

SOUTH AFRICA / JUDGMENT

K2017235138 (South Africa) (Pty) Ltd v Old Mutual Plc (LM179Sep17) [2018] ZACT 12; [2018] 1 CPLR 283 (CT) (26 January 2018) [2018] ZACT 12

COURT

Competition Tribunal

BEFORE

Norman Manoim, AW Wessels, Medi Mokuena

CASE / FILE NUMBER

LM179Sep17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM179Sep17

In the matter between:

K2017235138 (South Africa) (Pty) Ltd

Primary Acquiring Firm

and

Old Mutual Plc

Primary Target Firm

Panel

: Norman Manoim (Presiding Member)

: AW Wessels (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on

: 10 January 2018

Order Issued on : 10 January 2018

Reasons

Issued on : 26 January 2018

Reasons

for Decision

Approval

[1] On 10 January 2018, the Competition Tribunal (Tribunal") approved the proposed transaction between K2017235138 (South Africa) (Pty) Ltd and Old Mutual Plc subject to conditions.

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

Parties to proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is K2017235138 (South Africa) (Pty) Ltd, which since the notification of the transaction, has had its name changed to Old Mutual (Pty) Ltd, and will in due course be converted into a public company, Old Mutual Ltd ("OM Limited").[1]

[4] OM Limited is a newly incorporated company which does not have direct or indirect control over any firm, nor is it controlled by any firm.

[5] OM Limited was incorporated with the purpose of facilitating the internal reorganisation and managed separation of the Old Mutual

Group and to allow for listings on various stock exchanges. OM Limited will be a non-operating entity and it will act as the holding

company the Old Mutual Group's emerging markets operations.

Primary target firm

[6] The primary target firm is Old Mutual Plc ("OM Plc"), a company incorporated in accordance with the laws of the United

Kingdom. OM Plc is currently the holding company for the Old Mutual Group globally and is listed on the London Stock Exchange with a secondary listing on the Johannesburg Stock Exchange, nor is it controlled by any firm.

[7] For purposes of this transaction, and to understand the steps involved, OM Plc holds an interest in the following entities:

- a. 100% in Old Mutual Group (UK) Limited "OMGUK");
- b. OMGUK in turns holds 100% of the issued ordinary shares in Old Mutual (Netherlands) BV ("OM BV");
- c. OM BV in turns holds 100% of the issued ordinary shares in Old Mutual Group Holdings (SA) (Pty) Ltd ("OMGH"); and

d. OMGH is the holding company for the Old Mutual group of companies in South Africa.

[8] The Old Mutual Group provides investments, savings, life assurance, asset management, banking and property and personal insurance in Africa, Latin America and Asia. The Old Mutual Group has approximately 18.9 million customers and approximately 64 000 employees.

Proposed transaction and rationale

[9] The proposed transaction is part of the internal reorganisation and managed separation of the Old Mutual Group. The reorganisation of the Old Mutual Group is to take place in 4 (four) Phases.[2] The transaction before us relates to Phase 3, which in itself will take place in 3 (three) steps, and is the final Phase to appear

before the Tribunal.

a. Step 1 - OM Limited Creation

This step entails the incorporation of a new entity, namely OM Limited, which will acquire the entire shareholding in OM Plc. The effect of the creation, is that the shareholders of OM Plc immediately prior to the implementation of the creation will be the same shareholders of OM Limited after the creation.

OM Limited will have a primary listing on the Johannesburg Stock Exchange, a standard listing on the London Stock Exchange as well as secondary listings on the Malawi Stock Exchange, Namibia Stock Exchange, and the Zimbabwe Stock Exchange. OM Plc's issued ordinary shares will be delisted from all the securities exchanges on which they are currently listed.

b. Step 2 - Distribution of OM BV by OM Plc to OM Limited

OM Plc will distribute its shares in OM BV to OM Limited in terms of an in specie dividend distribution. This results in OM Limited becoming the direct holding company in OM BV.

c. Step 3 - Distribution of OMGH by OM BV to OM Limited

OM BV will then distribute its shares in OMGH to OM Limited in terms of a liquidation distribution. This will result in OM Limited becoming the direct holding company of OMGH. OM BV will be liquidated in due course.

Impact on competition

[10] The Commission found that the transaction does not result in a horizontal or vertical overlap as it relates to an internal reorganization of the Old Mutual Group. As a result the Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any market within South Africa.

[11] We concur with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

- [12] The merging parties submitted that the proposed transaction is an internal restructuring and managed separation of the Old Mutual Group and as such no retrenchments are expected as a result of the proposed transaction.[3]
- [13] The Commission, further noted that the proposed transaction does not result in a horizontal overlap, thus it is unlikely that retrenchments as a result of job duplications shall arise. The Commission concluded that the proposed transaction will not result in any job losses.
- [14] The Department of Economic Development ("EDD") filed a notice of intention to participate in the merger proceedings in terms of section 18(1) of the Competition Act, No. 89 of 1998, as amended.
- [15] The merging parties and the EDD engaged in discussions relating to public policy issues identified by the EDD such as black economic empowerment, employment and enterprise development.
- [16] Following their discussions, an agreement was reached, in terms of which the merging parties have made certain undertakings to address the public policy issues. The merging parties and EDD proposed to the Commission and to the Tribunal that their agreement be included as conditions to the approval of the transaction. The Commission did not object to the imposition of the commitments as conditions to the merger. Nevertheless the Commission adapted some of the terms of the Framework agreement in order to put them in a suitable form to constitute conditions. The merging parties and the EDD raised no objection to this.
- [17] At the hearing before the Tribunal, the merging parties confirmed that in their view the restructuring did not give rise to any adverse competition or public interest concerns.[4] Further, the merging parties confirmed, that in their view, the conditions are not remedial but they are nevertheless content to be bound by them. At the hearing, their representative stated:
- "... my client is very happy to agree to the conditions or the undertakings as set out in the agreement. The key point though is that these are not remedial conditions, they're not conditions that are seeking to remedy any harm, certainly from an Old Mutual perspective or from a Commission perspective."*[5]
- [18] The Tribunal was thus not required to assess whether there were any adverse public interest consequences of the merger and whether the conditions proposed remedy theme.[6]
- [19] The proposed transaction further raises no other public interest concerns.

Conclusion

[20] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In relation to public interest, issues that were raised, were adequately addressed. Accordingly, we approve the proposed transaction subject to the public interest conditions derived from the agreement between the EDD and the merging parties. The conditions are annexed hereto.

Mr Norman Manoim

Mr AW Wessels and Mrs Medi Mokuena concurring

26 January 2018

Case Manager: Kameel Pancham

For the Merging Parties: Robert Wilson and Werner Rysbergen of Webber
Wentzel

For the Commission: Sewela Moshoma and Ratshidaho Maphwanya

For the EDD:

Tebogo Malatji of Geldenhuys-Malatji Attorneys

Annexure A

Commission Case No: 2017Sep0008

Tribunal Case No. LM179Sep17

In the large merger Involving:

Old Mutual (Pty) Ltd

Primary Acquiring Firm

Old Mutual Plc

Primary Target Firm

MERGER CONDITIONS

1. DEFINITIONS

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

1.1 Act means the Competition Act No. 89 of 1998 as amended;

1.2 BBBEE Act means the Broad-Based Black Economic Empowerment Act No. 53 of 2003as amended;

- 1.3 Black Person means persons defined as „Black" in the BBBEE Act;
- 1.4 Black-owned Business means a business directly or Indirectly controlled by Black Persons;
- 1.5 Commission means the South African Competition Commission duly established under the Act;
- 1.6 Competition Authorities means a collective reference to the Commission and the Tribunal;
- 1.7 Conditions means these conditions Imposed by the Tribunal In relation to the Transaction and which are set out in more detail below;
- 1.8 EDD means the Economic Development Department of the Government;
- 1.9 Framework Agreement means the Framework Agreement entered into between OML and the EDD, signed on 09 January 2018;
- 1.10 FSC means the Financial Services Sector Code, a code created for the financial services Industry in South Africa in terms of Section 9 (1) of the BBBEE Act In the form applicable as at the Signature Date;
- 1.11 FTE means a full time equivalent associated with the employment of persons in full or part time employment, whether employed directly, or In terms of fixed term contracts or commission agency contracts;
- 1.12 Government means the government of South Africa;
- 1.13 Implementation Date means the date on which the Transaction closes;
- 1.14 JSE means the Johannesburg Stock Exchange;
- 1.15 LSE means the London Stock Exchange;
- 1.16 Managed Separation means an Internal reorganisation and managed separation of the Old Mutual Group, which Is envisaged to take place In four phases, and In terms of which, Inter alia, OML will become the holding company for all of the emerging markets operations currently conducted by the Old Mutual Group;
- 1.17 OMBV means Old Mutual (Netherlands) B.V.;
- 1.18 Old Mutual Group means the group of companies and businesses presently controlled by OM;
- 1.19 OM means Old Mutual Plc, a public company incorporated In England and Wales under Registration No. 03591559, which is listed on the LSE, with a secondary listing on the JSE, and other listings on stock exchanges in Malawi, Namibia and Zimbabwe. OM Is currently the holding company of the Old Mutual Group;

1.20 OMEM means Old Mutual Emerging Markets Limited, a company Incorporated In South Africa with Registration No. 1998/012277/06 and which conducts various emerging markets operations falling within the Old Mutual Group, and in particular various businesses operating In South Africa;

1.21 DMGH means Old Mutual Group Holdings (SA) (Proprietary) Limited, an Intermediate holding company Incorporated In South Africa with Registration No. 1998/012276/07 and which is the holding company of the various emerging markets operations falling within the Old Mutual Group, and in particular various companies and businesses operating in South Africa, Including OMEM;

1.22 OML means Old Mutual Limited, a public company incorporated in South Africa under Registration No. 2017/235138/06 which has been incorporated to facilitate the Managed Separation and which Is Intended to have a primary listing on the JSE and a secondary listing on the LSE, as well as on the stock exchanges of Namibia, Zimbabwe and Malawi;

1.23 OML Ecosystem means OMEM itself, the Black-owned Businesses and SMMEs from which OMEM procures or will procure goods and services, any businesses financed or supported by OMEM's enterprise development Initiatives, and any new Investments made by OMEM in subsidiaries and associates after the Implementation Date. For the avoidance of doubt, in measuring the OML Ecosystem, SMMEs from which OMEM procures goods and services on or prior to the Signature Date will continue to be treated by the parties as falling within the OML Ecosystem for the duration of this Agreement.

1.24 Signature Date means the date on which the Framework Agreement Is signed;

1.25 Small Business means a business generally regarded in South Africa as a small business, including SMMEs;

1.26 SMME means a business generally recognised as a small, medium or micro-enterprise, including those defined as "small business"

under the National Small Business Act No. 102 of 1996;

1.27 South Africa means the Republic of South Africa;

1.28 Transaction means the transaction as Is more fully described in paragraph 2.1 below; and

1.29 Tribunal means the South African Competition Tribunal duly established under the Act.

2. RECORDAL

2.1 The merging parties notified a large merger to the Commission on 6 September 2017 relating to an Internal reorganisation and managed separation of the Old Mutual Group, which is envisaged to take place In four phases. The current Transaction is In relation to Phase 3 of the Managed Separation. Phase 3 will be implemented through three separate steps which will entail the following:

2.1.1 The acquisition by OML of the entire shareholding in OM:

2.1.2 The distribution by OM of its shares In OMBV to OML in terms of a in specie dividend distribution; and

2.1.3 The distribution by OMBV of its shares In OMGH to OML in terms of a liquidation distribution.

2.2 In terms of the Transaction, OML will become the direct holding company of OMGH and, through Its shareholding in OMGH, will control the various emerging markets operations falling within the Old Mutual Group and, In particular, various companies and businesses operating in South Africa, Including OMEM. The Transaction involves a direct change in control of OM and has been notified as a large merger under the Act under Case No. 2017Sep0008.

2.3 The EDD has a statutory mandate in terms of section 18(1) of the Act, to consider the public interest implications of any merger notified to the Competition Authorities. Following the exercise of Its statutory mandate, the EDD found that the Transaction gives rise to public policy issues in the context of black economic empowerment, employment and enterprise development. OML and EDD have engaged on these public policy issues and OML has made certain undertakings in addressing these public policy Issues. The undertakings are reflected in these Conditions.

3. CONDITIONS

3.1 Commitments In respect of black economic empowerment

3.1.1 To the extent that OML BEE shareholding is less than 25%, OML shall Increase its BEE shareholding to at least 25% within 3 (three) years of the Implementation Date based on principles prescribed in the FSC and associated empowerment regulation and legislation.

3.1.2 It is recorded that OML will benchmark Its BEE shareholding to its peer group, and arms to have a BEE shareholding which ls best ln class, measured against comparable competitors as at the Implementation Date. Measured against that benchmark, and In accordance with the provisions set out In paragraph 3.1.3 below and OML Board Approval at the time, OML undertakes that within 5 (five) years of the Implementation Date, it will procure that the effective BEE shareholding In OML shall be no less than the effective BEE shareholding in the best empowered peer company as at the Implementation Date.

3.1.3 It ls noted that, as at the date of these Conditions:

3.1.3.1 the relevant transactions necessary to give effect to the undertakings set out in paragraphs 3.1.1 and 3.1.2 will be subject to provisions of the Companies Act, JSE Listings Requirements or other applicable legislation;

3.1.3.2 OML shall have full latitude to design appropriate transactions to give effect to the undertakings set out In paragraphs 3.1.1 and 3.1.2, to ensure performance or the obligations In paragraphs 3.1.1 and 3.1.2. To the extent that this Involves a BEE share transaction in OML, this shall Include broad based and employee participation elements.

3.2 Employment commitments

3.2.1 OML shall not retrench any employees as a result of the merger.

3.2.2 OML shall Increase the number of FTEs In OML or OMEM in South Africa by not less than 50 persons by the Implementation Date.

3.3 Enterprise development commitments

3.3.1 It Is recorded by OML that OMEM contributed significantly to the growth of employment in South Africa by virtue of its preferential procurement of goods and services from Black-owned Businesses and SMMEs, as well as Its enterprise development programs. It Intends to broaden this through a further commitment to Enterprise Supplier Development, as contemplated In paragraph 3.3.3 below. OMEM, the businesses Impacted by these Initiatives, and any new Investments made by OMEM in subsidiaries and associates are referred to as the OML Ecosystem. For the avoidance of doubt, the OML Ecosystem does not Include any of the Investments referred to in paragraph 3.3.2.

3.3.2 OML records that, as at the date of these Conditions, the Old Mutual Group Is already involved in a number of projects in South Africa which support social upliftment and the development of Small Businesses and Black-owned Businesses. These Include:

3.3.2.1 preferential procurement from SMMEs and Black-owned Businesses;

3.3.2.2 funding by the Masistzane Fund;

3.3.2.3 funding by the Black Distributor's Trust;

3.3.2.4 funding by the OM Foundation.

3.3.3 In addition to the projects Identified In paragraph 3.3.1 above, OML undertakes to procure that the Old Mutual Group shall, over a period of 3 (three) years following the Implementation Date, allocate an Incremental amount of R500 million (five hundred million Rand) to a ring-fenced perpetual Enterprise Supplier Development Fund (the ESD Fund), subject further to the terms of paragraphs 3.3.4 and 3.3.5 below. Funding extended by the ESD Fund is intended and anticipated to generate additional jobs in the OML Ecosystem..

3.3.4 The ESD Fund provided for under paragraph 3.3.3 may extend funding through a combination of Instruments to support individual Enterprise Supplier Development projects in the most appropriate way. These Instruments may include development funding loans, commercial loan guarantees, direct grants and technical assistance, skills development and training. The repayment of funding extended by the ESD Fund shall be retained by the ESD Fund for future investment in ESD projects.

3.3.5 The Old Mutual Group's participation in the ESD Fund and in the other activities referred to in paragraph 3.3.1 and paragraph 3.3.2 shall be managed and administered by a specially created function within the office of the Chief Executive of OML, which function shall also be responsible for the measurement of compliance by the Old Mutual Group with the FSC and OML's broader commitment to transformation in South Africa.

3.4 Having due regard for the South African Government's focus on employment and the need to create jobs for South Africans, OML is committed to maximizing employment in the OML Ecosystem on a commercially viable basis. It is acknowledged that, in the normal course of business and unrelated to the merger, there may be a reduction in OMEM's aggregate employment in South Africa, subject to the applicable labour legislation. If, in the normal course of business and unrelated to the merger, OMEM's aggregate employment in South Africa were to reduce (and in accordance with normal legal provisions) below that at the Signature Date, OML is committed to increase aggregate employment in the OML Ecosystem to the level at the Signature Date, measured at the second anniversary of the Signature Date. To this end, OML undertakes that such loss in FTEs at OMEM's South African businesses between Signature Date and the second anniversary of the Signature Date will be compensated for in new jobs created elsewhere in the OML Ecosystem in South Africa (including the increase in the number of FTEs as a direct consequence of the funding extended by the ESD Fund as set out in paragraph 3.3.3 and the Transaction as set out in paragraph 3.2.2), measured as at the second anniversary of the Signature Date.

3.5 Given the undertakings in paragraph 3.4, OML intends to continue seeking to support employment in the OML Ecosystem on a commercially viable basis following the expiry of the two year period following the Signature Date.

4. REPORTING

It is recorded that the financial year of OML will end on 31 December in each year. OML shall, by 30 April in each following year, provide a suitable and appropriately detailed annual report for the previous financial year of OML to the EDD and the Commission regarding its compliance with the Framework Agreement and these Conditions. This reporting obligation shall apply for a five year period commencing from 30 April 2019 to 30 April

2023. Thereafter, reports will be provided to the EDD and the Commission on request provided such request is given within a reasonable timeframe.

5. VARIATION

5.1 OML may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

[1] Transcript page 6, lines 64-67.

[2] Phase 1 relates to the restructure of Old Mutual Group UK. Phase 1 has already been approved by the Tribunal under case number LM 122Aug17. Phase 2 relates to the demerger of the Northern Group and will not be notified in South Africa - Transcript page 12, lines 156-158. Phase 3 (current transaction) relates to the OM Limited restructure. Phase 4 relates to a percentage of OM Limited's interest in Nedbank Group Limited being unbundled through a series of corporate transactions. This is to take place approx. six (6) months after this transaction.

[2] Phase 1 relates to the restructure of Old Mutual Group UK. Phase 1 has already been approved by the Tribunal under case number LM 122Aug17.

Phase 2 relates to the demerger of the Northern Group and will not be notified in South Africa - Transcript page 12, lines 156- 158.

Phase 3 (current transaction) relates to the OM Limited restructure.

Phase 4 relates to a percentage of OM Limited's interest in Nedbank Group Limited being unbundled through a series of corporate transactions. This is to take place approx. six (6) months after this transaction.

[3] Inter alia page 11 of the Merger Record.

[4] Transcript page 7, line s 80-82.

[5] Transcript page 7, lines 87-90.

[6] Transcript page 7, lines 73-80.

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