

SOUTH AFRICA / JUDGMENT

Business Venture Investments No. 1624 (Pty) Ltd and Another v Waco Africa (Pty) Ltd and Another (54/LM/May12) [2012] ZACT 65; [2012] 2 CPLR 440 (CT) (30 July 2012)

[2012] ZACT 65

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Medi Mokuena, Takalani Madima

CASE / FILE NUMBER

54/LM/May12

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 54/LM/May12

In the matter between:

Business Venture Investments No. 1624 (Pty) Ltd;Acquiring Firms

and

Business Venture Investments No. 1623 (Pty) Ltd

And

Waco Africa (Pty) Ltd;Target Firms

Waco Africa Holdings (Pty) Ltd

Panel : Andreas Wessels (Presiding Member) Medi Mokuena (Tribunal Member) Takalani Madima (Tribunal Member)

Heard on : 30 May 2012

Order issued on : 30 May 2012

Reasons

issued on : 30 July 2012

Reasons for Decision

Conditional approval

On 30 May 2012 the Competition Tribunal (“Tribunal”), in terms of section 16(2)(b) of the Competition Act of 19981, conditionally approved the merger between Business Venture Investments No. 1624 (Pty) Ltd and Business Venture Investments No.

1623 (Pty) Ltd, as the acquiring firms, and Waco Africa (Pty) Ltd and Waco Africa Holdings (Pty) Ltd, as the target firms.

Parties to transaction

The acquiring firms are

- (i) Business Venture Investments No. 1624 (Pty) Ltd (“BVI”); and (ii) Business Venture Investments No.1623 (Pty) Ltd (“SA Holdco”). Both these firms are newly incorporated entities and currently do not supply and products or services. BVI is controlled, as to 74.9%, by SA Holdco and the remaining 25.1% of the shareholding in BVI is held by Kagiso Strategic Investments (Pty) Ltd.

Of relevance to the competition assessment of the proposed transaction is that the shareholders of SA Holdco include RMB Private Equity (Pty) Ltd (“RMB Private Equity”); RMB Ventures Five (Pty) Ltd (“RMBV5”); and RMB Ventures Six (Pty) Ltd (“RMBV6”) (collectively referred to as “RMB”) – 29.3% shareholding in SA Holdco. RMB Private Equity, RMBV5 and RMBV6 are investment holding companies. RMB is part of the FirstRand group, an integrated financial services group.

The shareholders of SA Holdco further include Ethos Private Equity Fund V (“Ethos Fund V”) and Ethos Private Equity Fund VI (“Ethos Fund VI”) (collectively referred to as the “Ethos Funds” – 43.9% shareholding in SA Holdco. Ethos Fund V and Ethos Fund VI are private equity investment funds.

Of further relevance to the competition assessment of this transaction is that RMB holds a minority shareholding of 21.7% in Robor (Pty) Ltd (“Robor”), a steel tube and pipe manufacturing company. One of Robor’s divisions, Robor Scaffolding, supplies and erects access scaffolding equipment to sites and manages the erection, inspection, handover and dismantling of scaffolding equipment.

The primary target firms are (i) Waco Africa (Pty) Ltd (“WAPL”); and (ii) Waco Africa Holdings (Pty) Ltd (“WAH”), collectively referred to as “Waco Africa”.

WAPL wholly-owns the following operational subsidiaries: (i) Form Scaff (Pty) Ltd, which has a Mauritian branch named “Form Scaff Mauritius”; and (ii) Kwikform (Mauritius) (Pty) Ltd (“Kwikform Mauritius”). Kwikform Mauritius wholly-owns Waco Madagascar (Pty) Ltd. WAPL also has a few dormant subsidiaries in the Southern Africa region. WAH controls (i) Main Street 847 (Pty) Ltd (79.9%); (ii) Edglen Limited (80%) (which in turn wholly-owns Glen Anil Development Corporation Limited); and (iii) Glen Anil Investments (Pty) Ltd (100%).

Of relevance to the competition assessment of this transaction is that Waco Africa is involved, through its various divisions, in the manufacture and supply of scaffolding, as well as the provision of an “all-in-one” scaffolding service, i.e. the rental and erection of scaffolding material.

Proposed transaction and rationale

In terms of the proposed transaction BVI intends to acquire the business of WAPL as a going concern and SA Holdco intends to acquire the business of WAH as a going concern. The merging parties indicated that this constitutes a single, indivisible transaction.

The acquiring firms consider the proposed acquisition of WAPL and WAH to present an attractive private equity investment opportunity from which potentially attractive returns might result. The proposed transaction is furthermore the result of a willing buyer and willing seller situation, as both the acquiring firms and the seller of the target firms see value in the proposed transaction.

Relevant markets and impact on competition

There is no overlap between the products and services offered by the merging parties other than the above-mentioned activities relating to scaffolding. With regard to these scaffolding activities the Commission identified two possible relevant markets, namely (i) an upstream market for the manufacture and supply of scaffolding; and (ii) a downstream market for the hiring/renting of scaffolding, including the erecting and dismantling of scaffolding. The Commission considered the geographic scope of these markets to be national.

The Commission did not identify any likely unilateral competition concerns that result from the proposed transaction in the above-mentioned markets. We therefore do not deal with the unilateral issues in any further detail in these reasons, save to note that a number of other players are active in both the above-mentioned upstream and downstream scaffolding markets in South Africa.

The Commission did however raise a concern with regard to potential post-merger coordinated conduct through an exchange of information between Robor and Waco Africa, given RMB's above-mentioned investment interest in Robor. The Commission therefore recommended that the proposed transaction should be approved with certain conditions to address these concerns and the merging parties had no objection to such conditions. The Tribunal at the hearing raised certain questions in relation to the Commission's proposed conditions and the Commission and merging parties subsequently submitted an agreed enhanced set of conditions. We are satisfied that the final set of conditions as proposed by the Commission and tendered by the merging parties adequately address the concerns in relation to post-merger coordinated conduct.

In order to address the post-merger coordinated conduct concerns, RMB submitted by way of affidavit that RMB, which holds a minority stake and exercises negative control over Robor and therefore Robor Scaffolding, undertakes to ensure that the same RMB representatives,

who sit on the board of Robor, will not sit on any board of Waco². This is to ensure that there is no information exchange between Robor and Waco, post-merger.

RMB further confirmed that in respect of the post-merger internal investment portfolio reporting within RMB, all competitively sensitive confidential information pertaining to Robor Scaffolding will be redacted / expunged such that no RMB representative (other than the representative/s on the board of Robor) will be privy to such information pertaining to Robor Scaffolding.

The Tribunal further imposed the following conditions to address the concerns raised in relation to post-merger coordinated conduct:

RMB must ensure that the RMB representatives who sit on the board of Robor do not share any competitively sensitive information such as pricing, strategies, customer and competitor information in respect of Robor Scaffolding with the RMB representatives who sit on any board of Waco.

RMB shall ensure that the RMB representatives, who sit on the board of Robor, will not sit on any board of Waco.

The RMB representatives who currently sit on the board of Robor are Simon Murray and Amina Pahad and the RMB representatives who will sit on any board of Waco are Nick Hudson and Cassim Motala. In the event that either Nick Hudson or Cassim Motala is replaced by RMB on any board of Waco, RMB must ensure that such individuals have not previously sat on the board of Robor.

The above-mentioned conditions will apply as long as RMB has a direct or indirect interest in Waco and Robor.

Public interest

The merging parties submitted that the proposed deal will have no negative effects on employment since the current operations are being taken over as a going concern.³ The proposed transaction raises no other public interest concerns.

CONCLUSION

We approve the proposed merger subject to the conditions as explained above and attached hereto as “Annexure A”.

30 July 2012

A Wessels DATE

M Mokuena and T Madima concurring

Tribunal researcher: Thabani Ngilande

For the merging parties: Cliffe Dekker Hofmeyr

For the Commission: Thelani Luthuli

1Act No. 89 of 1998, as amended.

2Waco means Waco International (Pty) Ltd, Waco Africa Holdings (Pty) Ltd and Waco Africa (Pty) Ltd.

3See page 10 of the merger record.

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