

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 88/LM/Oct06

In the matter between:

Imperial Holdings Ltd

Acquiring Firm

And

Terex Africa (Pty) Ltd

Target Firm

Panel	:	DH Lewis (Tribunal Member) N Manoim (Tribunal Member), and M Mokuena (Tribunal Member)
Heard on	:	20 December 2006
Decided on	:	20 December 2006
Reasons Issued:	:	09 January 2007

REASONS FOR DECISION

Approval

[1] On 20 December 2006, the Tribunal issued a merger clearance certificate unconditionally approving the merger between the abovementioned parties. The reasons for the decision follow.

Parties

[2] The primary acquiring firm is Imperial Holdings Ltd ("Imperial").¹ Imperial has a significant number of subsidiaries or business interest internationally including in South Africa.² The primary target firm is Terex Africa (Pty) Ltd ("Terex Africa"). Terex Africa is a wholly owned subsidiary of Terex Corporation, incorporated under the laws of the State of Delaware in the United States of America.³

¹The shareholders who beneficially hold more than 5% of the issued share capital of Imperial are: Public Investment Corporation 18.21%; Old Mutual 11.23%; Ukhamba 10.1%; Sanlam 8.4% and Lereko Mobility 7.25%.

² For the purpose of the present transaction the only subsidiaries of Imperial which are relevant are: MCC Contracts (Pty) Ltd ("MCC Contracts") and Mutual Construction Company (Tvl) (Pty) Ltd trading as MCC Plant Hire ("MCC Plant Hire")

³ The only subsidiary of Terex Corporation, relevant for the purposes of the present transaction is Terex Africa. Terex Africa does not control any subsidiaries.

Transaction

[3] In terms of a sale of shares agreement concluded between Imperial and Terex Corporation, Imperial intends to acquire the entire issued share capital of Terex Africa, as well as the agencies to distribute Terex Corporation products in a number of countries in Sub-Saharan Africa. Post-merger Imperial will have sole control over Terex Africa.

Rationale of the Transaction

[4] From Imperial's perspective, it is seeking to expand its business into other areas of the broad heavy earthmoving equipment market, as well as broadening its product range in order to compete effectively in the identified market. Terex Corporation wishes to distribute a broad range of products through one dealer in the Southern Africa region and would prefer this activity to be outsourced to an outside entity rather than distributing through a local subsidiary.

Parties' Activities

[5] Imperial has activities in the wider transportation and mobility markets in Southern Africa, Europe and the United Kingdom. Its activities cover a wide range including integrated logistics solutions; fleet management; vehicle and forklift leasing; aviation operations; sale and leasing; car rental and tourism; motor vehicle importation; sales and after sales services and related financial services businesses.

[6] Terex Corporation is a diversified global manufacturer operating five business segments.⁴ It manufactures a broad range of equipment for use in various industries, including the construction, infrastructure, quarrying, recycling, surface mining, shipping, transportation, refining, utility and maintenance industries. Terex Africa operates through the materials processing and mining segment of Terex Corporation, supplying surface mining equipment and mobile cranes, predominantly to the mining industry.

The Relevant Market

[7] The Commission's investigation revealed that there is no overlap in the activities of the merging firms, as Imperial is not involved in the distribution of earthmoving equipment. According to the Commission there is, however, vertical integration between the activities and the markets where the merging

⁴ The five business segments are: Terex Construction; Terex Cranes; Terex Aerial Work Platforms; Terex Materials Processing and Mining and Terex Road Building and Utilities.

firms are involved. The vertical integration occurs in that firstly, Terex Africa sells mining equipment to extract minerals on behalf of mining companies. Secondly, Terex Africa sells construction equipment and MCC Plant Hire procures construction equipment, which it leases out, to third parties.

[8] In analysing the proposed transaction the Commission found that the proposed transaction affects four markets namely: the market for the distribution of surface mining equipment; the market for open cast⁵ contract mining services where MCC contracts are involved; the market for the distribution of construction equipment⁶ where Terex Africa is involved and the market for renting out construction equipment where MCC Plant Hire is involved.⁷

[9] In the market for distribution of surface mining equipment, the Commission's investigation found that the major manufacturers of this equipment include Caterpillar, Komatsu, Hitachi and Liebherr. According to the Commission surface mining equipment⁸ is used for loading and hauling overburden and ore in open cast mining application.

[10] As both parties sell surface mining and construction equipment throughout South Africa as well as in Southern Africa, the Commission in line with the decision of the Tribunal in the Barloworld matter⁹ defined the geographic market as national.

Market Shares

The estimated market shares for distribution of surface mining equipment

Table 1

Name of Competitors	Market Shares (%)
Caterpillar	45
Komatsu	20

⁵ According to the Commission open cast contract mining services entails the contracting of third party company such as MCC Contracts, Moolman (Pty) Ltd and Diesel Power (Pty) Ltd to undertake mining of minerals on behalf of mining companies such as Amplats, Impala Platinum and Lonmin.

⁶ The Commission's investigation revealed that this entails the distribution of equipment, which is used in the construction industries. The construction equipment, which Terex and its competitors distribute, includes wheel loaders, excavators and grades. Most of the players that distribute construction equipment also distribute mining equipment. These distributors include players such as Barloworld, which distributes on behalf of Caterpillar and Terex Africa, which distributes on behalf of Terex Corporation. Other players, which distributes on their behalf and in competition with Terex Africa and Barloworld include Komatsu, Bell, Volvo and Liebherr.

⁷ According to the Commission the plant hire market involves the hiring out of heavy earthmoving equipment. In this market there are players such as MCC Plant, CAT Rental Store, Margado and Tiechman rent out heavy equipment such as graders and excavators to third parties involved in the construction sector. Their customers are players such as Murray & Roberts, Grinaker –LTA, WBHO and Roschcon.

⁸ This equipment includes mining trucks and excavators

⁹ Tribunal case number 20/LM/Apr03

Hitachi	10
Liebherr	10
Terex Africa	10
Others	5
Total	100
HHI	2750

[11] According to the Commission Terex Africa has a 10% market share for the distribution of surface mining equipment. Although Terex Africa's market share is not high the market is highly concentrated with an **HHI** of **2750**. According to the Commission this high level of concentration is due to the size of Caterpillar, which has 45% of the market. Terex Africa also competes in this market with players such as Komatsu, Hitachi and Liebherr.

The estimated market shares for distribution of construction equipment

Table 2

Name of Competitor	Market Shares (%)
Caterpillar	35
Komatsu	16.5
Bell	14
Volvo	13
Hitachi	8.5
Liebherr	7.5
Others	5.5
Total	100
HHI	2020

[12] The Commission found that in this market Terex Africa falls under "Others" as can be seen in Table 2 above, which are very small players. According to the Commission the reason why Terex is small in this market is that it started recently to distribute construction equipment. An examination of the transaction shows that the combined entity would continue to face a number of strong effective competitors notably Caterpillar which is the market leader followed by Komatsu then Bell, Hitachi and Liebherr.

The estimated market share in the plant hire market

Table 3

Name of Competitor	Market Shares (%)
MCC Plant Hire	27
CAT Rental Store	20
Tiechman	10
Sandton Plant Hire	10
Alfs Tippers	5
Others	28

Total	100
HHI	2138

[13] The Commission found that in this market MCC Plant has a relatively high market share of 27%. According to the Commission this market is highly concentrated partly due to the fact that 28% of the market has been lumped together under “Others”. The Commission is of the view that if the 28% under others were to be broken down, the level of concentration would decline significantly.

The estimated market share for open cast contract mining service

Table 4

Name of Competitor	Market Shares (%)
MCC Contract	19
Scharighuisen	17
Moolman Bros	16
Concor	7
Diesel Power	5
Basil Reed	3
Others	33
Total	100
HHI	2078

[14] As can be seen from the market shares on Table 4 above although there are other players MCC Contracts has the highest market share. According to the Commission this market is also highly concentrated partly due to the fact that 33% of the market has been lumped together under “Others”. The Commission is of the view that if the 33% under “Others” were to be broken down, the level of concentration would decline significantly.

Competitive Analysis

[15] The Commission found that the proposed transaction results in vertical integration. The vertical integration occurs firstly in that Terex Africa sells mining equipment to MCC Contracts, which utilises this mining equipment to extract minerals on behalf of mining companies. Secondly, Terex Africa sells construction equipment and MCC Plant Hire procures construction equipment, which it leases out to third parties.

[16] As vertical mergers raises competition concerns if the market shares are high, the Commission firstly considered the effect of the proposed transaction on competition in the national markets for the distribution of surface mining equipment and open cast contract mining services and also

the market for distribution of construction and equipment plant hire. Secondly the Commission considered whether this merger would result in facilitating collusion or whether it will result in foreclosure of competitors either upstream or downstream. And lastly the Commission also contacted customers and competitors of the merging parties in order to solicit their views regarding the proposed transaction.

[17] In the market for the distribution of surface mining equipment and open cast contract mining services, the Commission found that the transaction will not result in customer input foreclosure as MCC Contracts procures a small percentage of equipment from Terex Africa. We agree with the Commission's conclusion because a number of strong competitors would remain in this market *inter alia* the market leader Caterpillar 10, Komatsu, Hitachi and Liebherr. According to the Commission these competitors can supply other customers in the event Terex Africa decides to supply MCC Contracts only. The Commission's investigation also found that with regard to customer foreclosure, the proposed transaction would not result in customer foreclosure, as MCC is not a major customer of surface mining equipment. 11

[18] In the market for construction equipment and plant hire, the Commission found that the transaction would not result in input foreclosure, as MCC Plant Hire does not source any construction equipment from Terex Africa.¹² The Commission also found that the proposed transaction would not result in customer foreclosure, as MCC Plant Hire is not a major customer of construction equipment.¹³ We agree with the Commission's conclusion because it is clear that upstream suppliers will still have the ability to continue selling to downstream customers.

[19] With regard to the likelihood of the proposed transaction facilitating collusion if the upstream participant gains access to the information about its competitors from a downstream participant, the Commission found that this is unlikely to occur as, both the upstream and downstream markets are characterised by many firms. The Commission further found that the proposed transaction would not result in collusion, as it does not increase contacts between players in the upstream and downstream markets.

10 See table 1 above

11 According to the Commission the major customers of surface mining equipment are mining companies such as De Beers Diamond Company, AngloGold Ashanti and others. The other customers of surface mining equipment are competitors of MCC Contracts, which are Moolman Bros, Basil Read, Diesel Power, Concor/ Murray & Roberts and Scharrihuisen/ Benigon.

12 As can be seen from Table 2 there are other big players in this market such as Caterpillar, Komatsu, Hitachi and Liebherr. According to the Commission these competitors can supply other customers with construction equipment in the event that Terex Africa decides to supply MCC Plant Hire only.

13 According to the Commission the major customers of construction equipment include construction companies such as Basil Read, Grinaker-LTA, Concor/ Murray & Roberts, WBHO and Group Five

[20] The Commission also contacted both the customers¹⁴ and competitors¹⁵ of the merging parties in order to solicit their views with regard to the proposed transaction. Customers interviewed by the Commission indicated that they do not have concerns with the proposed transaction, as there are a number of other alternative suppliers of earthmoving equipment. However Torquip, Komatsu and Barloworld raised concerns with regard to customer foreclosure. They were concerned that MCC Plant Hire and MCC Contracts would procure their surface mining and construction equipment only. The Commission's investigation revealed that the vertical integration would not result in customer foreclosure as MCC Plant and MCC Contracts are not major customers of earthmoving equipment. The Commission found that the concerns raised do not hold, as there are many big suppliers that can supply earthmoving equipment. We agree with the Commission because if faced with price increase from the merged entity the downstream firms can turn to alternative suppliers.

Public Interest Issues

[21] There are no public interest issues.

Conclusion

[22]. Based on the above the transaction will not result in a substantial lessening or prevention of competition in the identified markets and is accordingly approved unconditionally.

D. Lewis

Tribunal Member

09 January 2007

Date

N Manoim and M Mokuena concurring.

Tribunal Researcher : J Ngobeni

For the merging parties : Vishal Koovejee (Deneys Reitz Inc)

¹⁴ The customers are Potgietersrus Platinum Mines, Murray & Roberts, Stephanutti & Bressan and WBHO

¹⁵ The competitors are Tiechman, Sandton Plant Hire, Margado, Alfs Tippers and Torquip Construction Equipment ("Torquip"), Komatsu, Liebherr, Bell and Babcock.

For the Commission : Makgale Mohlala
Mergers and Acquisitions