

SOUTH AFRICA / JUDGMENT

**Africa Data Centres SA Development (Pty)
Ltd v Digital Titan (Pty) Ltd and a related
matter (LM165Jan22; INT016Apr22) [2022]
ZACT 68; [2022] 1 CPLR 18 (CT) (23 May 2022)
[2022] ZACT 68**

COURT

Competition Tribunal

BEFORE

Y Carrim, A Wessels, S Goga

CASE / FILE NUMBER

LM165Jan22; INT016Apr22

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COMPETITION TRIBUNAL OF
SOUTH AFRICA

Case

No: LM165Jan22/ INT016Apr22

In

the intervention
application between:

AFRICA DATA CENTRES
SA DEVELOPMENT (PTY) LTD Applicant
and
DIGITAL
TITAN (PTY)
LTD First
Respondent
TDE
INVESTMENTS (PTY)
LTD Second
Respondent
COMPETITION
COMMISSION OF SOUTH AFRICA Third
Respondent
In
the large merger
between Case
No: LM165Jan22
DIGITAL
TITAN (PTY)
LTD Primary

Acquiring Firm
TDE
INVESTMENTS (PTY)
LTD Primary
Target Firm
Panel: Y
Carrim (Presiding Member)
A Wessels (Tribunal
Member) S Goga (Tribunal Member)
Heard
on: 12
May 2022
Order
Issued on: 17 May 2022
Reasons
Issued on: 23 May 2022

REASONS FOR DECISION

Introduction

- [1] This matter concerns an intervention application filed by Africa Data Centres SA Development (Pty) Limited (“ADC”), seeking to participate in the large merger proceedings before the Tribunal under case number LM165Jan22 in terms of section 53 of the Competition Act, 89 of 1998, as amended (“the Act”).
- [2] The large merger proceedings relate to Digital Titan (Pty) Ltd (“Digital Titan”) acquiring most of the issued share capital of TDE Investments (Pty) Ltd (“TDE”) which will give it a controlling shareholding in Terarco Data Environment (Pty) Ltd (“Terarco”).
- [3] ADC sought to be admitted as an intervenor in the Tribunal’s consideration of the larger merger between Digital Titan and TDE (“the proposed transaction”) on competition and public interest concerns. The application was opposed by the merging parties only as to scope.
- [4] The Tribunal after hearing ADC’s application granted it limited participation rights on some of the grounds it had advanced in support of its intervention on 17 May 2022.[1] The order is attached hereto as annexure A.
- [5] ADC has now asked that this Tribunal provide it with reasons for not granting it intervention rights for one of its potential theories of harm, namely, that the proposed transaction will lead to the elimination of the acquiring firm as a potential efficient competitor in the relevant South African data centre market.
- [6] These are the reasons for our decision.

Background

[7] On 13 April 2022, the Competition Commission (“Commission”) referred the proposed transaction between Digital Titan and TDE to the Tribunal and recommended that the proposed transaction be approved subject to certain public interest conditions.

[8] The Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the provision of data centre services in South Africa and its public interest concerns were satisfied as to a condition relating to a greater spread of ownership.

[9] The Commission's investigation involved extensive engagements with the merging parties, its customers, competitors and other stakeholders. Other than ADC, no customer or competitor of the merging parties raised any concerns with the proposed transaction. The Commission had concluded that ADC's concerns were not substantiated.

[10] ADC sought to intervene in the Tribunal proceedings and for the right to:

10.1. attend pre-hearing conferences, if any are held before the merger hearing;

10.2. have access to, and to inspect, the third respondent's record

in respect of the merger proceedings including, all documents, memoranda, reports, minutes of meetings, letters, electronic correspondence and other documents which relate to the merger proceedings and, in particular –

10.2.1. all submissions made by the first and second respondents (“the merging parties”);

10.2.2. any additional documents filed by the merging parties;

10.2.3. any additional information and/or submissions received from third party market participants (including the customers and competitors of the merging parties);

10.2.4. any internal competitive analyses;

10.2.5. any internal economic analyses;

10.2.6. the results of its investigation into and assessment of the proposed merger;

10.2.7. any report furnished by the third respondent's investigative team to the third respondent's EXCO ahead of the meeting held on 11 April 2022; provided that any confidential information contained in the third respondent's record and/or the additional documents shall, unless otherwise directed by the Competition Tribunal, be disclosed only to the applicant's

legal representatives and economic experts and on the condition that they provide appropriate undertakings to respect and protect their confidentiality.

- 10.3. request the Competition Tribunal to direct, summon and/or order any person to appear at the merger hearing and/or to produce any documents relevant to the merger proceedings;
- 10.4. participate in any interlocutory proceedings in respect of the merger hearing;
- 10.5. adduce oral and documentary evidence at the merger hearing;
- 10.6. have access to, and to inspect, any documentary evidence placed before the Tribunal;
- 10.7. cross-examine any of the witnesses appearing on behalf of the merging parties and/or any other participants in the merger hearing; and
- 10.8. present argument at the merger hearing.

[11] The merging parties opposed the application but in the interests of progress in arriving at a merger decision, opposed it only to the extent that it was too wide, that ADC sought to supplant the Commission's role in merger proceedings for example in citing public interest grounds and that its participation ought to be limited to the ADC-specific concerns namely that the proposed transaction will have an impact on ADC specifically and not the industry as a whole. The merging parties also asked that the procedural scope of intervention should be strictly limited to the ADC-specific concerns.

Analysis

- [12] ADC initially sought to intervene on a number of grounds as listed above. At the hearing ADC conceded that its public interest grounds were probably more related to competition concerns. Its oral submissions focussed on two essential concerns that seemingly would affect it directly, namely its ability to compete for hyper-scale customers and input foreclosure. It persisted with its request for intervention on the grounds of the removal of a potential competitor and put up a draft order to the Tribunal recording its amended case.[2]
- [13] Section 53 of the Act provides for the right to participate or intervene in a hearing. Section 53 expressly grants rights of participation in relation to three types of procedures, namely: restrictive practices, exemption applications and mergers. In each of these procedures, the Act recognises specifically named persons as participants and then also recognises a residual or general class of persons who have a material interest if the Tribunal grants them permission to intervene.
- [14] In terms of section 53(c)(v) the Tribunal may recognise any party as a participant in merger proceedings. Typically, customers and competitors are considered to be parties who may have a material interest in a merger either because of direct experience with the merging parties or their knowledge of market dynamics and parameters of competition in a particular market.
- [15] However, the mere fact that a party seeks to intervene in merger proceedings does not entitle it to be admitted with intervention rights to such an extent to supplant the role of the Commission. Whether or not it is admitted as a participant and the extent of such

participation is matter of the Tribunal's discretion. As stated in *Anglo-American Corporation Medical Scheme v the Competition Commission and Others*, the Tribunal exercises a judicial discretion in determining whether to grant participation and the extent of such participation.[3]

- [16] The Tribunal in its discretion is entitled to limit parties' rights of intervention both in respect of scope and procedure. In *Cornucopia v the Competition Commission and Others*, [4] the Tribunal denied the intervenor participation rights because it had failed to show that it will be able to provide any value or assistance to the Tribunal in its deliberations.[5] In *Comair Ltd v the Competition Commission and SAA*, [6] the Tribunal permitted Comair to participate in complaint proceedings but delineated Comair's extent of participation. In *Caxton and CTP Publishers and Printers Ltd and Media 24 (Pty) Ltd and Others*, [7] the Tribunal allowed the applicants to intervene but on a limited basis. An intervention application was brought in the large merger between *Thabong Coal (Pty) Ltd and South32 SA Coal Holdings (Pty) Ltd*, [8] and was denied as the intervenors had failed to show either that they have a material interest in the merger proceedings or that they will be able to assist the Tribunal in its consideration of the merger. In that matter, the Tribunal confirmed its approach that it may permit a third party to intervene in merger proceedings only if it has shown a material and substantial interest in the matter, or if it has shown that it can provide evidence of its ability to assist the Tribunal in the merger proceedings.[9]
- [17] Ultimately the Tribunal exercises its discretion by having regard to the interests of the applicant and the extent to which it can assist the Tribunal in its deliberations, bearing in mind that the Commission is still the *dominis litis* in Tribunal proceedings, whether these are merger or complaint referrals.[10]
- [18] The Tribunal in exercising its discretion was mindful that the Commission had conducted a thorough investigation after which it found that the transaction did not give rise to any competition concerns. Other than ADC, a direct competitor of the target firm, no other third party had raised any concerns. However, ADC is a direct competitor of TDE, and it did have an interest in the outcome of the merger (as conceded by the merging parties). A significant concern for ADC was the global or regional footprint of the merged entity which in its view would impact adversely on ADC's ability to compete for hyper-scale customers.
- [19] The Tribunal was of the view that ADC as a competitor could possibly assist the Tribunal in gaining insights into the nature of competition in the relevant markets as argued by it at the hearing and potential theories of harm in relation to ADC's business.
- [20] However, it was less clear what additional insights ADC could provide on potential entry by the acquiring firm absent the proposed

transaction. ADC's concerns regarding barriers to entry generally are not helpful to the Tribunal, given the evidence put up by the merging parties which was not disputed, that new entrants are able to build capacity at the same or higher standards as compared to competitors already in the market. Moreover, existing players, including ADC, were in the process of increasing their capacity in the national market.[11]

[21] When considering an application for intervention by a direct competitor the Tribunal also has to guard against merger proceedings of this sort, where the Commission is present and has not identified any competition concerns, being unduly protracted by the participation of a competitor who might be incentivised to delay merger proceedings if it was concerned about the impact of a transaction on its own market position.

[22] There was no need for ADC to duplicate the role of the Commission who will be able to assist the Tribunal in its deliberations on all other matters.

[23] Moreover, the Tribunal still retains its inquisitorial powers in merger proceedings to call for more evidence or to require the Commission to investigate further any aspect of the proposed transaction that it sought to be fully ventilated.

[24] In considering all of these factors, the Tribunal exercised its discretion to allow ADC to intervene on the following issues/theories of harm:

24.1. that the proposed transaction will bring about anti-competitive network/ conglomerate effects in the relevant South Africa data centre market by virtue of the fact that it will enable the target firm's data centre business to offer hyper-scale and other customers (including, international cloud and cloud application providers, mobile operators, content distribution networks etc.) a global footprint which cannot feasibly be replicated by ADC (and other competitors) in the market, which will result in a substantial lessening or prevention of competition in the relevant market; and

24.2. that the proposed transaction will give rise to input foreclosure in that customers of ADC (and of other data centre providers) will be foreclosed from access to the target firm's NAP Africa internet exchange on the basis and terms that they currently enjoy.

Conclusion

[25] In light of the above, we conclude that ADC be recognised as a participant in the large merger proceedings before the Tribunal on the limited scope as provided in our order.

Ms Yasmin Carrim

Mr Andreas Wessels and Ms Sha'ista Goga concurring

Tribunal Case Manager: Juliana

Munyembate

For the Applicant: Adv

Jerome Wilson SC instructed by Nortons Inc

For the First and Second Respondents: Adv Steven Budlender SC instructed by

Bowmans and ENS Africa

- [1] Attempts had been made by this Tribunal to facilitate an agreed basis for intervention between the parties at a prehearing on 6 May 2022 with little success. The matter was then argued on 12 May 2022 before a full panel.
- [2] Provided by Nortons Inc to the Tribunal on 12 May 2022.
- [3] 04/CR/Jan02 at pg. 9. See also Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another 2004
- (6) SA 196 (CAC) at 202-3 where the Competition Appeal Court confirmed that this was an exercise of the Tribunal's discretion.
- [4] 105/LM/Dec04.
- [5] Cornucopia para 34.
- [6] 83/CR/Oct04.
- [7] Case number: 019232.
- [8] LM144Jan20/INT130Sep20.
- [9] Ibid pg. 8, para 24.
- [10] Barnes Fencing Industries (Pty) Ltd & Dunrose (Pty) Ltd v Iscor Limited (Mittal SA) & others, Case No 08/CR/Jan07.
- [11] Paragraph 60.1 and 60.2 of Answering Affidavit.

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