

SOUTH AFRICA / JUDGMENT

K2014158670 Proprietary Limited v Dorper Wind Farm (RF) Proprietary Limited (020222) [2015] ZACT 35 (15 April 2015)

[2015] ZACT 35

COURT

Competition Tribunal

BEFORE

Anton Roskam, Fiona Tregenna, Imraan Valodia

CASE / FILE NUMBER

020222

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020222

In the matter between:

K2014158670 PROPRIETARY LIMITED.....Acquiring Firm

And

DORPER WIND FARM (RF) PROPRIETARY LIMITED.....Primary Target Firm

Panel : Anton Roskam (Presiding Member)

: Fiona Tregenna (Tribunal Member)

: Imraan Valodia (Tribunal Member)

Heard on: 18 March 2015

Order Issued on: 18 March 2015

Reasons Issued on : 15 April 2015

Reasons for Decision

Approval

[1] On 18 March 2015, the Competition Tribunal (“Tribunal”) unconditionally approved the merger between K2014158670 (Proprietary) Limited (“TriAlpha SPV”) and DorperWind Farm (RF) (Proprietary) Limited (“DWF”).

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

Primary acquiring firm

- [3] The primary acquiring firm is TriAlpha SPV, a newly formed entity specifically incorporated for the purpose of the proposed transaction. It is a wholly owned subsidiary of TriAlpha Specialised Investments Trust III (“TriAlpha Trust”). TriAlpha SPV is managed by Gaia Energy infrastructure Funds (“GAIA”). TriAlpha is managed by TriAlpha Investment Management Proprietary Limited (“TriAlpha Investment”). Neither TriAlpha SPV nor TriAlpha Trust controls any firms.
- [4] TriAlpha SPV is a special purpose vehicle established for the current transaction and as such does not conduct any operations. TriAlpha is an investment firm that manages various investment mandates, predominantly for institutional clients in various sectors within South Africa.

Primary target firm

- [5] The primary target firm is DWF, a private company incorporated in accordance with the laws of the Republic of South Africa. DWF is controlled by Summit Wind Power South Africa proprietary Limited (“SWPSA”) which is a wholly owned subsidiary of Sumitomo Corporation (“Sumitomo”), a public company incorporated in terms of the laws of Japan and listed on the Tokyo Stock Exchange. DWF does not control any firm.
- [6] DWF is engaged in the development, construction, financing, commissioning and operation of onshore wind energy generation facility in the Eastern Cape Province. DWF was selected as a preferred bidder in terms of the Renewable Energy Independent Power Producer Procurement Programme (“REIPP”) run by the South African Department of Energy.
- [7] In terms of the proposed transaction, TriAlpha SPV will acquire an interest in DWF’s issued ordinary share capital and certain of its shareholder loans. Upon implementation of the proposed transaction, DWF will be jointly controlled by TriAlpha SPV and SWPSA.
- [8] In terms of rationale, TriAlpha submits that investing in DWF will deliver returns which are in line with its investment aims. On the other hand, Sumitomo is interested in infrastructural development in South Africa and other Sub-Saharan countries.

Relevant market and Impact on competition

- [9] In terms of the relevant market, DWF produces renewable energy whilst TriAlpha is an investment firm that does not hold shares in any firms that produce renewable energy in South Africa. Accordingly, the Competition Commission (the “Commission”) concluded that there are no horizontal overlaps between the activities of the merging parties. However, based on the fact that TriAlpha has notified another transaction to the Commission in terms of which it, through TriAlpha SPV, intends to acquire control over Intikon Energy (Proprietary) Limited,¹ the Commission assessed the impact on competition in the national market for the production of renewable energy.

- [10] In relation to the market for the production of renewable energy in South Africa, the Commission found that DWF and the Intikon Group are both IPP's meaning that their operations are limited to the provisions of the Renewable Energy Independent Power Producers Programme ("REIPP"). Thus, the Commission considered the procurement process and the roles of the key participants directly involved in the programme, namely the Department of Energy ("DOE"), the National Energy Regulator of South Africa ("NERSA") and Eskom Holding SOC Limited (Eskom).
- [11] Upon considering this supply chain, the Commission found that competition between IPPs takes place at the bidding stage where firms compete to be appointed as preferred renewable energy suppliers. Further, services of IPPs are procured per technology meaning that only companies with the same technology are considered competitors.
- [12] The Commission ultimately concluded that although both the Intikon Group and DWF produce electricity under the REIPP and supplies it exclusively to ESKOM, they do not use the same technology for this purpose. The Intikon Group generates electricity through Solar PV whereas DWF generates electricity using onshore wind technology. Thus, members of the Intikon Group and DWF are not competitors in the market and there is no product overlap.
- [13] Further, based on the fact that Eskom has Power Purchase Agreements (PPA's) with approximately 60 IPPs which will continue to supply renewable energy until 2030, it is unlikely that the merged entity will have market power.
- [14] The Commission thus concluded that the proposed transaction will not substantially lessen or prevent competition in any relevant or related market.

Public interest:

- [15] The Commission concluded that the proposed transaction does not raise any public interest concerns.

Conclusion:

- [16] 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, no public interest issues arise from the proposed transactions. Accordingly we approve the proposed transaction unconditionally.

DATE: 15 April 2015

Anton Roskam

Fiona Tregenna and Imraan Valodia concurring

Tribunal Researcher: Ammara Cachalia

For the merging parties: Daryl Dingley, Webber Wentzel.

For the Commission: Dineo Mashego.

1 See K201458795 (Pty) Ltd and Intikon Energy (Pty) Ltd case no: 020511.

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