



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM156Feb20

In the matter between:

Izimbiwa Associated Companies (Pty) Ltd

Primary Acquiring Firm

and

Bittersweet Trade and Invest 55 Proprietary Limited

Primary Target Firm

Panel	:	Yasmin Carrim (Presiding Member)
	:	Fiona Tregenna (Tribunal Member)
	:	Andiswa Ndoni (Tribunal Member)
Heard on	:	29 April 2020
Order Issued on	:	29 April 2020
Reasons Issued on	:	05 May 2020

Reasons for Decision

Approval

[1] On 29 April 2020, the Competition Tribunal (“Tribunal”) unconditionally approved the transaction involving Izimbiwa Associated Companies (Pty) Ltd and Bittersweet Trade and Invest 55 (Pty) Ltd.

[2] The reasons for approving the proposed transaction follows.

Parties to the proposed transaction

Primary acquiring firm

- [3] The primary acquiring firm is Izimbiwa Associated Companies (Pty) Ltd (“IAC”) an investment holding company and a wholly-owned subsidiary of the Phembani Group (Pty) Ltd (“Phembani”), a private company incorporated in accordance with the laws of the Republic of South Africa.
- [4] Phembani is controlled by the Capgro Trust through various firms. The Capgro Trust is controlled by Mr Phuthuma Nhleko (Mr Nhleko). The Capgro Trust trustees are Mr Nhleko and Mr Robyn John Elliot Beale. Phembani is a South African based industrial holding company with a focus on investing and operating in the oil, gas, minerals, mineral resources, metals and infrastructure related industries. Phembani and IAC shall collectively be referred to as the “Acquiring Group”.
- [5] The Capgro Trust holds various investments, however, of relevance to the proposed transaction are the investments of the Capgro Trust in the mining industry through Phembani. The relevant Phembani’s current portfolio include Izimbiwa Coal Proprietary Limited¹⁴ (“Izimbiwa Coal”) which is a coal mining company. Izimbiwa Coal’s only operating mine is the Middleburg Complex located in Mpumalanga. This mine operates in the production and supply of thermal coal.

Primary target firms

- [6] The primary target firm is Bittersweet Trade and Invest 55 Proprietary Limited (“Bittersweet”). Bittersweet is controlled by Julovision Proprietary Limited (“Julovision”) 50%; and Lifocept Proprietary Limited (“Lifocept”) 50%.
- [7] Bittersweet controls a number of firms which includes, Crimson Clover Proprietary Limited (“Crimson”), in turn Crimson has a 100% shareholding in

Lexshell 828 Investments Proprietary Limited (“Lexshell 828”). 828 in turn has a 51.9% shareholding in Lexshell 827 Investments.

- [8] Lexshell 827 Investments has a 50.1% shareholding in Lexshell 826 Investments. Lexshell 826 has a 100% shareholding in Umcebo Mining. Umcebo Mining controls Hlagisa Mining Proprietary Limited (“Hlagisa”).
- [9] Crimson, Lexshell 828, Lexshell 827, Lexshell 826, Umcebo Mining and Hlagisa shall be referred to as the “Target Group”.
- [10] The only operating entities of the Target Group are Umcebo Mining and Hlagisa. Umcebo Mining operates in the production and supply of thermal coal through Wonderfontein Colliery, an open-cast mine. In addition, Hlagisa owns the Wildfontein mine which is no longer producing coal. Hlagisa has an arrangement with Mafube coal mine whereby Hlagisa contract mines coal from Mafube. Hlagisa owns the coal it mines but the mine itself is owned by Mafube.¹

Proposed transaction and rationale

- [11] In terms of the proposed transaction, Phembani is acquiring the entire shareholding of Bittersweet from Julovision and Lifocept via IAC. According to the Call Option Agreement entered between the merging parties, Phembani has an irrevocable right and option to purchase Julovision and Lefocept’s shares in, and claim against, Bittersweet.
- [12] The conditions precedent of the Call Option Agreement state that Phembani can exercise the Call Option at any time between the Effective Date and 10 years after that. Phembani has elected to exercise the Call Option and intends to acquire (through IAC, the primary acquiring firm) the entire issued share capital of, and claims against, Bittersweet. Upon implementation of the proposed transaction, Bittersweet will be controlled by Phembani via IAC.

¹ Please see further para 21 and 22 page 14 of the CC recommendation

- [13] The Acquiring Group submitted that Phembani has exercised the Call Option with the objective of enhancing its coal portfolio. The Target Group submitted that the Bittersweet shareholders are exiting the investments in line with the Call Option Agreement.
- [14] This transaction follows a merger transaction between *Izimbiwa Associated Companies (Pty) Ltd and Moxitorque Investments (Pty) Ltd LM139Aug17* approved by the Tribunal on 20 October 2017, where the merging parties informed us that the transaction was phase one of a broader transaction which would ultimately result in Izimbiwa acquiring control of Umcebo Mining. In that transaction the merging parties had advised that a second phase of the transaction would be notified to the Commission as and when it occurred. The transaction before us is therefore envisaged second phase.

Impact on competition

- [15] The Commission considered the activities of the merging parties and found that they overlap with regard to the production and supply of thermal coal. The Commission found that the Acquiring Group is active in the supply of coal through Izimbiwa Coal and the Target Group is active in the supply of coal through Wonderfontein and Hlagisa. The Commission also found that the merging parties supply their thermal coal to the domestic and export market however the Commission noted that the merging parties do not supply thermal coal to Eskom under a tied market arrangement or through long term contracts.
- [16] The Commission did not conclude on the exact relevant market, however the Commission did assess the horizontal overlap between the activities of the merging parties in the national market for the supply of thermal coal to Eskom under short term contracts, the national market for the supply of coal to other customers other than Eskom ("Residual market") and the export market. The Commission's assessment revealed the following:

- [16.1] In the national market for the supply of thermal coal to Eskom under short term contracts, the Commission found that the merged entity will have a combined post-merger market share of approximately less than 15%. The Commission concluded that the proposed merger is unlikely to substantially prevent or lessen competition in the market for the supply of thermal coal to Eskom as the merged entity will remain a small supplier to Eskom. Furthermore, the merged entity will continue to face competition from other reputable players active in the market.
- [16.2] In the national market for the supply of coal to customers other than Eskom ("Residual market"), the Commission found that the merged entity will have a market share of approximately less than 10%. The Commission submitted that the proposed transaction is unlikely to substantially prevent or lessen competition in the residual domestic market as the combined post-merger market shares of the merging parties are low. Furthermore, the Commission also noted that there are various other players active in the market such as Anglo-American Coal South Africa with a market share of approximately less than 70%, Exxaro Recourses Limited with a market share of approximately less than 20%, and South32 SA Coal Holdings Proprietary Limited with a market share of approximately less than 15%.
- [16.3] In the market for the export of coal the Commission found that the merged entity will have a market share of less than 1%. The Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in the export market as the merged entity is a minuscule player. Furthermore, the Commission noted that there were various other players active in the market such as Anglo-American Coal South Africa with a market share of approximately less than 30%, Exxaro Recourses Limited with a market share of approximately less than 20%, and South32 SA Coal Holdings Proprietary Limited with a market share of approximately less than 20%.

[17] The Commission submitted that none of the customer and/or competitors of the merging parties raised concerns about the proposed merger and recommended that we approve the proposed transaction unconditionally.

Public interest

[18] The proposed transaction will not have any negative effect on employment in South Africa and raises no other public interest concerns.

Conclusion

[19] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approve the proposed transaction unconditionally.

Ms Yasmin Carrim

Prof Fiona Tregenna and Ms Andiswa Ndoni concurring

05 May 2020

DATE

Tribunal Case Manager : Ms Busisiwe Masina
For the merging parties : Mr Wade Graff of ENS Africa Inc
For the Commission : Nolubabalo Myoli and Themba Mahlangu