

SOUTH AFRICA / JUDGMENT

Competition Commission v WBHO Construction (Pty) Ltd and Another (69/AM/Oct10) [2010] ZACT 77 (10 November 2010)

[2010] ZACT 77

COURT

Competition Tribunal

BEFORE

N Manoim, A Wessels, Y Carrim

CASE / FILE NUMBER

69/AM/Oct10

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No:69/AM/Oct10

In the matter between:

The Competition CommissionApplicant

and

WBHO Construction (Pty) Ltd1st Respondent

Edwin Construction (Pty) Ltd2nd Respondent

Panel : N Manoim (Presiding Member), A Wessels (Tribunal Member) and Y Carrim (Tribunal Member)

Heard on 10 November 2010

Decided on : 10 November 2010

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents, annexed hereto marked "A".

Presiding Member

N Manoim

Concurring: A Wessels and Y Carrim

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

In the matter between:

THE COMPETITION COMMISSIONAPPLICANT

And

WBHO CONSTRUCTION (PROPRIETARY) LIMITED1st RESPONDENT

EDWIN CONSTRUCTION (PROPRIETARY) LIMITED2nd RESPONDENT

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND WBHOCONSTRUCTION (PROPRIETARY) LIMITED AND EDWIN CONSTRUCTION (PROPRIETARY) LIMITED IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED) The Competition Commission and WBHO Construction (Proprietary) Limited and Edwin Construction (Proprietary) Limited hereby agree that an application be made to the Competition Tribunal for confirmation of the Consent Agreement as an order of the Competition Tribunal in terms of Sections 49D as read with Sections 58(1)(b) and 59(1)(d)(t) of the Competition Act 89 of 1998, as amended, on the terms set out below:

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND WBHOCONSTRUCTION (PROPRIETARY) LIMITED AND EDWIN CONSTRUCTION (PROPRIETARY) LIMITED IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

The Competition Commission and WBHO Construction (Proprietary) Limited and Edwin Construction (Proprietary) Limited hereby agree that an application be made to the Competition Tribunal for confirmation of the Consent Agreement as an order of the Competition Tribunal in terms of Sections 49D as read with Sections 58(1)(b) and 59(1)(d)(t) of the Competition Act 89 of 1998, as amended, on the terms set out below:

1. Definitions For the purposes of this Consent Agreement the following definitions shall apply: 1.1 "Ac?" means the Competition Act 89 of 1998 (as amended). 1.2. "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 Building C, Mulayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng. 1.3. "Tribunaf 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 Building C, Muiayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng. 1.4. "Consent Agreement means this written consent agreement duly signed by the Commission, WBHO and Edwin. 1.5. WBHO- means-WBHO Constraoction (Proprietary) Limited a private company which has its principal place of business at 53 Andries Street,

Wynberg, Sandton. WBHO is ultimately controlled by Wilson Bayly Holmes-Ovcon Limited, a public company listed on the JSE Limited. 1.6. "Edwin" means Edwin Construction (Proprietary) Limited a private company which has its principal place of business at 53 Andries Street, Wynberg, Sandton. Edwin is as at the date of signature of this Consent Agreement controlled by WBHO. 1.7. "Respondents" means Edwin and WBHO collectively.

2. Background facts 2.1. The First Transaction 2.1.1. On 2 June 2005, a shareholders' agreement was entered into between WBHO and Mr Edwin Maila (a shareholder of Edwin) to regulate and govern their relationship as shareholders of Edwin. The shareholders agreement formed part of a transaction in terms of which WBHO acquired 49% of the issued share capital of Edwin for R49 ("the First Transaction"). In terms of the shareholders agreement, WBHO obtained the right to appoint the majority of the directors of Edwin and accordingly in terms of Section 12(2)(c) of the Act acquired sole, de jure control over Edwin as a result of the First Transaction. 2.1.2. The First Transaction was not notified to the Commission as required by the provisions of section 13A of the Act. The Respondents implemented the First Transaction immediately after the conclusion of the shareholders agreement. 2.2. The Second Transaction 2.2.1. During May 2008, WBHO and Mr Maila concluded heads of agreement for, inter alia, the transfer of a further 8% of the shares in Edwin to WBHO, increasing WBHO shareholding from 49% to 57% of the issued share capital of Edwin ("the Second Transaction"). 2.2.2. The Respondents implemented the Second Transaction after the conclusion of heads of agreement : " 2.2.3. The First and Second Transaction shall hereinafter be collectively referred to as the "Transaction". 2.2.4 Failure to notify the Transaction only came to the attention of the Respondents when the auditors BDO Spencer Steward Inc ("BDO") were auditing WBHO's financial statements for the financial year ending 30 June
2009. BDO raised the question as to whether the acquisition of control by WBHO over Edwin had been notified to the Commission. 2.2.5. WBHO advised the Commission that immediately upon receiving the query from BDO it contacted its legal advisors, Cliffe Dekker Hofmeyr Inc ("CDH"), to check whether the Transaction required compulsory notification to the Commission. CDH confirmed that the Transaction required notification and was instructed by WBHO to bring this fact to the attention of the Commission and to resolve the issue as soon as possible. 2.2.6. The Commission met with CDH and a representative of WBHO on 28 July 2009, and advised the parties to notify the Transaction as soon as possible and to provide factual background to the failure to notify. 2.2.7. The Transaction was notified to the Commission on 18 August 2009 as an intermediate merger, which was approved by the Commission 29 September 2009, under case number: 2009Aug4617. 3. Commission's investigation and findings 3.1 The Commission investigated the alleged contravention and found the following: 3.1.1. The Transaction resulted in the change of Edwin's control, which change of control constituted a merger in terms of section 12(1) of the Act. 3.1.2. Further, the Commission found that the threshold for an intermediate merger as defined in section 11 (5)(b) as read with section 11 (1) of the Act and Notice 253 of 2001 was met in respect of the Transaction. 3.1.3. Further, the Commission found that the merging parties

implemented the merger prior to the notification of and approval by the Commission in contravention of section 13A(3) of the Act. 4. Admissions 4.1. The Respondents admit that the Transaction constituted a notifiable intermediate merger as defined in Section 11(5)(b) of the Act 4.2. The Respondents further admit that the merger was implemented prior to notification and approval of the Commission in contravention of Section 13A(3) of the Act. 4.3. The Respondents further admit that both WBHO and Edwin were responsible for notifying the Commission of the Transaction. 5. Compliance with the Act The Respondents agree and undertake to: 5.1. refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act; and 5.2 continue to implement the existing compliance programme already adopted by the Respondents.

6. Administrative penalty The Respondents admit that they are each liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act

WBHO agrees to pay an administrative penalty of R1 000 000 (One Million Rand), and Edwin agrees to pay an administrative penalty of R100 000 (One Hundred Thousand Rand). Each penalty shall be payable within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal. The administrative penalty is payable into the bank account of the Commission whose, banking details are: Bank: ABSA Bank Name of account: Competition Commission Account Number 4050778576 Branch Code: 323345 6.5. Proof of payment of the administrative penalty amounts will emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions. 6.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act.

7. Full and final settlement This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to the contravention of section 13A(3) of the Act, investigated under the Commission's case number: 2009Aug4617.

1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

1.1 "Act" means the Competition Act 89 of 1998 (as amended).

1.2. "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 Building C, Mulayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng.

1.3. "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 Building C, Muiayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng.

1.4. "Consent Agreement means this written consent agreement duly signed by the Commission, WBHO and Edwin.

1.5. WBHO- means-WBHO Constraotion (Proprietary) Limited a private company which has its principal place of business at 53 Andries Street, Wynberg, Sandton. WBHO is ultimately controlled by Wilson Bayly Holmes-Ovcon Limited, a public company listed on the JSE Limited.

1.6. "Edwin" means Edwin Construction (Proprietary) Limited a private company which has its principal place of business at 53 Andries Street, Wynberg, Sandton. Edwin is as at the date of signature of this Consent Agreement controlled by WBHO.

1.7. "Respondents" means Edwin and WBHO collectively.

2. Background facts

2.1. The First Transaction

2.1.1. On 2 June 2005, a shareholders' agreement was entered into between WBHO and Mr Edwin Maila (a shareholder of Edwin) to regulate and govern their relationship as shareholders of Edwin. The shareholders agreement formed part of a transaction in terms of which WBHO acquired 49% of the issued share capital of Edwin for R49 ("the First Transaction"). In terms of the shareholders agreement, WBHO obtained the right to appoint the majority of the directors of Edwin and accordingly in terms of Section 12(2)(c) of the Act acquired sole, de jura control over Edwin as a result of the First Transaction.

2.1.2. The First Transaction was not notified to the Commission as required by the provisions of section 13A of the Act. The Respondents implemented the First Transaction immediately after the conclusion of the shareholders agreement.

2.2. The Second Transaction

2.2.1. During May 2008, WBHO and Mr Maila concluded heads of agreement for, inter alia, the transfer of a further 8% of the shares in Edwin to WBHO, increasing WBHO shareholding from 49% to 57% of the issued share capital of Edwin ("the Second Transaction").

2.2.2. The Respondents implemented the Second Transaction after the conclusion of heads of agreement : "

2.2.3. The First and Second Transaction shall hereinafter be collectively referred to as the "Transaction".

2.2.4 Failure to notify the Transaction only came to the attention of the Respondents when the auditors BDO Spencer Steward Inc ("BDO") were auditing WBHO's financial statements for the financial year ending 30 June

2009. BDO raised the question as to whether the acquisition of control by WBHO over Edwin had been notified to the Commission.

2.2.5. WBHO advised the Commission that immediately upon receiving the query from BDO it contacted its legal advisors, Cliffe Dekker Hofmeyr Inc ("CDH"), to check whether the Transaction required compulsory notification to the Commission. CDH confirmed that the Transaction required notification and was instructed by WBHO to bring this fact to the attention of the Commission and to resolve the issue as soon as possible.

2.2.6. The Commission met with CDH and a representative of WBHO on 28 July 2009, and advised the parties to notify the Transaction as soon as possible and to provide factual background to the failure to notify.

2.2.7. The Transaction was notified to the Commission on 18 August 2009 as an intermediate merger, which was approved by the Commission 29 September 2009, under case number: 2009Aug4617.

3. Commission's investigation and findings

3.1 The Commission investigated the alleged contravention and found the following:

3.1.1. The Transaction resulted in the change of Edwin's control, which change of control constituted a merger in terms of section 12(1) of the Act.

3.1.2. Further, the Commission found that the threshold for an intermediate merger as defined in section 11 (5)(b) as read with section 11 (1) of the Act and Notice 253 of 2001 was met in respect of the Transaction.

3.1.3. Further, the Commission found that the merging parties implemented the merger prior to the notification of and approval by the Commission in contravention of section 13A(3) of the Act.

4. Admissions

4.1. The Respondents admit that the Transaction constituted a notifiable intermediate merger as defined in Section 11(5)(b) of the Act

4.2. The Respondents further admit that the merger was implemented prior to notification and approval of the Commission in contravention of Section 13A(3) of the Act.

4.3. The Respondents further admit that both WBHO and Edwin were responsible for notifying the Commission of the Transaction.

5. Compliance with the Act

The Respondents agree and undertake to:

5.1. refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act; and

5.2 continue to implement the existing compliance programme already adopted by the Respondents.

6. Administrative penalty

The Respondents admit that they are each liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act

WBHO agrees to pay an administrative penalty of R1 000 000 (One Million Rand), and Edwin agrees to pay an administrative penalty of R100 000 (One Hundred Thousand Rand).

Each penalty shall be payable within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal.

The administrative penalty is payable into the bank account of the Commission whose, banking details are:

Bank: ABSA Bank

Name of account: Competition Commission

Account Number 4050778576

Branch Code: 323345

6.5. Proof of payment of the administrative penalty amounts will be emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions.

6.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act.

7. Full and final settlement

This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to the contravention of section 13A(3) of the Act, investigated under the Commission's case number: 2009Aug4617.

Date and signed at Sandton on this the 18th day of October 2010

WBHO Construction (Proprietary) Limited

Date and signed at Sandton on this the 19th day of October 2010

Edwin Construction (Proprietary) Limited

Date and signed at Pretoria on this the 26th day of October 2010

Competition Commission

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