



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM155Nov20

In the matter between

GREENSTREET 1 (PTY) LTD

Primary Acquiring Firm

And

SOLAR CAPITAL DE AAR 3 (RF) (PTY) LTD

Primary Target Firm

Panel	: Ms M Mazwai (Presiding Member)
	: Mr E Daniels (Tribunal Member)
	: Dr T Vilakazi (Tribunal Member)
Heard on	: 21 January 2021
Order Issued on	: 21 January 2021
Reasons Issued on	: 5 March 2021

REASONS FOR DECISION

APPROVAL

- [1] On 21 January 2021, the Competition Tribunal ("Tribunal") unconditionally approved a large merger between Greenstreet 1 (Pty) Ltd and Solar Capital De Aar 3 (RF) (Pty) Ltd.
- [2] The reasons for the approval of the proposed transaction follow.

PARTIES TO THE PROPOSED TRANSACTION

Primary acquiring firm

- [3] The primary acquiring firm is Greenstreet 1 (Pty) Ltd (“Stanlib Fund II SPV”), a special purpose vehicle ultimately controlled by Stanlib Asset Management (Pty) Ltd, which is a wholly owned subsidiary of Stanlib Ltd (“Stanlib”). Stanlib Fund II SPV and all the firms it controls, all the firms controlling it and the various firms controlled by those firms, shall be referred to as the “Acquiring Group”.
- [4] The Acquiring Group is involved in the provision of financial services. Stanlib Fund II SPV is a private equity investment fund established with the objective of acquiring a portfolio of long-term infrastructure assets.
- [5] Of relevance to the proposed transaction are the various controlling interests held by the Acquiring Group in wind and solar photovoltaic (“PV”) independent power producers (“IPPs”) which operate under the Renewable Energy Independent Power Producer Procurement Programme (“REIPPPP”)¹ to supply Eskom SOC Ltd (“Eskom”) with electricity, as set out in the table below:

Project name	Share-holding	Location	Power output ²
Mulilo Renewable Energy Solar PV Prieska (RF) (Pty) Ltd (“Mulilo Prieska”)	80%	Pixley ka Seme District Municipality, Northern Cape	20MW from solar PV
Mulilo Renewable Energy Solar PV De Aar (RF) (Pty) Ltd (“Mulilo De Aar”) ³	80%	Pixley ka Seme District Municipality, Northern Cape	10MW from solar PV

¹ See “Background to the renewable energy independent power producer procurement programme” for a detailed description.

² The respective contracted generation capacities in terms of megawatts (“MW”).

³ Stanlib Fund II SPV recently acquired indirect control of Mulilo Prieska and Mulilo De Aar (LM174Mar20).

Project Kalkbult	35.1%	Pixley ka Seme District Municipality, Northern Cape	75MW from solar PV
Project Linde	30.53%	Pixley ka Seme District Municipality, Northern Cape	43MW from solar PV
Project Dreunberg	38.32%	Joe Gqabi District Municipality, Eastern Cape	75MW from solar PV
Kouga Wind Farm	40.6%	Sarah Baartman District Municipality, Eastern Cape,	80MW from wind power

Primary target firm

- [6] The primary target firm is Solar Capital De Aar 3 (RF) (Pty) Ltd (“SCDA 3”), which is controlled by several firms. SCDA 3 is a solar PV project located within the Pixley ka Seme District Municipality, Northern Cape.
- [7] SCDA 3 has been operational since 2016 and is contracted to supply 75MW of electricity produced from solar energy to Eskom under the REIPPPP. It was awarded this project in the second round of the REIPPPP.

PROPOSED TRANSACTION AND RATIONALE

- [8] The Acquiring Group intends to acquire a 40% controlling stake in SCDA 3 from existing shareholders. Post-merger, the Acquiring Group will exercise joint control over SCDA 3.
- [9] The Acquiring Group submits that its rationale for the proposed transaction is in accordance with its investment approach to invest in long-term infrastructure projects in South Africa.
- [10] For the sellers, the proposed transaction represents an opportunity to realise their investment in SCDA 3.

BACKGROUND TO THE RENEWABLE ENERGY INDEPENDENT POWER PRODUCER PROCUREMENT PROGRAMME (“REIPPPP”)

- [11] According to the Competition Commission (“Commission”), the REIPPPP was established in 2010 by the (then) Department of Energy, the National Treasury and the Development Bank of Southern Africa. The Integrated Resource Plan for electricity (“IRP”) 2010-2023 provides a long-term plan for electricity generation. The IRP calls for the doubling of electricity capacity using a diverse mixture of energy sources, mainly, nuclear and renewable energy. The REIPPPP contributes to the IRP’s target of 29 330MW of additional renewable energy, and cogeneration capacity from the private sector by 2025.
- [12] The REIPPPP office’s mandate is to enhance South Africa’s power generation capacity by securing electricity from various renewable energy sources from the private sector. This is done through a tender process that culminates in the IPPs selling electricity to Eskom.
- [13] The Department of Mineral Resources and Energy (“DMRE”) begins by announcing a new round of bidding (“bidding window”) for available projects under the REIPPPP. In each round, the DMRE indicates the total megawatt (“MW”) value that it wishes to achieve through renewable energy resources and the technologies that it wishes to contribute to that MW output. Interested parties submit proposals indicating, *inter alia*, what technology they will employ, where the plant will be based, the anticipated power output of the plant and the price per MW to purchase electricity.
- [14] According to the merging parties, in each bidding window, the DMRE selects bidders who it awards with the status of preferred bidders. In each of the four previous large bidding windows announced since 2011, no less than 53 bids were received, and no less than 13 bidders were awarded the status of preferred bidder.
- [15] According to the Commission, the IPPs under the REIPPPP cannot alter the price and volume of energy supplied to Eskom except for inflation, nor can they supply electricity to any third parties. It is for this reason that the Commission

concluded that the proposed merger would not lead to a substantial prevention or lessening of competition.

- [16] According to the Commission, it is likely that the Electricity Regulation Act 4 of 2006 provides the Minister of the DMRE a discretion to allow the direct procurement of electricity by municipalities from IPP projects. The consequences of this likelihood are explored in the following section.

RELEVANT MARKETS

- [17] The Commission considered the activities of the merging parties and found an overlap in the supply of electricity to Eskom by renewable energy producers using solar PV.
- [18] It submitted that the relevant market is the national market for the supply of electricity to Eskom by renewable energy producers using solar PV.
- [19] The merging parties also submitted that the relevant market is the national market for the supply of electricity to Eskom by IPPs via solar PV technology. They submitted that the geographic market was a national market because the location of an IPP's plant is only a function of where the renewable energy resource is located, and that the electricity produced is sold to Eskom and supplied directly into the national grid.⁴
- [20] The Commission also assessed the impact of the proposed transaction at local and district municipality level, in particular the supply of electricity to Eskom by way of solar PV in the Pixley ka Seme District Municipality and the Emthanjeni Local Municipality. It did so as a worst-case scenario because it is not clear whether or not the Electricity Regulation Act provides the Minister of the DMRE the discretion to allow municipalities to directly procure electricity from IPP projects. The Commission consulted the National Energy Regulator of South Africa ("NERSA") in this regard. NERSA stated that existing arrangements

⁴ In support of this, the merging parties submitted that some parts of the country are more desirable for the location of an independent power plant using renewable energy resources, depending on the type of renewable energy resource being used. The Northern Cape, for example, is ideal for solar PV power plants because of the high levels of sunshine that the area experiences.

under the REIPPPP could not be diverted without a new bidding process being initiated. The REIPPPP's IPP office informed the Commission that recent amendments to the electricity regulations on new generation capacity enable municipalities in good standing to procure new generation capacity from IPPs, but that this is a distinct and separate process from the REIPPPP.

- [21] Given the possibility of direct procurement by municipalities, the Commission proceeded to assess the supply of electricity to Eskom by renewable energy producers using solar PV technology nationally, at district level (Pixley ka Seme District Municipality) and at local level (Emthanjeni Local Municipality), located in the Pixley ka Seme District Municipality.
- [22] We have assessed the competition effects of the proposed transaction on the above basis, however, since the renewable energy markets are relatively new and developing, we leave the exact product and geographic market delineation open.

IMPACT ON COMPETITION

- [23] The Commission found that the merging parties entered non-negotiable, 20-year power purchasing agreements ("PPA's) with Eskom, as preferred bidders under the REIPPPP.
- [24] In calculating the estimated market shares of the merging parties, the Commission utilised the power plants' production capacity in terms of MWs.

National market for the supply of electricity to Eskom by renewable energy producers using solar PV technology

- [25] The Commission found that the merged entity would have a market share of approximately 12% in this national market with an accretion of approximately 3% as a result of the proposed transaction. It found that the market for the supply of solar PV energy at a national level is fragmented and includes many participants that would constrain the merging parties.

District (Pixley ka Seme District Municipality) market for the supply of electricity to Eskom by renewable energy producers using solar PV technology

- [26] The Commission found that the merged entity would have a market share of approximately 35% in this district market with an accretion of approximately 12% as a result of the proposed transaction. The Commission further found that there are currently six alternative solar PV renewable energy projects in the Pixley ka Seme District Municipality.

Local (Emthanjeni Local Municipality) market for the supply of electricity to Eskom by renewable energy producers using solar PV technology

- [27] The Commission found that the merged entity would have a market share of approximately 43% in this local level market with an accretion of approximately 34% as a result of the proposed transaction. The Commission found that there are currently two alternative solar PV renewable energy projects in the Emthanjeni Local Municipality.
- [28] As indicated, the Commission assessed the district and local level supply markets under a worst-case scenario as is it not clear whether municipalities would in time be allowed to procure electricity directly from REIPPPP projects.
- [29] The Commission further submitted that the above market shares, at both district and local municipality levels, are likely to be overstated as the current capacity by each of the merging parties' projects is committed exclusively to Eskom for a period of 20 years under the REIPPPP.
- [30] Furthermore, the Commission found that to the extent that the merger may result in high market share accretions and concentration at municipal levels, the merged entity's long-term agreements under the REIPPPP would constrain it from acting unilaterally to the detriment of customers or competitors. This is because pricing is determined upfront when the bid is awarded and cannot be altered for the duration of the IPP project.

- [31] The Commission also consulted NERSA. NERSA reiterated that the IPP projects awarded in terms of the REIPPPP are to supply Eskom only and municipalities are thus not able to procure renewable energy from any of these existing projects. NERSA clarified that it also needs to issue a licence for any renewable energy project to supply a municipality with electricity.⁵

Our Assessment

- [32] In light of the parties' submissions regarding a national market (where the renewable energy is provided directly into the Eskom grid), we tested with the parties during the hearing whether there would be locational advantages to providing renewable energy at municipal level, thereby giving the merged entity a further competitive advantage (in light of the increased market shares arising from this transaction) should (future) direct procurement by municipalities be permitted.
- [33] The merging parties acknowledged that there would be locational advantages. However, for purposes of this merger assessment, nothing turns on this as direct municipal supply by IPPs is not permitted yet. This however may be relevant to the assessment of future competition.
- [34] The merging parties also stated that the merged entity would be precluded in any event from tendering for direct municipal supply as NERSA proscribes this. They acknowledged however that nothing precludes the parties from forming a new consortium and tendering for direct municipal supply.
- [35] We tested the impact of this proposed merger on future competition and whether the Commission had assessed (i) the number of mergers engaged in by the acquiring firm, in light of section 12A(2)(k) (so-called creeping mergers); and (ii) potential information exchanges between the merging parties arising from common shareholding in related IPP projects.

⁵ NERSA also clarified that upon the expiry of the 20-year term, the national government has the first option to acquire the IPP projects. Should the government opt not to acquire it, the IPP owner can apply to renew the contract to supply Eskom or enter a contract to supply another third party. However, that process requires a new license from NERSA.

[36] The Commission noted that the majority of the mergers in renewable energy have involved private equity firms. Given the short-term nature (5-7 years) of private equity investment, any concerns of concentration contemplated in section 12A(2)(k) seem unlikely. The merging parties further submitted that the number of IPP projects in which they have interests pre-merger is only five of 104 existing IPP projects⁶. Through this transaction, their involvement in IPP projects will increase to six projects, which remains insignificant. We found no basis to conclude that creeping acquisition is a concern in the context of this proposed transaction.

Information exchange and future competition

[37] The Commission submitted that it did not consider the board representation of the Acquiring Group on the various IPP projects to raise concerns as in its view, the nature of the information in question was not capable of dampening competition.⁷ This is because volumes, price, and customer (Eskom) are fixed at the tender stage and cannot change once the contract has been awarded. Therefore any exchange of information among the different IPPs in which Stanlib has shareholding, cannot be used to dampen competition among its existing IPPs⁸.

[38] While cognisant that the customer, volumes and price are determined at bid stage and therefore unlikely to change, we had a residual concern regarding the use of information obtained through common shareholding and whether this could influence future competition. The Commission submitted that the nature of the information obtained by Stanlib through its shareholding in the IPP projects listed above is likely to be pro-competitive because it may enable Stanlib in future consortia to submit more competitive bids or contribute to optimising the management of specific power projects (noting also that Stanlib does not typically participate at the REIPPPP bidding stage).

⁶ Transcript reference

⁷ Transcript page 76.

⁸ Transcript page 83.

- [39] Further, the Commission submitted that even if the Acquiring Group were to utilise pricing or strategic information they had gained to benefit future bids, those future bids would still be subject to competition from other bids.⁹
- [40] We noted that since the commencement of the REIPPPP programme in 2011, four rounds of bids (bid windows) have been issued, with the fifth scheduled to have taken place in December 2020. In each of the four bid windows, no less than 53 bids were submitted with no less than 13 bidders awarded preferred bidder status.
- [41] We concluded that the bidding process appears competitive given the number of participants. However, information exchanges in the renewable energy markets should be more fully investigated on a case-by-case basis in future mergers. We note that nothing currently precludes the constituent members of a successful IPP to, independently of the IPP, form consortia with other shareholders for the purposes of participating in other REIPPPP bidding processes.¹⁰
- [42] We further note that the renewable energy markets are relatively new and developing. In this context strategic information may go beyond information about customers, price and volumes, and may include information for example, on future investment plans and strategies, specific technologies to be used in a project and the management of the production processes in terms of cost efficiencies and other factors, which in turn also impact on price, output and the ability to secure a contract with the customer (Eskom).

PUBLIC INTEREST

- [43] The merging parties submitted that the proposed transaction would not result in retrenchments or any other negative effects on employment in any of the firms involved. The merging parties submitted that Stanlib Fund II SPV does not have any employees, and the employee representative of Stanlib Asset

⁹ Transcript page 78.

¹⁰ See Commission's Report, paragraphs 18 and 48.

Management (Pty) Ltd did not raise any concerns regarding the proposed transaction.

[44] The Commission found that the proposed transaction was unlikely to raise any employment or other public interests concerns.

CONCLUSION

[45] In light of the above, we concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in any relevant market. In addition, we are of the view that no public interest concerns arise from the proposed transaction.

[46] Accordingly, we approved the transaction without conditions.


Ms Mondo Mazwai

5 March 2021
Date

Mr E Daniels and Dr T Vilakazi concurring

Tribunal Case Manager: P Kumbirai

For the Merging Parties: N Altini and L Engelbrecht of Herbert Smith
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For the Commission: W Gumbie & T Loate