... would consign the Act and the authorities to the scrap heap', because they would not be relevant to the constituency that brought them into being in the first place. LB

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