

SOUTH AFRICA / JUDGMENT

Ethos Private Equity Fund VI v Nampak Corrugated and Nampak Tissue Business Divisions of Nampak Products Limited (020412) [2015] ZACT 31 (1 April 2015)

[2015] ZACT 31

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Medi Mokuena, Imraan Valodia

CASE / FILE NUMBER

020412

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020412

In the matter between:

ETHOS PRIVATE EQUITY FUND VI.....Acquiring
Firm

And

THE NAMPAK CORRUGATED AND NAMPAK.....Primary Target Firms
TISSUE BUSINESS DIVISIONS OF NAMPAK PRODUCTS LIMITED

Panel: Andreas Wessels (Presiding Member)

: Medi Mokuena (Tribunal Member)

: Imraan Valodia (Tribunal Member)

Heard on: 11 March 2015

Order Issued on : 11 March 2015

Reasons Issued on : 01 April 2015

Reasons for Decision

Approval

[1] On 11 March 2015, the Competition Tribunal (“Tribunal”) unconditionally approved the merger between Ethos Private Equity Fund VI (“Ethos Fund VI”) and the Nampak Corrugated and Nampak Tissue divisions of Nampak Products Limited (these two divisions are collectively referred to as “the target firms”).

[2] The reasons for approving the proposed transaction follow.

Parties to transaction and their activities

Primary acquiring firm

[3] The primary acquiring firm is Ethos Fund VI, a company incorporated in accordance with the laws of the Republic of South Africa. Ethos Fund VI comprises of the following firms: Ethos Capital VI GP (Jersey) Limited, Ethos Capital VI GP (SA) (Pty) Ltd and the interim trustees of the Ethos Fund VI Co-Investment Trust. Ethos Fund VI controls/holds investments in a number of companies.¹

[4] Ethos Fund VI is a private equity investment fund that comprises of various local and foreign limited partners (investors).

[5] Ethos Fund VI is advised by Ethos Private Equity (Pty) Ltd (“Ethos”). Ethos also advises two other private equity investment funds, namely Ethos Fund V and Ethos Technology Fund. No single shareholder directly or indirectly controls Ethos. Ethos Fund V and Ethos Technology Fund control/hold investments a number of companies.²

Primary target firm

[6] The primary target firms are the Nampak Corrugated and Nampak Tissue divisions of Nampak Products Limited (“Nampak”).

[7] Nampak Corrugated manufactures corrugated packaging in South Africa.

[8] Nampak Tissue manufactures tissue paper products and other related household products in Southern Africa.

Proposed transaction and rationale

[9] In terms of the proposed transaction, Ethos Fund VI intends to acquire the businesses and operations of the Nampak Corrugated and Nampak Tissue divisions of Nampak. Upon implementation of the proposed transaction, Ethos Fund VI will control the target businesses.

[10] Ethos submitted that the target businesses are strong players in their industries with a stable volume growth outlook.

[11] The target firms submitted that the transaction fits in with Nampak’s strategy to focus on its core product segments.

Impact on competition

- [12] The Commission concluded that there are no horizontal overlaps between the activities of the merging parties since the portfolio firms in which Ethos, Ethos Fund V, Ethos Fund VI and Ethos Technology Fund have interests, are not involved in similar activities to those of the target firms.
- [13] The Commission found that a vertical relationship exists between the activities of the merging parties and assessed whether there were any foreclosure concerns. The potential vertical effects arise from the fact that RTT Holdings (Pty) Ltd, controlled by Ethos Fund VI, offers distribution and related services. Currently, Imperial Logistics Southern Africa (“Imperial”), through the Imperial Cargo Division, offers distribution and related services to the target firms. The Commission however concluded that it is unlikely that Imperial will be foreclosed post-merger.³ We concur with the Commission’s assessment and do not deal with this vertical aspect in any further detail.
- [14] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

- [15] We below deal with the potential effects of the proposed transaction on employment. The proposed transaction raises no other public interest concerns.
- [16] As background to the potential employment effects: the employees of Nampak Corrugated are represented by the Chemical Energy Paper Printing Wood and Allied Workers Union (“CEPPWAWU”); and the employees of Nampak Tissue are represented by both CEPPWAWU and the South African Typographical Union (“SATU”).
- [17] In their merging filing the merging parties submitted to the competition authorities that they will not retrench any employees as a result of the proposed merger other than at senior management/ executive level, in particular no semi- or unskilled workers will be retrenched as a result of the proposed transaction.⁴ This was also confirmed by the merging parties’ counsel at the hearing.⁵ They further submitted that to the extent that any senior management / executives will be affected by the proposed transaction, the merged entity will attempt to find alternative positions internally for such employees (also see paragraph 22 below).
- [18] The merging parties furthermore indicated that all employees of the target firms, excluding two managing directors, will be transferred to the acquiring group in terms of section 197 of the Labour Relations Act 66 of 1995, on terms and conditions that are on the whole no less favourable to those employees. Again, this was confirmed by the merging parties’ counsel at the hearing.⁶
- [19] The Commission further noted that the merging parties, after certain concerns were initially raised by SATU, also made the following submissions: (i) that Ethos Fund VI only plans to restructure the current managing director of Nampak Tissue who has agreed to remain an employee of Nampak post-merger and will not be transferred to the merged

entity; (ii) as regards Nampak Tissue's Pietermaritzburg plant, the merging parties submitted that Ethos Fund VI has no intention to close down or move this plant post-merger and intends to continue running the plant as is; and (iii) Ethos Fund VI will not implement any new employment policies on the current employees.⁷

[20] The Commission indicated that SATU ultimately, after consultations with the merging parties, submitted that it did not have any further concerns regarding the proposed transaction's impact on employment.

[21] CEPPWAWU, on the other hand, submitted to the Commission that although to a certain extent the merging parties provided clarification, it was still concerned about the impact that the proposed transaction was likely to have on employment. It proposed a five year moratorium on forced retrenchments and other terms and conditions related to the working conditions of employees. CEPPWAWU's concern was in essence that Ethos allegedly is more concerned about improving its own business interests and will acquire the target companies and /or business units and then sell them.

[22] After investigation of the potential impact on employment and taking into account the submissions from both the trade unions and the merging parties, as well as conducting a review of the merging parties' strategic documents, the Commission concluded that it had no evidence which contradicts the merging parties' various submissions that the proposed transaction will not result in any retrenchments. The Commission further indicated that the merging parties have entered into agreements with two senior employees that would have been affected by the restructuring to avoid any retrenchments.

[23] However, the merging parties were prepared to give the undertaking that for a period of only one year after the proposed transaction

there will be no merger-related retrenchments.⁸ The Commission was of the view that a moratorium of only one year on merger-related retrenchments would essentially make the employees

worse-off, bearing in mind that the merging parties have undertaken that there will be no retrenchments at all as a result of the

proposed transaction.⁹

[24] Given the concerns raised, specifically by CEPPWAWU, the Tribunal informed both CEPPWAWU and SATU of the set down of the matter and gave both these unions the opportunity to make oral submissions at the hearing.

[25] The representative of SATU at the hearing confirmed that after interactions between it and the merging parties it no longer had any concerns regarding the proposed transaction.¹⁰

[26] CEPPWAWU's representatives at the hearing however indicated that it was still concerned and requested that a five year moratorium be placed on retrenchments resulting from the proposed transaction. It alleged that the acquiring group will make the target firms more efficient by retrenching employees and then in time sell these firms.¹¹ It also raised concerns regarding the conduct of another acquirer of a Nampak business in a previous merger on which the Commission

imposed employment conditions.¹² However, since this past merger involves the alleged conduct of a different acquiring group we do not consider it relevant to this

assessment and do not deal with this any further in these reasons.

[27] We note that the Tribunal questioned the merging parties regarding their willingness to give only a very limited undertaking of one year with regards to merger-specific retrenchments. The merging parties then extended their undertaking to, for a period of two years after the proposed merger, not retrench any employees as a result of the proposed merger, with the exception of two managing directors.¹³

[28] We shall hold the merging parties to their submissions that they will not retrench any employees as a result of the proposed merger other than two employees at executive level and that all employees of the target firms, excluding two managing directors, will be transferred to the acquiring group in terms of section 197 of the Labour Relations Act, on terms and conditions that are on the whole no less favourable to those employees.

[29] We have found no reason to deviate from the Commission's recommendation on employment. We have not been provided with any evidence which contradicts the merging parties' submissions that the proposed transaction will not result in any retrenchments. We therefore approve the proposed merger without conditions based on the merging parties' submissions to the competition authorities that the proposed merger will not result in any job losses or retrenchments other than two executive positions. No doubt the trade unions will monitor this and inform the Commission should any merger-specific retrenchments occur after the proposed transaction.

Conclusion

[30] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, based on the merging parties' submissions with regards to employment, no public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.

01 April 2015

DATE

Andreas Wessels

Medi Mokuena and Imraan Valodia concurring

Tribunal Researcher; Ammara Cachalia

For the merging parties: Shawn Van der Meulen of Webber Wentzel

For the Commission: Portia Bele and Nompucuko Nontombana

¹See merger record, pages 22, 52 and 53.

²See merger record, pages 20, 21 and 53 to 56

³See Commission's Report, pages 17 to 19.

⁴Merger record, pages 13, 47, 49 and 62.

⁵Transcript pages 7, 8 and 19.

⁶Transcript pages 7, 8, 11, 12 and 22.

⁷Commission's Report, page 21.

⁸Also see transcript page 9.

⁹Also see transcript pages 10 and 11.

¹⁰Transcript page 12.

¹¹Transcript pages 13 and 14.

¹²Transcript pages 15 and 16. Also see merging parties' response at transcript pages 16 and 17.

¹³Transcript pages 20, 22 and 25.

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