

SOUTH AFRICA / JUDGMENT

Gatsby SPV Ltd vs Cell C Ltd (LM004Apr20) [2020] ZACT 32; [2020] 1 CPLR 350 (CT) (15 June 2020) [2020] ZACT 32

COURT

Competition Tribunal

BEFORE

E Daniels, A Ndoni, F Tregenna

CASE / FILE NUMBER

LM004Apr20

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM004Apr20

In the matter between

Gatsby Security SPV (Pty)

Ltd Primary

Acquiring Firm

And

Cell C

Ltd Primary

Target Firm

Panel

: Mr E Daniels (Presiding Member)

: Ms A Ndoni (Tribunal
Member)

: Prof. F Tregenna
(Tribunal Member)

Heard on

: 27 May 2020 Order

Issued on :

27 May 2020 Reasons Issued on : 15 June 2020

REASONS FOR DECISION

Conditional approval

[1] The proposed transaction forms part of the recapitalisation programme of one of the largest Mobile Network Operators (MNO), Cell C, in an attempt to boost its balance sheet and address its long-term debt burden. On 27 May 2020, the Tribunal conditionally approved the proposed transaction in terms of which Gatsby Security SPV (Pty) Ltd (“Gatsby SPV”) is acquiring control over certain assets [...] [1] (“Target Assets”) of Cell C Ltd (“Cell C”). We considered the matter on an expedited basis given Cell C’s urgent need for liquidity.

[2] The reasons for the conditional approval of the proposed transaction follow.

Parties to the transaction

[3] Gatsby SPV is a newly incorporated private company which will be controlled by a Trust that is yet to be formed and its sole purpose will be to hold shares in Gatsby SPV (the Trust). The full details of who the trustees will be is not clear at this stage. However, the merging parties submit that none of the current Cell C shareholders will be involved in the management of Gatsby SPV and/or the Trust, nor shall they be a shareholder in Gatsby SPV or have any economic interest therein. [2] Gatsby SPV and the Trust will be collectively referred to as the “Acquiring group”.

[4] Gatsby SPV was incorporated for the purpose of the proposed transaction to serve as a security special purpose vehicle. Gatsby SPV does not conduct any business activities and has been created for purposes of providing security [...] [3]. In other words, [...] [4].

[5] The primary target firm is comprised of certain assets of Cell C. Cell C entered the market in 2001 and offers a range of products and services, inter alia, voice and data services to mobile and business clients and also provides value-added services such as cell phone insurance.

Proposed transaction

[6] The proposed transaction entails the acquisition of the target assets by Gatsby SPV from Cell C. In consideration of these assets, Gatsby SPV will, inter alia, guarantee the obligations of Cell C [...] [5], and enter into a roaming agreement with Cell C which will allow Cell C’s [...] [6] to roam on Cell C’s network (“Primary Roaming Agreement”). [...] [7]. Post-merger, Gatsby SPV will own and exercise control over the target assets. However, the Target Assets will continue to be managed and utilised by Cell C post-merger.

Counterfactual

- [7] The merging parties submit that the counterfactual is that without further liquidity being provided [...] [8] through the proposed transaction, Cell C could go into Business Rescue or Liquidation which would see Cell C no longer be able to compete in the market as an MNO. Cell C's exit will impact negatively on overall competition in the market as customers will have reduced choice.

Competition Analysis

- [8] Due to the current lack of certainty regarding who the controllers of the Gatsby SPV and the Trust will be, the Commission's assessment has been conducted on the information and undertakings provided by the merging parties regarding the proposed structure of the transaction. The Commission found that the proposed transaction will not raise any horizontal overlaps because Gatsby SPV does not conduct any business activities. No firm from the Acquiring group is active in the telecommunications market in competition with the Target Assets. Further, the proposed transaction does not present a vertical link because no firm from the Acquiring group has/will have a vertical relationship with Cell C (other than a [...] [9] relationship). In view of the above, the Commission is of the view that the proposed transaction is unlikely to change the structure of the market because it will not result in any market share accretion as the Acquiring Group is not active in the telecommunications market or a market where the Target Assets are used.

Remedies

- [9] Notwithstanding the above finding, the Commission noted that the merging parties are currently not in a position to indicate which trustees will be appointed to the Trust that will control Gatsby SPV. The Commission is of the view that this could present competition concerns such as (i) the exchange of anticompetitive information should the trustees appointed to the Trust include individuals from firms that compete with Cell C; or (ii) present undisclosed competitive overlaps which were not considered in the Commission's assessment due to certain suspensive conditions.
- [10] To guard against these potential competition concerns, the Commission recommends that the proposed transaction be approved subject to conditions that Gatsby SPV and/or the Trust will not be owned/controlled by firms that compete or may compete with Cell C or firms that have a vertical relationship with Cell C (other than a lending relationship). The merging parties have agreed to the conditions proposed by the Commission contained below in "Annexure A".

Failing firm

- [11] [...] [10]. In view of the above, the Commission concluded that the proposed transaction is unlikely to substantially lessen or prevent competition in the relevant market. We find no reason to disagree with the Commission.

Public interest

[12] The proposed transaction does not raise any public interest concerns. Further, the transfer of the Target Assets will not negatively impact the customers of Cell C. Lastly, there are conditions precedent that were put in place to protect all parties involved in this proposed transaction.

Conclusion

[13]

In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction subject to the conditions marked hereunder as “Annexure A”.

Signed by: Enver Daniels

Signed at: 2020-06-23 13:58:23 +02:00

Reason: I approve this document

15

June 2020

Mr Enver Daniels

Ms A Ndoni and Prof. Fiona Tregenna concurring

Tribunal Case Manager : Kgothatso Kgobe

For the Merging Parties : L Odendaal and D Clark of Falcon & Hume

For the Commission :

A Mfuphi

[1] Confirmed as confidential.

[2] Other than Cell C employees, certain of whom are currently shareholders in Cell C [...].

[3] Claimed as confidential.

[4] Claimed as confidential.

[5] Claimed as confidential.

[6] The entire section was claimed as confidential.

[7] Claimed as confidential.

[8] Claimed as confidential.

[9] Claimed as confidential.

[10] Claimed as confidential.

NON-CONFIDENTIAL

ANNEXURE A

IN THE LARGE MERGER INVOLVING:

GATSBY SECURITY SPV (PTY) LTD

AND

CELL C LIMITED

CC CASE NUMBER: 2020APR0025

CT CASE NUMBER: LM004APR20

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings: -

1.1.1. “Acquiring Firm” means Gatsby SPV;

1.1.2. “Acquiring Group” means Gatsby SPV, the Trust and the ultimate controllers of the Trust;

1.1.3. “Act” means the Competition Act 89 of 1998, as amended;

1.1.4. “Ancillary Agreements” means [...] [1];

1.1.5. “Approval Date” means the date referred to in the Tribunal’s merger clearance certificate (Form CT 10) in relation to this Merger;

1.1.6. “Asset Sale Agreement” means the agreement that records the terms of the sale of the Target Assets by Cell C to the Acquiring Group;

1.1.7. “Cell C” means Cell C Limited;

1.1.8. “Commission” means the Competition Commission of South Africa;

1.1.9. “Commission Rules” means the Rules for the Conduct of Proceedings in the Commission

1.1.10. “Conditions” means the conditions referred to in this document;

1.1.11. “Day” means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.1.12. “Finance Agreements” means [...] [2];

- 1.1.13. “Gatsby SPV” means Gatsby Security SPV (Pty) Ltd;
- 1.1.14. “Guiding Principles” [...] [3]:
- 1.1.14.1. [...];
- 1.1.14.2. [...];
- 1.1.14.3. [...];
- 1.1.14.4. [...];
- 1.1.14.5. [...];
- 1.1.14.6. [...];
- 1.1.15. “Implementation Date” means the date on which the Merger is implemented;
- 1.1.16. “Merger” means the acquisition of the Target Assets by the Acquiring Firm;
- 1.1.17. “Merging Parties” means Gatsby SPV and Cell C;
- 1.1.18. “Primary Roaming Agreement” means [...] [4]:
- 1.1.18.1. [...];
- 1.1.18.2. [...];
- 1.1.18.3. [...];
- 1.1.18.4. [...];
- 1.1.19. “Professional Trustees” means either [...] [5], who both provide professional trust administration services;
- 1.1.20. “Roaming Provider” means the counterparty to the Primary Roaming Agreement or the Secondary Roaming Agreement as the case may be;
- 1.1.21. “Secondary Roaming Agreement” means [...] [6]:
- 1.1.21.1. [...];
- 1.1.21.2. [...] and
- 1.1.21.3. [...];
- 1.1.22. “Target Assets” means certain assets of Cell C (but excluding the Cell C spectrum) which include Cell C’s network assets; [...] [7]; the Cell C brand, trademarks and other intellectual property; and any technology [...] [8];
- 1.1.23. “Target Firm” means Cell C Limited;
- 1.1.24. “Tribunal” means the Competition Tribunal of South Africa;

1.1.25. “Trust” means a trust that is yet to be formed whose sole purpose will be to hold 100% of the issued shares in Gatsby SPV;

1.1.26. “Trust Deed” means the legal document that governs the Trust;

1.1.27. “Trustees” means the person or persons to be appointed by the Professional Trustees to be a trustee of the Trust.

2. RECORDAL

2.1. On 16 April 2020, the Merging Parties notified the Merger to the Commission.

2.2. As part of the Merger notification, the Merging Parties also informed the Commission that following the implementation of the Merger:

2.2.1. they intend entering into the [...]9]2.2.2. Gatsby SPV intends entering into the [...]10]; and

2.2.3. the Merging Parties and various lenders intend entering into the Finance Agreements.

2.3. The Merging Parties submit that [...]11].

2.4. The Merging Parties submit that [...]12].

2.5. [...]13].

2.6. Accordingly, and following its investigation of the Merger, the Commission concluded that, based on the information before it, the Merger is unlikely to substantially prevent or lessen competition in any relevant market.

2.7. Despite the above finding, the Commission notes the Merging Parties are currently not yet in a position to confirm which trustees will be appointed to the Trust that will control Gatsby SPV. The Commission is accordingly of the view that the Merger may raise competition concerns, such as inter alia, (i) anticompetitive information exchange should the trustees appointed to the Trust, include individuals from firms that compete with Cell C or (ii) present undisclosed competitive overlaps which were not considered in the assessment of the Merger. In addition, the Merging Parties submit that they are not yet in a position to indicate which Professional Trustee will be appointed to manage and control the Trust.

2.8. The Merging Parties have indicated that they will appoint either [...]14] as the Professional Trustee to manage the Trust.

2.9. The Merging Parties have undertaken that the Acquiring Group will not be owned or controlled by firms that compete with Cell C or have a vertical relationship with Cell C (other than a lending relationship). In addition, the Merging Parties submit that the current shareholders of Cell C shall not be part of the Acquiring Group whether through holding an economic interest in Gatsby SPV or through being a trustee of the Trust.

2.10. In order to ensure that the Merging Parties implement their commitments in relation to the composition of the Acquiring Group, the Commission recommends that the Merger be approved by the Tribunal subject to the below Conditions.

3. CONDITIONS

3.1. The Merging Parties shall ensure that:

3.1.1. If to the extent that any of the Ancillary Agreements are negotiated and entered into, they will comply with the Guiding Principles at all times.ⁱ

3.1.2. No firm or individual that competes or may compete with Cell C or firms that have a vertical relationship with Cell C (other than a lending relationship) holds or will hold an economic interest in the Acquiring Group.

3.1.3. No current shareholder of Cell C holds or will hold an economic interest in the Acquiring Group.

3.1.4. The trustees appointed to the Trust are employees of a Professional Trustee.

3.2. The conditions in clause 3.1.3 shall not apply in relation to Cell C employees, certain of whom are currently shareholders in Cell C [...] [15].

4. APPOINTMENT OF TRUSTEES

4.1. The Merging Parties shall propose Trustees for the Commission's written approval within 20 (twenty) Days of the expiry of the Implementation Date or such extended period that may be agreed upon between the Commission and the Merging Parties.

4.2. The proposal shall contain such information required for the Commission to determine whether the proposed Trustees comply with clauses 3.1.2 to 3.1.4 of the Conditions.

4.3. [...] [16].

5. MONITORING OF COMPLIANCE WITH THE CONDITIONS

5.1. The Acquiring Firm shall inform the Commission of the Implementation Date within 5 (five) Days of it occurring.

5.2. The Acquiring Firm shall provide the Commission with a compliance report within 3 months of the Implementation Date indicating the extent of the Merging Parties compliance with clause 3 above. Such report shall be accompanied by an affidavit deposed to by a director or trustee of the Acquiring Firm confirming the contents of the report.

5.3. The Merging Parties shall submit to the Commission copies of the Trust Deed, the Asset Sale Agreement and the Finance Agreements within 15 (fifteen) Days of them being duly signed and executed.

5.4. The Commission may request additional information from Gatsby SPV which the Commission from time to time deems necessary for the monitoring of compliance with these Conditions.

6. GENERAL

6.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

6.2. In the event that the Commission receives a complaint regarding non-compliance by the Merging Parties with these Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of the Conditions, the matter shall be dealt with in terms of Rule 39 of the Commission Rules.

7. VARIATION

7.1. The Merging Parties and Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted.

[1] Claimed as confidential.

[2] Claimed as confidential.

[3] The entire section was claimed as confidential.

[4] The entire section was claimed as confidential.

[11] Claimed as confidential.

[12] Claimed as confidential.

[13] Claimed as confidential.

[14] Claimed as confidential.

[15] Claimed as confidential.

[16] Claimed as confidential.

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