

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CC Case No: 2021Feb0030 CT

Case No:

In the matter between

THE COMPETITION COMMISSION

Applicant

and

**OVERLOOKED COLLIERY ALPHA
PROPRIETARY LIMITED**

First Respondent

SUDOR COAL PROPRIETARY LIMITED

Second Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D OF THE ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND, OVERLOOKED COLLIERY ALPHA PROPRIETARY LIMITED AND SUDOR COAL PROPRIETARY LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A (3) OF THE COMPETITION ACT, 1998.

1. PREAMBLE

The Competition Commission and, Overlooked Colliery Alpha (Pty) Ltd and Suder Coal Pty Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this consent agreement as an order of the Competition Tribunal in terms of section 49D read with sections 58(1)(b) and 59(1)(d) of the Competition Act 89 of 1998, as amended on the terms set out below.

2. DEFINITIONS

For the purposes of this consent agreement the following definitions shall apply:

2.1. **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2. **"Acquiring Group"** means Overlooked Colliery Alpha (Pty) Ltd, a private company incorporated in accordance with the laws of the Republic of South Africa ("OVA") and Overlooked Colliery (Pty) Ltd, a private company incorporated in accordance with the laws of the Republic of South Africa ("Overlooked"). OVA and Overlooked are wholly owned by [...].

2.3. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1stFloor, Mulayo Building (Block C), the DTI Campus, 77 Melintse Street, Sunnyside, Pretoria, Gauteng;

2.4. **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and the Respondents;

2.5. **"Days"** means business days;

2.6. **"Merging Parties"** means Overlooked Colliery Alpha (Pty) Ltd and Sudor Coal (Pty) Ltd;

2.7. **"OVA"** means Overlooked Colliery Alpha (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 22A Samora Machel, Middelburg, 1050;

2.8. **"Overlooked"** means Overlooked Colliery (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 22A Samora Machel, Middelburg, 1050;

2.9. **"Respondents"** mean OVA and Sudor Coal (Pty) Ltd;

2.10. **"Sudar Coal"** means Sudor Coal (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 15 Beyers Avenue, Industrial area, Ermelo, 2350;

2.11. **"Target Firms"** means the assets of Sudor Coal comprising the Halfgewonen, Kalbasfontein and Weltevreden collieries including property, plant, equipment, employees and certain assets as well as mining rights;

2.12. **"The Transaction"** means the transaction whereby OVA acquired Weltevreden, Kalbasfontein and Halfgewonen collieries including property, plant, equipment, employees and certain assets and mining rights from Sudor Coal;

2.13. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. BACKGROUND TO THIS CONSENT AGREEMENT

3.1. On 19 February 2021, the Commission received a notice of an intermediate merger transaction, which was filed by OVA and Sudar Coal. In terms of the Transaction, OVA acquired the target firms owned by Sudar Coal comprising the Weltevreden, Kalbasfontein and Halfgewonen collieries (including property, plant, equipment, employees and mining rights) which comprised of an underground coal mine as well as a coal washing plant in Mpumalanga. The Weltevreden colliery is an underground coal mine. The coal produced at the Weltevreden colliery is processed at the Halfgewonen colliery which has a coal washing, crushing and screening plant. The mining rights related to the mining of coal at the aforementioned collieries.

3.2. The Commission became aware of the Transaction in February 2021 when the merging parties filed the merger notification. In the merger filing, the Respondents indicated that the Transaction was effected in various stages in 2019 and 2020, and accordingly sought the retrospective approval of the transaction. According to the merging parties, the date of implementation of the Transaction was on 30 June 2020, which was 10 (ten) business days after Minister of Mineral Resources of the Republic of South Africa granted the consent to the cession and transfer of the relevant mining rights from Sudar Coal to OVA.¹

3.3. When the transaction took place, OVA was a newly established shelf company for purposes of acquiring the target firms and it did not conduct any business. Overlooked, the sister company to OVA, is regarded as a junior coal miner in South Africa. It owns a coal mining operation at its Overlooked Colliery and operates as a crushing and screening facility.

3.4. Before the Transaction, the target firms were wholly owned by Sudar Coal, which operated in the mining of and supply of coal. The Transaction resulted in OVA acquiring sole control of the target firms.

3.5. The Commission evaluated the Transaction and found that it was unlikely to have resulted in the substantial lessening or prevention of competition in any market, that it was unlikely to negatively impact on employment, and that it did not raise any public interest concerns. The Transaction was accordingly approved without conditions on 4 May

¹ Consent granted in terms of section 11 of the Mineral and Petroleum Resources Development Act 28 of 2000.

2021. The issue of prior implementation, to which this Consent Agreement relates, was dealt with separately.

4. COMMISSION'S INVESTIGATION AND FINDINGS

4.1. The Commission's investigation found that the Respondents concluded a Sale of Business Agreement on or about 30 October 2019 in terms of which Sudar Coal would sell its business and its mining rights to OVA. The Transaction was implemented in various stages in 2019 and 2020, and the Respondents concluded various agreements to implement the different aspects of the transaction including:

4.1.1 Sale of Immovable Properties and Plant and Equipment Agreement in terms of which OVA would purchase Sudar Coal's immovable properties, plant and equipment; and

4.1.2 Sale of Mining Rights Agreement in terms of which OVA would purchase Sudar Coal's mining rights pertaining to the Weltevreden, Kalbasfontein and Halfgewonen Collieries, and the liabilities would transfer to Overlooked.

4.2. On 1 August 2019, Sudar Coal appointed OVA as its contractor to conduct mining services on its behalf pursuant to the mining rights granted to Sudar Coal in terms of the Contract Mining Agreement. In order to outsource the contract mining services to OVA, Sudar Coal sold various property, plant and equipment to OVA in terms of Sale of Immovable Properties and Plant and Equipment Agreement. Simultaneously, OVA entered into an Off-take Agreement with Sudar Coal such that it would acquire some of the coal that it had mined on Sudar Coal's behalf. The mining rights transferred from Sudar Coal to OVA on 30 June 2020, 10 business days after Minister of Mineral Resources granted the statutory consent to the cession and transfer of the relevant mining rights from Sudar Coal to OVA.

4.3. The Respondents voluntarily informed the Commission of their *bona fide* prior implementation error and notified the Commission of the Transaction in February 2021 after they became aware of the fact that the transaction constituted a notifiable merger transaction. This conduct by the Merging Parties is in contravention of 13A(3) of the Act, which stipulates that parties to an intermediate merger may not implement that merger until it has been approved, with or without conditions, by the Commission in terms of section 14(1){b}.

5. ADMISSION OF LIABILITY

The Respondents admit that they have contravened section 13A(3) of the Act by implementing the Transaction prior to the approval of the Transaction by the Commission.

6. FUTURE CONDUCT

6.1. The Respondents agree and undertake to notify the Commission of any future transactions that constitute a notifiable merger as defined in section 12(1) read together with section 11(5) of the Act. The Respondents further agree and undertake to refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act.

6.2. The Respondents also agree and undertake to develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors, and agents do not engage in future contraventions of Chapter 3 of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection, and monitoring of any contravention of the Act.

6.3. The Respondents furthermore agree and undertake to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Tribunal.

7. ADMINISTRATIVE PENALTY

7.1. Having regard to the provisions of section 59(1)(d), 59(2) and 59(3) of the Act, OVA accepts that it is liable to pay an administrative penalty, which is not more than 10% of its annual turnover in the Republic and its exports from the Republic during the preceding financial year.

7.2. The Respondents have agreed that OVA will pay an administrative penalty in the total amount of R577 500.00 (Five hundred and seventy-seven thousand and five hundred Rand).

7.3. OVA will pay the penalty as set out in paragraph 7.2 above to the Commission over a period of 6 (six) months, in 5 (five) instalments of R100 000.00 (One hundred thousand Rand) and the final instalment of R77 500 (Seventy seven thousand, five hundred Rand). The first shall be instalment payable within 30 (thirty) days from the date of the confirmation of this Consent Agreement as an order of the Tribunal. The remainder of the instalments payable on the 30th of each month following the first payment.

7.4. The administrative penalty will accrue interest in terms of the provisions of section 80(1) of the Public Finance Management Act 1 of 1999 for any amounts not paid within a year from the date of confirmation of this Consent Agreement by the Tribunal.

7.5. The penalty and such interest as may become payable in terms of 7.3 above, must be paid into the Commission's bank account which is as follows:

NAME BANK: THE COMPETITION COMMISSION: ABSA BANK BUSINESS BANK
ACCOUNT NUMBER: [...]
BRANCH CODE PAYMENT REF: 632005: 2021Feb0030/OVA

7.6. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and the Respondents relating to the contravention of section 13A(3) of the Act by the Respondents that were the subject of the Commission's investigation under CC case number: 2021Feb0030.

Duly authorised signatory Overlooked Colliery Alpha (Pty) Ltd

Dated and signed at PRETORIA on the 19 day of AUGUST 2021

E Daniel
Competition Commissioner