

SOUTH AFRICA / JUDGMENT

Digital Titan (Pty) Ltd v TDE Investments (Pty) Ltd (LM165Jan22) [2022] ZACT 27; [2022] 2 CPLR 31 (CT) (18 August 2022) [2022] ZACT 27

COURT
Competition Tribunal

BEFORE
Y Carrim, I Valodia, T Vilakazi

CASE / FILE NUMBER
LM165Jan22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM165Jan22

In the matter between:

Digital Titan (Pty) Ltd

Primary Acquiring Firm

and

TDE Investments (Pty) Ltd

Primary Target Firm

Panel : Y Carrim (Presiding Member)

: I Valodia (Tribunal Member)

: T Vilakazi (Tribunal Member)

Heard on : 20 July 2022

Order issued on : 20 July 2022

Reasons

issued on : 18 August 2022

REASONS

FOR DECISION

Introduction

- [1] On 20 July 2022, the Tribunal conditionally approved the large merger in which Digital Titan (Pty) Ltd (“Digital Titan”) will indirectly purchase a majority of the issued share capital of TDE Investments (Pty) Ltd (“TDE”) which will give it a majority shareholding in Teraco Data Environment (Pty) Ltd (“Teraco”) and its subsidiaries.
- [2] TDE’s direct and indirect South African subsidiaries include Teraco. Following the implementation of the proposed transaction, Digital Titan will acquire control over TDE.

Primary acquiring firm

- [3] Digital Titan is incorporated in accordance with the laws of South Africa[1] and is ultimately controlled by Digital Realty Trust Inc., through its controlling interest in Digital Realty Trust L.P. (collectively, “*Digital Realty*”).
- [4] Digital Realty owns, acquires, develops and operates data centres and is focused on providing data centre colocation[2] and interconnection solutions[3] to customers across a variety of industries, ranging from cloud and information technology services; communications and social networking; financial services; manufacturing; energy; and healthcare and consumer products.

Primary target firm

- [5] TDE is a company incorporated in accordance with the company laws of the Republic of South Africa and is jointly controlled by Springlux Midco S.a.r.l and Berkshire Partners LLC.
- [6] TDE, through its subsidiary, Teraco is a provider of data centre services. Through its seven data centres, located in Johannesburg, Durban, and Cape Town, Teraco provides data centre space to customers who wish to retain control over their own infrastructure, but which may lack the facilities to house them; rentable floor/cabinet space; and all auxiliary infrastructure services such as monitoring power, cooling, humidity security, ancillary building systems and limited non- technical support.
- [7] TDE is not owned or controlled by any historically disadvantaged persons (“HDPs”). However, of relevance to the proposed transaction is that TDE indirectly controls Teraco which has some of its shareholding held by a B-BBEE entity, [...] [...].

Background

- [8] 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. However, on 28 April 2022 Africa Data Centres SA Development (Pty) Limited (“ADC”) filed an intervention application seeking to participate in the large merger proceedings before the Tribunal in terms of section 53 of the Competition Act, 89 of 1998, as amended (“the Act”).
- [9] ADC competes directly with Teraco for colocation services, including data centre services, energy, cross-connects and remote hands services. ADC also competes with Teraco in the public peering market. In this regard, ADC partners with the South African community internet exchange (“INX-ZA”) to provide peering to its clients at its facilities, while Teraco offers public peering through its subsidiary, NAP Africa.
- [10] The Tribunal, after hearing ADC's intervention application, granted it limited participation rights on some of the grounds it had advanced in support of its intervention on 17 May 2022. ADC[4] appealed this decision to the Competition Appeal Court (“CAC”) seeking to expand its scope of participation but was unsuccessful.[5]
- [11] The parties had agreed to a timetable for the filing of papers in the merger proceedings, but these proceedings were interrupted during the discovery stage by way of a section 45 application brought by TDE against ADC on 14 June 2022 and an application to compel by the merging parties against ADC on 3 July 2022.
- [12] On 11 July 2022, ADC and the merging parties came to an agreement on proposed conditions which addressed the issues raised by ADC (“the access condition”). ADC formally withdrew its opposition to the merger, on the basis that the merger would be approved subject to the access conditions.
- [13] The merger was heard in chambers by the panel and was approved on the conditions agreed between ADC and the merging parties and those proposed by the Commission. The reasons for this decision follow.

Competition Assessment

Market definition: relevant product market

- [14] Although both Digital Realty and Teraco provide data centre services, Digital Realty is not active and does not own any data centres in South Africa.
- [15] In its investigation, the Commission considered the likely effects of the proposed transaction in relation to the provision of data centre services in South Africa. The Commission was guided by international and local jurisprudence[6], however, the Commission did not find it necessary to conclude on the relevant product market but considered the effects of the proposed transaction in the market for the provision of colocation/off-site or outsourced data centre services, in line with the Tribunal's decision in the ADC / Samrand Data

Centre[7] matter.

- [16] Based on the above, the Tribunal assessed the impact of the proposed transaction on the market for the provision of colocation/off-site or outsourced data centre services.

Relevant geographic market

- [17] Teraco's data centre facilities are situated in metropolitan areas in Johannesburg, Durban, and Cape Town. Digital Realty has no presence in South Africa.
- [18] It was noted in the ADC / Samrand Data Centre matter, that although data centres are largely located in metropolitan areas where customers are headquartered, any data centre can service a much broader region. This is because data centres are connected to various networks and are positioned to offer services throughout the country. Therefore, the Tribunal accepted the Commission's view that the relevant geographic market for the provision of data centre services is national.
- [19] Given the lack of geographic overlap between the activities of the merging parties in South Africa, the Commission was of the view that it is not necessary to take a definitive view on the geographic market as Digital Realty is not active and does not own any data centres in South Africa.
- [20] Based on the above, the Tribunal assessed the competition effects of the proposed transaction in the national market.

Market shares

- [21] The merging parties submitted that Teraco has approximately [...] in the national market for the provision of data centre services. Teraco will continue to face competition from other firms such as ADC, Internet Solutions, Telkom, Vodacom and MTN in the market.
- [22] There is no accretion in market share as a result of the proposed transaction in South Africa because Digital Realty is not active in South Africa.
- [23] The Commission relied on the market share estimates from the merging parties because there were no readily available independent sources of industry information on the market shares for the provision of data centre services market.
- [24] Market participants contacted by the Commission confirmed that they were unable to provide estimates of the total size of the data centre services in South Africa due a lack of publicly available information. However, they acknowledged that there are alternative players in the market that will continue to constrain the merged entity post-merger.
- [25] Having considered the above in assessing the proposed transaction, the Tribunal concluded that it is unlikely that the proposed merger will result in a substantial prevention or lessening of competition in any relevant market.

ADC's theories of harm

- [26] The Commission's investigation involved extensive engagements with the merging parties, customers, competitors, and other stakeholders. Other than ADC, no third party raised any concerns with the proposed transaction.
- [27] ADC was concerned about the impact of the proposed transaction on competition post-merger and alleged that the current market dominance of TDE in South Africa (coupled with the dominance currently enjoyed by NAP Africa in the internet exchange ecosystem), will create a highly dominant player and an uncompetitive environment.
- [28] ADC also submitted that the proposed transaction would bring about several significant network effects which would make it impossible for the ADC to compete effectively for large hyperscale customers and undermine their broader offering to the rest of the market.
- [29] As far as NAP Africa is concerned, ADC submitted that NAP Africa's dominant position in the internet exchange point ("IXP") market has the effect of attracting customers to TDE's data centres and creating barriers to entry for other data centres which do not have access to NAP Africa. ADC further alleged that although NAP Africa does permit remote connections to the IXP, without the customer having to have a colocation service with TDE, this service may be revoked under the new ownership since remote peering is at the discretion of TDE.
- [30] In addition, ADC submitted that the proposed transaction will not promote a greater spread of ownership by HDPs but will result in a foreign offshore entity acquiring a majority interest in a South African-based firm.
- [31] To remedy its concerns, ADC proposed conditions to the effect of the divestiture of NAP Africa; as an alternative to the divestiture of NAP Africa, a behavioural condition requiring NAP Africa to allow connectivity to other data centres in perpetuity; and the divestiture of up to three existing TDE collocation centres and some of the land owned by TDE in Cape Town and Johannesburg to smaller South African majority-owned players having a market share of less than 10%.
- [32] The merging parties argued that the concerns raised by ADC were baseless and motivated by self-interest. They submitted that the proposed transaction does not raise any competition concerns in the market for the provision of data centre services, given that Digital Realty is not active in South Africa, and accordingly there is no horizontal overlap or vertical relationship between the merger parties' activities in South Africa.
- [33] The merging parties also submitted that Teraco operates in a highly dynamic and innovative market in South Africa, where it is required to compete against strong competitors including larger firms within the telecommunication sector. Teraco's competitors, such as ADC, operate significant telecoms networks and have the resources and capabilities to invest in new products and services in order to be competitive in the provision of data centre services.

- [34] With respect to IXPs, the merging parties submitted that NAP Africa is open to everyone that wishes to connect, even if such party is not a customer of Teraco's colocation services. Competitors of Teraco, within the telecoms sector have unrestricted access to NAP Africa. The merging parties further submitted that NAP Africa is entirely voluntary for Teraco's customers, and no customer is compelled to connect with NAP Africa.
- [35] During its investigation, the Commission did not find any evidence to support the concerns raised by ADC given the number of alternatives in the market for the provision of data centre services in South Africa. Based on the market shares estimates, the Commission found that the merged entity will continue to face competition from numerous competing firms such as ADC, MTN, Telecom Egypt, Telkom and Dimension Data, amongst others. Therefore, the Commission concluded that ADC's concerns were not substantiated.
- [36] After hearing ADC's intervention application, the Tribunal allowed ADC to intervene in the merger proceedings in respect of two of the theories of harm it had namely, (i) the network-effect theory of harm; and (ii) the foreclosure theory of harm given that ADC.[8]
- [37] Subsequent to the CAC's dismissal of ADC's appeal, the merging parties and ADC tendered the access condition which provided that TDE will not restrict or prevent any third-party provider of co-location data centres, including ADC, from connecting to, and peering at NAP Africa located at TDE's data centres; restrict or prevent the customers of any third-party provider of co-location data centre services, including ADC, from remote peering at NAP Africa, facilitated by the third-party provider of co-location data centres; restrict or prevent any third-party providers of co-location data centres, capable of peering or facilitating remote peering at NAP Africa, from marketing these services to its customers and potential customers, provided that such marketing is reasonable and proportional and clearly states that the third-party provider of co-location data centres offers "Remote Peering at NAP Africa Internet Exchange"; or prevent a third-party provider of co-location data centres and/or a remote peering customer from connecting to and peering or remote peering, as applicable, at NAP Africa.
- [38] The Tribunal concluded that the competition concerns raised by ADC were adequately addressed by these conditions.

Public Interest

Effect on employment

- [39] The merging parties submitted that the proposed transaction will not have any effect on employment given that Digital Realty is not active in South Africa and does not have any employees in South Africa.
- [40] The employees of TDE are not represented by any trade union but their representative confirmed that the employees did not raise any employment concerns.[9]
- [41] Accordingly, the proposed transaction is unlikely to raise employment concerns.

Effect on the spread of ownership

- [42] Post-merger, TDE (and Teraco) will be owned and controlled by Digital Realty which has no HDP shareholder.
- [43] The merging parties submitted that the proposed transaction will not have any negative impact on the greater spread of ownership by HDPs post-merger and although Digital Realty is not active in South Africa, and therefore does not have black empowerment credentials, the merging parties entered into the proposed transaction on the basis that [....].
- [44] As there will be no reduction in HDP ownership because of the proposed transaction, the merging parties were of the view that conditions regarding [....] ownership are not warranted in this matter. However, the merging parties were willing to tender a condition to [....].
- [45] Further, the merging parties were willing to [....].
- [46] Having considered the above, the Tribunal found that the proposed remedies would ensure that the target firm remains empowered post-merger, [....].
- [47] The proposed transaction raises no other public interest concerns.

Conclusion

- [48] For the reasons set out above, we concluded that access condition addresses the network-effect and foreclosure concerns by ADC. We are satisfied that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.
- [49] Furthermore, the public interest condition will [....].
- [50] In order to give effect to the above, the Tribunal approved the transaction on the conditions attached as “Annexure A” hereto.

Date: 18 August 2022

Ms Yasmin Carrim

Professor Imraan Valodia and Dr. Thando Vilakazi concurring

Tribunal Case Manager: Juliana Munyembate

For the Merging Parties: Derek Lotter, Maryanne Angumuthoo and Tshidi Vilakazi of Bowmans and Jocelyn Katz, Aidan

Scallan and Hayley Lyle of ENSAfrica

For the Commission: Thabelo Masithulela and Zanele Hadebe

- [1] Digital Titan does not control (directly or indirectly) any firm and does not conduct any activities

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- [2] Colocation refers to several aspects of this type of data centre. First, the fact that servers and other equipment from many different companies are ‘co-located’ in one data centre. It also refers to the concept that a company can have their equipment located in multiple places. They may have servers, for example, in three or four different co-location data centres.
- [3] Interconnection solutions are physical network connection between two parties. The cross-connect is enabled by the installation of patch cord(s) between ports of the respective parties’ interconnection panels.
- [4] See Tribunal Case No. LM165Jan22/INT016Apr22 for intervention application reasons.
- [5] 200/CAC/May22 at para 28.
- [6] Data centres are designed to house servers and network equipment. Data centres provide a highly reliable, secure environment with redundant mechanical, cooling, electrical power systems and network communication connection connections.
- [7] Tribunal Case No. LM169Mar20. The Tribunal accepted the Commission’s view that although a data centre is ideal for companies that need a dedicated system, of late, more and more companies are moving into the cloud instead of owning their own data centres to cut back on the cost of running their own centralized networks and servers.
- [8] See Tribunal Case No. LM165Jan22/INT016Apr22 for intervention application reasons.
- [9] Email from Radia Bhamjee dated 4 February 2022, page 919 of merger record.
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