

SOUTH AFRICA / JUDGMENT

EMIF II Investment Proprietary Limited v Vector Logistics Proprietary Limited (LM003Apr23) [2023] ZACT 59; [2023] 3 CPLR 39 (CT) (13 July 2023) [2023] ZACT 59

COURT

Competition Tribunal

BEFORE

L Mncube, S Goga, A Ndoni

CASE / FILE NUMBER

LM003Apr23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM003Apr23

In the matter between:

EMIF II Investment Proprietary Limited Acquiring Firm

and

Vector Logistics Proprietary Limited Target Firm

Panel: L

Mncube (Presiding Member)

S Goga (Tribunal Member)

A Ndoni (Tribunal Member)

Heard on: 20

June 2023

Order issued on: 20

June 2023

Reasons

Issued on: 13

July 2023

REASONS

FOR DECISION

Approval

- [1] On 20 June 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger wherein EMIF II Investment Proprietary Limited (“EMIF II Investment”) intends to subscribe for 100% of the share capital of Vector Logistics Proprietary Limited (“Vector Logistics”).
- [2] Upon the implementation of the proposed transaction, EMIF II Investment will solely control Vector Logistics and its subsidiary.

Parties to the transaction and their activities

Primary acquiring firm

- [3] The primary acquiring firm is EMIF II Investment Proprietary Limited (“EMIF II Investment”), a company incorporated in accordance with the laws of South Africa. EMIF II Investment is a 100% indirectly owned subsidiary of A.P. Møller Capital – Emerging Markets Infrastructure Fund II K/S (“EMIF II”), a Danish limited partnership, acting through its manager, A.P. Møller Capital P/S (“APMC”), a fund management company incorporated in terms of the laws of Denmark.
- [4] APMC is ultimately controlled by A.P. Møller Holding A/S (“APMH”), the holding company of the A.P. Møller Holding group of companies, incorporated in terms of the laws of Denmark.
- [5] APMH is primarily active through A.P. Moller-Maersk A/S (“APMM”) in South Africa, an integrated transport and logistics company. However, it is noted that APMM and APMC are operated and managed completely separately. APMM has no decision-making power over EMIF II and APMC’s investments, including the investment taking place pursuant to the notified transaction (and APMC has no control over APMM’s activities or investments). As such, although APMM and APMC may be viewed as part of the same economic entity for merger control purposes, they are legally, administratively and operationally separate entities.
- [6] APMC controls numerous firms in South Africa, including Lumika Renewables Proprietary Limited, Reunert Investment Company No 2 Proprietary Limited and Terra Firms Solutions Proprietary Limited. Further, APMM, an affiliate of APMH, controls the following firms in South Africa: APM Terminals IS Cape Town Proprietary Limited, Maersk Logistics and Services South Africa Proprietary Limited, Maersk South Africa Proprietary Limited (Maersk South Africa) and Precool Cold Storage Proprietary Limited (Precool JV), amongst others.

- [7] EMIF II Investment does not control any firms in South Africa. EMIF II Investment and all firms controlling it are collectively referred to as the Acquiring Group.

Primary target firm

- [8] The primary target firm is Vector Logistics Proprietary Limited (“Vector Logistics”).
- [9] Vector Logistics is currently wholly owned by RCL Foods Limited (“RCL Foods”), which is in turn controlled by Remgro Limited (“Remgro”), a public company listed on the stock exchange operated by the JSE Limited.
- [10] In South Africa, Vector Logistics only controls Empty Trips Proprietary Limited (“Empty Trips”).

Proposed transaction and rationale

Transaction

- [11] The proposed transaction entails a subscription for 100% of the share capital of Vector Logistics by EMIF II Investment, a 100% indirectly owned subsidiary of EMIF II. As a result, EMIF II will indirectly acquire sole control of Vector Logistics.

Rationale

- [12] The Acquiring Group submits that APMC manages EMIF II, a Danish limited partnership which invests in Africa, South and South-East Asia in transport and energy infrastructure. Within that, one of the strategies of EMIF II is to focus on investments which enhance food security and reduce food waste. This investment in Vector Logistics would fit well within the geographic focus and sector focus, and also within the strategy.
- [13] From the perspective of the Target Firm, it was originally acquired by Rainbow Chicken Limited (now RCL Foods Limited) (“Rainbow Chicken”) in 2004 to control, optimise and operate Rainbow Chicken’s outbound supply chain function. Since then, Vector Logistics has grown significantly by expanding the range of services provided and taking on a number of external customers (retailers, food producers and quick service restaurants). Vector Logistics has further demonstrated its ability to grow acquisitively as in the case of the 2019 acquisition and subsequent integration of the Imperial Cold Chain Logistics business, and acquisitions of stakes in entities in Botswana and Zambia. In addition, several transformative initiatives have been implemented over time, most recently, the acquisition of Empty Trips, a smart online digital freight matching platform. The proposed transaction therefore seeks to secure an appropriate long-term shareholder of reference who can facilitate the achievement of Vector Logistics’

key strategic objectives going forward whilst simultaneously maintaining the critical role that Vector Logistics plays with respect to food security in the various markets serviced.

Relationship between the parties

- [14] The Competition Commission (“the Commission”) considered the activities of the merging parties and found that both the Acquiring Group (through APMM) and Vector Logistics are involved in the market for the provision of broad cold chain logistics services.
- [15] Despite the above, the Commission submitted that the proposed transaction does not result in a horizontal overlap given that the merging parties do not provide any services in competition with each other.
- [16] In light of the above, we note that there is no horizontal overlap in the activities of the merging parties.

Horizontal issues

- [17] APMM is active in providing cold chain logistics services for chilled food products (predominantly chilled export fruits and vegetables) while Vector Logistics, on the contrary, provides integrated cold chain logistics to domestic customers.
- [18] The Commission submitted that APMM focuses on serving customers who require their goods to be chilled while Vector Logistics provides services primarily to customers who provide their goods already frozen and require that they remain frozen throughout the cold chain.
- [19] Since the merger does not raise any competition concerns, we did not consider it necessary to conclude on the precise scope of the relevant markets.

Public interest assessment

Effect on employment

- [20] The merging parties submitted that the proposed transaction will not have any detrimental or negative effects on employment. In this regard, it is submitted that Vector Logistics will continue to operate as a standalone business post- transaction. Further, EMIF II Investment undertook that it will not affect any merger-specific retrenchment of employees in South Africa at the Target Firm for a one year period from the date of implementation of the notified transaction. EMIF II Investment confirmed that it is willing for this undertaking to be made as a condition to the approval of the transaction notified.
- [21] EMIF II Investment does not have any employees in South Africa. The unionised employees of Vector Logistics (including Empty Trips) are represented by the National Union of Food Beverages Wine Spirits & Allied Workers (“NUFBWSAW”) and the Transport Retail and General Workers Union (“THORN”), while the employees not affiliated to any trade union are represented by employee representatives. The Commission engaged with the respective trade unions and employee representatives.

- [22] The Vector Logistics employee representatives and NUFBWSAW and THORN confirmed that they have been notified of the proposed transaction. NUFBWSAW filed a notice of intention to participate raising various concerns, including employment. NUFBWSAW submitted that the Commission should impose a condition which restricts the merging parties from effecting any voluntary or involuntary retrenchments within the next 10 years.
- [23] The Commission also received a notice of intention to participate from the Department of Trade, Industry and Competition (the "DTIC") based on public interest considerations. The DTIC acknowledged the merging parties' commitment to not affect any merger specific retrenchments in South Africa for a period of one year, post implementation of the merger. However, the DTIC submitted that the proposed transaction be approved subject to a 36 months moratorium on retrenchments condition instead of the 12 months moratorium proposed by the merging parties.
- [24] The merging parties agreed to a 2 (two) year moratorium. The DTIC did not make any further submissions relating to employment.
- [25] Considering the above, the Commission concluded that the proposed transaction is unlikely to have a negative effect on employment.

Effect on the spread of ownership

- [26] The primary target firm, EMIF II Investment is indirectly wholly owned by EMIF II, a Danish limited partnership, acting by its manager, APMC. There are no HDP shareholders in EMIF II Investment.
- [27] Vector Logistics is currently wholly owned by RCL Foods and does not have any direct HDP shareholding. As a JSE listed entity, RCL Foods' shares are held by various shareholders, including HDP shareholders. Similarly, Remgro (controlling entity of RCL Foods) is a JSE listed entity which has various shareholders, including HDP. The merging parties submit that it would be impossible to accurately indicate how many HDP or BEE shareholders RCL Foods and Remgro has with a view to determine how the proposed transaction affects HDP ownership. RCL Foods has 20.89% HDP ownership, while Remgro has 21.94% HDP ownership.
- [28] The DTIC raised concerns with the proposed transaction in relation to the impact of the proposed transaction on the promotion of a greater spread of ownership. In particular, the DTIC is of the view that the merger filing is lacking in respect of

analysis

of the substantial negative impact of the proposed transaction on ownership by HDPs and broad-based black economic empowerment (“B- BBEE”) in Vector Logistics, more generally. In this regard, the DTIC submitted that the merging parties should promote HDP ownership participation in the merged entity of at least 25% and with the inclusion/addition of workers through an appropriate employees share ownership programme (“ESOP”) within three (3) years.

[29] With regards to the impact of the proposed transaction on the promotion of a greater spread of ownership by HDPs and workers, the merging parties submit that the proposed transaction will generate indirect value for shareholders in RCL Foods, as the consideration paid can be redeployed and better utilised by RCL Foods in the best interests of its shareholders, including shareholders. Further, the proposed transaction already provides significant public interest benefits, including foreign capital flow to south Africa and

future investments in a strategic industry.

[30] Notwithstanding the above, the merging parties committed to establish an ESOP for an effective [...] % interest in Vector Logistics within two (2) years of the implementation date of the proposed transaction, that will give all South African employees of Vector Logistics and its subsidiaries an opportunity to benefit. The DTIC did not make any further submissions relating to the promotion of a greater spread of ownership.

[31] The Commission also received concerns from NUFBWSAW relating to previous ESOPs implemented by RCL Foods/Vector Logistics ("the B-BBEE Schemes"). According to NUFBWSAW, Vector Logistics and its sister companies RCL Foods and Remgro has had two ESOPs which NUFBWSAW claimed, have “vanished without any trace”. Accordingly, the union requested an explanation as to what happened to the ESOPs as it claimed that “employees are concerned that their benefits from these two ESOPs had not been distributed.”

[32] During the Commission’s investigation, the merging parties submitted that there has been extensive engagement with participating Vector Logistics employees (including the relevant trade unions) regarding the status of the B-BBEE Schemes. Vector Logistics employees have also been provided with all the relevant information which according to the merger parties explained that any benefit flowing to participating employees depended on the performance of the RCL Foods share price. The merging parties detailed through various forms of communication that the RCL Foods share price did not perform in line with original expectations and as a result, the BEE Schemes were unable to deliver any value to the participants. RCL Foods had hoped for the B-BBEE Schemes to succeed, however, prevailing market conditions were such that the performance of the B-BBEE Schemes was out of RCL Foods’ control.

Capex commitments

- [33] In addition, the DTIC further submitted that the merger parties' rationale for the proposed transaction is at odds with key financial and other data referenced in the merger filing documents (i.e., [...] i) the projected capital expenditure (capex) to net revenue ratio will decline by 50% between 2022 to 2026, and ii) the acquiring group will seek to optimise operational efficiencies of the business to improve profitability, with a view to exit the investment over the medium term. In this regard, the DTIC submitted that the merging parties should commit to a R [...] capex spend in addition to projected replacement capex over five years.
- [34] In this regard, the merging parties have committed that Vector Logistics shall, over a period of five (5) years from the implementation date, to invest at least R [...] in additional capital expenditure to the projected replacement capital expenditure by Vector Logistics as at the approval date. At least R [...] of the committed investment will be directed to firms owned or controlled by HDPs, provided that the relevant goods and services are available and of sufficient quality, and that it is commercially viable to do so, and that the goods and services can be sourced on competitive terms.
- [35] Given the above, the merger parties and the Commission submitted a set of conditions to address the concerns.

Conclusion

- [36] For the above reasons, we approve the transaction with conditions agreed to by the merging parties.

Date: 13 July 2023

Prof Liberty Mncube

Ms Andiswa Ndoni and Ms Shaista Goga concurring

Tribunal Case Manager: Theodora Michaletos For the Acquiring Group: For the Target Firm: Xolani Nyali, Sivuyise Lutshiti and Kayla Abrahams of Bowmans Attorneys Robert Wilson, Dudu Mogapi and Monde Mbali of Webber Wentzel For the Commission: Reabetswe Molotsi and Grashum Mutizwa

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Prepared on 14 October 2026 · Esheria