COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no.: 83/LM/Nov02

In the matter between:

The Competition Commission	**Applicant**
and	
Structa Technology (Pty) Ltd	**1st Respondent**
Dorbyl Engineering Management Company (Pty) Ltd	**2nd Respondent**
Fastpulse Trading 26 (Pty) Ltd	**3rd Respondent**

Reasons and Order

This is an application brought by the Competition Commission to impose an administrative penalty because the respondents have proceeded to implement a merger without the prior approval of the Competition Commission as required by the Act. The respondents have asked that the application be dismissed.

History of this case

On 6 February 2002 a joint venture agreement was concluded between Dorbyl Engineering Management Company (Pty) Ltd and Fastpulse Trading 26 (Pty) Ltd in terms of which each held a 50% share in Structa Technology (Pty) Ltd ("the Joint Venture"). The merging parties did not notify this merger because they considered that the relevant turnover and asset values of the merging firms were below the notification thresholds of R30 million for the target firm as prescribed by the Act[1].

However, on the advice of an independent financial advisor they consulted with their

1 Parties are not obliged to notify transactions where the combined annual turnover of the acquiring firm and the transferred firms is below R200 million and the annual turnover or assets of the target firm is below R30 million.

attorneys, who, on 11 March 2002, pointed out to them that they had used the wrong annual turnover and asset figures for the target firm in calculating the target firm's thresholds. Instead of using the financial statements for the immediately preceding year ending on 31 March 2001, as prescribed by the Act, they had used the current financial year figures, for 2001/2002. Their attorneys advised them that they did meet the required target threshold of R 30 million but suggested that Dorbyl apply for an advisory opinion from the Competition Commission, based on a Practitioner Update issued by the Commission on Joint Ventures. In this Update the Commission, inter alia, addresses the determination of thresholds of joint venture transactions where the target firm that is acquired by the parties is a joint venture. According to this Update the Commission would regard the turnover and assets of a joint venture that is a dormant shelf company as zero in calculating the threshold.

The parties followed this advice and wrote to the Commission's Compliance division on on 23 April 2002 asking for an advisory opinion. On 11 June 2002 the Competition Commission, in its advisory opinion, concluded that the transaction is indeed notifiable because the transaction did meet the required threshold for it to be classified as a intermediate merger. With regard to par. 5.6 of the Practitioner update the Commission advised as follows:[2]

> *"It must be emphasised that par.5.6 of the Practitioner Update applies only in situations where the Joint Venture entity is a dormant company with no assets or turnover, with a view to commencing an enterprise by acquiring assets or businesses from two or more companies in the same market. It would not, apply to the present situation where the new entity acquires assets or businesses from its parent companies."*

The respondents decided not to challenge the Commission's opinion and to file the merger belatedly with the hope that the Merger Division of the Commission would find the transaction not to be notifiable. However, the Commission did find it to be an intermediate merger and approved it without conditions on 2 October 2002.

Subsequent to approving the merger the Commission issued a notice of motion requesting the Tribunal to impose a penalty of R250 000,00 for implementing the merger prior to approval by the Commission.

The penalty

Section 13(A)(1) of the Act states that:

> *A party to an intermediate or large merger must notify the Competition Commission of that merger in the prescribed manner and form.*

2 For purposes of this hearing we need not go into the merrits on whether this merger was notifiable or not.

Section 13(A)(3) states:

> *The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.*

This section must be read with section 59(1)(d) which allows the Tribunal to impose an administrative penalty if the parties to a merger have –

i) Failed to give notice to the merger as required by Chapter 3;
ii) Proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
iii) Proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
iv) Proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act.

Furthermore, when determining an appropriate penalty, the Competition Tribunal must consider the following list of factors as set out in section 59(3) of the Act:

(a) the nature, duration, gravity and extent of the contravention;
(b) any loss or damage suffered as a result of the contravention;
(c) the behaviour of the respondent;
(d) the market circumstances in which the contravention took;
(e) the level of profit derived from the contravention;
(f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
(g) whether the respondent has previously been found in contravention of this Act.

It is, in the first place, the Competition Commission's task to ensure that business complies with the Competition Act. Its aim in enforcing the Act should be to stop unlawful conduct, to punish the wrongdoer and to deter or prevent unlawful conduct occurring or being repeated in future. In light of this it is understandable that the Commission would want to be seen to be actively enforcing the law by sending strong signals to the market that breaches of the Act will not be tolerated. However, the imposition of a fine in this case would send decidedly mixed signals.

This is a case where the respondents have laid all their cards on the table and acknowledged that they have implemented a merger without prior approval by the Commission. They claim – and this has not been challenged - that their non-compliance was the result of a *bona fide* mistake and that they did not deliberately flout the

Commission's authority. When they realised that they had made a mistake they immediately sought legal opinion and when they were told by their lawyer to ask the Commission's compliance division for a legal opinion they did so.

The Commission, for its part, in asking us to impose a fine on the respondents, has not addressed any of the factors listed in section 59(3) above. Instead it asks for the imposition of a fine because, argues the Commission, failure to do so would set an undesirable precedent, which will make it difficult for the Commission to ensure future compliance with the provisions of the Act. To put it in the Commissions own words, "the Act has been transgressed and the Commission wishes to make an example of the respondents because a murderer does not get away with murder when he acknowledges it". They are also quick to point out that because the respondents have consulted with the Commission's Compliance division, they have been lenient in asking for a fine of R250 000, a lower figure than the maximum penalty allowed by the Act, which is 10% of a firm's turnover.

The parties have listed a number of mitigating factors:

- They never tried to hide the transaction but have come forward and co-operated every step of the way with the Commission. They were *bona fide* in their initial view of the merger and their subsequent reliance on legal advice. There is no evidence that the Commission would have even been aware of the transaction had the parties not informed them.
- In fact the merger was only implemented for a period of three weeks before the respondents started taking action. They contacted the Commission after 11 weeks and notified the merger after 7 months. During this time they were in constant contact with the Commission. There is no evidence that the parties had acquired any advantage by implementing the transaction prior to notifaction.
- The merger was approved without conditions after the respondents had fully complied with the Commission's request that the merger be filed and a filing fee be paid. The merger has had no adverse effect on competition and no one had suffered any loss or damage as a result of the merger. In fact, pre-merger the company was making a loss and to date has not made any profits on a cumulative basis.
- This is the first time that any of the parties has been found to contravene the Act.

Surely the message that the Commission needs to send to the market is, that when in doubt, consult with the compliance division of the Commission, that the Act has wide jurisdiction and that it is better to err in notifying a non-notifiable merger than err in not notifying at all. One of the main objectives of compliance is to convince people that it is in their best interest to comply with the law, and not to force them to hide their transgressions once they realise that they have made a bona fide mistake. However, this is not the message that would be conveyed if a fine is imposed in this case. Indeed, precisely the converse is conveyed. Attorneys would advise their clients to rather keep

quiet when a *bona fide* mistake is made because co-operation with the authorities will, provide the authorities with the material necessary to mount a prosecution. In doing so law abiding citizens are forced to become fugitives. These are surely not the targets that the legislature had in mind when it drafted section 59(1)(d)(iv) of the Act.

The Act has been contravened. However, it is a contravention based on a *bona fide* error that embodies no negative consequences. Subsequent to their becoming aware of their error, the parties diligently set about complying with their obligations and were at all times candid with the Competition Commission. For this reason we have set a fine at a symbolic level.

Order

In light of the above we find the parties have contravened Section 13(A) (3) of the Act read with section 59(1)(iv) and that they are jointly and severaly liable for the payment of a fine of R1,00. Should one of the parties pay the fine the other party is absolved from paying it. The fine must be paid to the Commission within 7 business days of this decision.

_____ 24 March 2003

D Lewis **Date**

Concurring: N Manoim, M Holden