



COMPETITION ALERT

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The Commission had earlier investigated Macsteel and UVSS following a complaint lodged alleging that UVSS had acquired control over Brokrew Industrial Proprietary Limited (Brokrew) and UCEV without the requisite competition approval.

The Commission's investigation found that the conduct of the merging parties prior to receiving approval of the transaction amounted to a contravention of s13(A)(1) and s13(A)(3) of the Act.



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The respondents, Macsteel and UVSS had notified a transaction to the Commission in terms of which Macsteel would acquire 50% of the shares in UVSS and consequently acquired joint control of UVSS and its subsidiaries (Unique Camp Engineering and Ventilation Proprietary Limited (UCEV) and Ventilation and Support Africa Proprietary Limited (VSA)). The Commission unconditionally approved this transaction.

However, the Commission had earlier investigated Macsteel and UVSS following a complaint lodged by Videx Wire Products Proprietary Limited, alleging that UVSS - known then as Ricoco Proprietary Limited (Ricoco) - had acquired control over Brokrew Industrial Proprietary Limited (Brokrew) and UCEV without the requisite competition approval. Videx also alleged that Macsteel and two Olevano brothers were the shareholders of UVSS.

Brokrew, a manufacturer and installer of finished steel products was a long-standing customer of Macsteel. Brokrew was placed in liquidation and owed a debt to Macsteel to the tune of over R22 million. Unique Clamp Trust (UCT) sought to acquire Brokrew to complement its existing business since its subsidiaries sold mining ventilation support products to customers similar to or the same as Brokrew. One of the Olevano brothers approached Macsteel

for funding, which Macsteel agreed to with the view of potentially recovering some of the debt owed to it by Brokrew. UCT was selected as the preferred bidder to acquire Brokrew after a bidding process by liquidators. Mr Olevano and Macsteel then agreed that Brokrew would be acquired through UVSS (then Ricoco). Macsteel also agreed to Mr Olevano's request for assistance with various administrative tasks relating to the Brokrew acquisition.

The Commission continued its investigation stemming from the initial allegation by Videx of prior implementation.

The Commission's investigation found that the conduct of the merging parties prior to receiving approval of the transaction amounted to a contravention of s13(A)(1) and s13(A)(3) of the Act. Macsteel was found to have been involved in the operations and affairs of UVSS prior to the notification and approval of the transaction in the following ways:

- Representatives of Macsteel were involved in the discussions and provided recommendations regarding the changing of the companies' names within UVSS;
- Macsteel engaged the shareholder of UVSS regarding the structuring of the acquisition of Brokrew by UVSS (through a special purpose vehicle that UVSS would purchase);

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Although the Guidelines have yet to be finalised, its provisions propose maximum penalties as high as R5 million in respect of a failure to notify intermediate mergers and R20 million for failing to notify larger mergers.

- Macsteel nominated two directors to the board of the then Ricoco – who in turn appointed Macsteel as company secretary and KPMG as auditors. (The respondents argued that the representatives of Macsteel were removed before any decision affecting the business of Ricoco was taken);
- Macsteel's Chief Financial Officer at the time of the UVSS acquisition of Brokrew was involved in the day-to-day operations of UVSS; and
- A representative of Macsteel performed the company secretarial functions and provided administrative support to UVSS in its daily operations.

Acknowledging that some of the conduct outlined above may have constituted prior implementation and thus a contravention of the Act, the respondents agreed with the Commission to pay a settlement amount of R1 million as a penalty.

Given that the decision is a settlement and was not contested, it does not shed any light on how the mitigating and

aggravating factors set out in s59(2) of the Act were applied during settlement negotiations.

The competition authorities view prior implementation harshly. This is indicative in the Commission's draft Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Mergers Contrary to the Competition Act (Guidelines). Although the Guidelines have yet to be finalised, its provisions propose maximum penalties as high as R5 million in respect of a failure to notify intermediate mergers and R20 million for failing to notify larger mergers (provided these figures do not exceed the limit of 10% of a firm's annual turnover as stipulated in the Act). Presumably there has been no application of the Guidelines' proposed methodology of determining an appropriate administrative penalty in this decision. Once the Guidelines are in place, it will be interesting to see how the methodology proposed is applied.

Albert Aukema and Kitso Tlhabanelo

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WHAT DO THE COMPETITION COMMISSION AND THE SCHOOL UNIFORM MARKET PLAYERS HAVE TO SAY ABOUT ANTI-COMPETITIVE BEHAVIOUR IN THE SCHOOL UNIFORM SECTOR?

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This means that many school uniform retailers and suppliers do not face competition in the manufacture and sale of a particular school's uniform.



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Memories of the yearly back to school rush may flood back and serve as a reminder that much of the sales in the school uniform industry occur only for short periods each year. On the face of it, the school uniform industry must contend with hyper-cyclicalities even beyond that experienced by general clothing retailers.

According to the Commission, its statistics have shown that out of 1595 schools surveyed, 32% of all private schools and 33% of all so-called Model C schools have concluded exclusivity agreements with school uniform manufacturers. There may also be de facto exclusive arrangements that subsist without written agreements. This means that many school uniform retailers and suppliers do not face competition in the manufacture and sale of a particular school's uniform.

But what really drives the perceived high prices of school uniforms? Is it the apparent lack of competition that arises through these exclusivity arrangements or is it the need for school uniform suppliers and manufacturers to recoup reasonable returns in a very short period of time?

Understandably, school uniform manufacturers and retailers highlighted that the mark-ups on uniforms have to cover similar overheads compared to an ordinary clothing manufacturer and retailers over the course of a full year. One must have some sympathy for the difficulties in trying to operate a business only seasonally where fixed or semi-fixed costs may be high.

School uniform manufacturers also alleged that it often occurs that schools will suddenly change the uniform design once the manufacturing process is underway, resulting in manufacturers being burdened with high levels of unsellable stock. There appear to be many manufacturers who do not conclude formal written agreements with schools and they often feel that they are left with no remedy in this regard. It is unfortunately difficult to see how this is a competition problem.

Unavoidably, the discussion also delved into the educational pros and cons on the school uniform as an institution. Clearly uniforms impact on the affordability of giving a child a basic education.

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We hope that the Competition Commission will take a clear-eyed approach to assessing the issues before it within the legislative framework presented by the Competition Act.



However, there is arguably also educational and social value in a uniform. The value of school uniforms was supported by the Minister of Basic Education, Angie Motshekga. She said:

Children are very cruel people and we need to save them against themselves. Equality at schools is important especially for poor pupils as they will feel comfortable and have a sense of belonging.

Daya Chetty of the South African Principals Association made a similar comment saying:

A single standard in class creates a sense of belonging. A safe and healthy learning environment includes equality for pupils and reduced distractions in class.

There were various suggestions as to how to address the cost of school uniforms. The Competition Commission appears to be leaning in favour of removing exclusivity

arrangements or introducing a form of regulated competitive bidding for uniforms. Solutions proposed by the Southern African Clothing and Textile Workers Union (SACTWU) suggested that "all school uniforms should be manufactured in state run factories". The Union further proposed that Value Added Tax for school wear should be done away with.

Although the debate highlights, once again, the often-insurmountable barriers that the cost of education poses to many children in a country with high levels of inequality, we hope that the Competition Commission will take a clear-eyed approach to assessing the issues before it within the legislative framework presented by the Competition Act. It is not clear whether exclusivity arrangements are the cause of competition concerns or a side-effect of the risk inherent in operating in a market which presents the peculiarities of the school uniform sector.

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