

SOUTH AFRICA / JUDGMENT

K2020704995 (South Africa) (Pty) Ltd v Comair Ltd (In Business Rescue) (LM137Oct20) [2020] ZACT 71 (22 December 2020)

[2020] ZACT 71

COURT

Competition Tribunal

BEFORE

Y Carrim, E Daniels, AW Wessels

CASE / FILE NUMBER

LM137Oct20

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM137Oct20

In the matter between

K2020704995 (South Africa) (Pty) Ltd

Primary Acquiring Firm

and

Comair Ltd (In Business Rescue)

Primary Target Firms

Panel: Y Carrim (Presiding Member), E Daniels (Tribunal Panel Member) AW

Wessels (Tribunal Panel Member)

Heard on: 30

October 2020

Order Issued on: 30 October 2020

Reasons

Issued on: 22 December 2020

REASONS

FOR DECISION

Introduction

- [1] On 30 October 2020 the Competition Tribunal ('Tribunal') approved a transaction in terms of which K2020704995 (South Africa) (Pty) Ltd (Bidco) acquired sole control of Comair Ltd (In Business Rescue) (Comair) with conditions.
- [2] The reasons for the conditional approval follow.

Parties to the transaction

Primary Acquiring Firm

- [3] The primary acquiring firm, Bidco, is a newly established company that was created for the purposes of the proposed transaction, it does not directly or indirectly control any firm.
- [4] Mr Martin Moritz will control Bidco, with a shareholding of 61%. All beneficial voting rights attached to these shares will be owned and held by Mr Moritz. The Commission confirms that Mr Moritz does not control any other firm.

- [5] The remaining shareholders in Bidco are:

5.1 the Executive management of Comair;

5.2 the South African Lenders of Comair;

5.3 a Broad-Based Black Economic Empowerment/and or Employee Share Ownership Program (by operation of the conditions imposed); and

5.4 a firm referred to as SA Holdco.

- [6] SA Holdco primarily serves as an investment vehicle for a consortium of companies representing the interests of certain individuals. The Commission submits that none of the companies with a shareholding in SA Holdco have any interests in businesses in the airline industry which compete with Comair.

Primary target Firm

- [7] Comair is a public company incorporated in accordance with the laws of the Republic of south Africa. Comair's listing on the Johannesburg Stock Exchange was suspended with effect from 5 May 2020, the date on which Comair entered voluntary business rescue as applied for by its board of directors who considered it to be prudent and in the best interests of the shareholders.

- [8] Comair is a South African aviation company which offered scheduled airline services within South Africa to the rest of sub-Saharan Africa and the Indian Ocean Islands. Comair operates under two brands, namely its low fare airline brand Kulula and the British Airways brand as part of a licence agreement with British Airways PLC. In addition, Comair controls several firms which offer services ancillary to the provision of scheduled airline services.
- [9] Comair has not been operational since 26 March 2020 when the national lockdown restrictions enacted to curb the spread of Covid-19 commenced. At the time of the transaction, Comair was under control of its Business Rescue Practitioners (BRP).

Background

to the Proposed transaction

- [10] As indicated above, Comair entered voluntary business rescue on 05 May 2020 in order to restructure and improve its financial position. At the time, it also suspended its trading on the JSE.
- [11] The merging parties submit that this decision was made in a context where, for months preceding the decision, Comair was operating under significant financial distress caused by several factors which included:
- 11.1 Rising levels of debt due to significant capital expenditure to renew the Comair fleet;
 - 11.2 The failure of South African Airways to pay the outstanding amount of R790 million owed to it in terms of a settlement agreement;
 - 11.3 The national lockdown imposed which had an unprecedented and prejudicial economic effect on Comair due to travel suspensions.
- [12] The merging parties submitted that these conditions resulted in the inevitability of the commencement of business rescue proceedings, with the only alternative being the liquidation or structured winding down of the company which would have significant detrimental effects on competition in its operational space, as well as direct and indirect employment levels.
- [13] Although air travel has been allowed since at least 18 August 2020, on the submissions of the merging parties, it is currently impossible for Comair to resume operations and the BRP's have taken the view that flights will not be able to resume until Comair is sufficiently capitalised.
- [14] The Commission noted the merging parties' submission that the proposed transaction would provide the necessary capital injection required for Comair to remain operational.

Proposed transaction and rationale

- [15] In terms of the proposed transaction Bidco intends to acquire 99% of the issued shares in Comair. Thereafter, Comair will be delisted from the JSE and Bidco will, accordingly, exercise sole control over Comair.
- [16] In line with the requirements of the Air Service Licensing Act 115 of 1990, 99% of Comair's voting interests will post merger be held and controlled by BidCo, a South African entity, with the public holding the remaining 1%.
- [17] In terms of the conditions to the merger, discussed below, a shareholding amount of up to in BidCo will be earmarked for a broad-based black economic empowerment initiative on mutually acceptable commercial terms the initiative will take place within [...] of the proposed 'flying start date' (ie the date on which Comair resumed operations-being 1 December 2020).
- [18] We note here that the proposed transaction arises from the approved business rescue plan and, to the BRP, it is viewed as the best possible way for Comair to resume operations and resolve its current financially perilous situation. Comair's BRP issued a request for proposals and offers in response to which a number of investors formed a consortium, titled the Comair Rescue Consortium (which is now ultimately Bidco), and made a binding offer to provide funding to Comair and acquire 99% of its issued share capital. The BRP included the binding offer in the business rescue plan and it was approved by the creditors and shareholders of Comair at a duly convened meeting on 18 September 2020.
- [19] In terms of rationale, Bidco submits broadly that it is in the best position, by virtue of the quality of its shareholders and management, to achieve the recapitalisation plan required for Comair to deliver on the long-term sustainability and viability of its business. It submits that it is in the best position to ensure the long-term sustainability and viability of the business.
- [20] Comair submits that the proposed transaction best enables it to achieve the return of Comair to sustainable operational levels. The transaction will result in both new equity capital and access to debt funding of up to R 1.9 billion, a substantial amount desperately needed to preserve the key business elements during the business rescue period and to the facilitate Comair's return to operations.
- [21] The Commission, in assessing the submitted rationales found that the proposed transaction will likely provide a better outcome through the capital injection than would be the case under liquidation, at the same time allowing about 1 681 jobs to be preserved.

Competition Assessment

[22] The Commission assessed the activities of the merging parties and found that there is no horizontal overlap between the business activities of the merging parties as none of the Bidco shareholders are involved in activities that can be deemed interchangeable or substitutable with those of Comair. Accordingly, the proposed transaction will not result in any market share accretion or any change in the competitive landscape in any relevant market.

[23] In addition, the Commission found that there is no vertical overlap between the merging parties' activities as they do not participate at different levels of the same supply chain. Given the lack of horizontal or vertical overlap between the activities of the merging parties, the Commission concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

[24] We agree with the Commission's conclusions.

Public interest considerations

Employment

[25] The merging parties submitted that the proposed transaction would result in a positive public interest outcome. In particular, the implementation of the transaction would ensure that approximately 1600 jobs would be saved. The parties submitted that the transaction would enable the return to operations of Comair, thus ensuring that employees would not face retrenchment as a result of liquidation or winding down proceedings.

[26] However, given the ailing financial position of Comair, Bidco made known its intent to reduce Comair's staff complement by no more than 200 people based upon operational requirements. The merging parties submitted that most of the employees who may need be retrenched will be in the skilled, professionally qualified or senior executive category. It was also submitted that no unskilled employees would be retrenched and only a few semi-skilled were at risk of retrenchment. The Commission noted the merging parties' submission that the proposed retrenchments represented a worst-case scenario number, which was still subject to engagement with Comair Management, and that therefore the number may be reduced

[27] In order to address the employment concerns raised by the proposed transaction, the merging parties committed to a condition which caps the number of post-transaction operational retrenchments at 200 employees and requires it to make offers of employment to all staff who have been retrenched as a result of the proposed transaction when jobs become available.

[28] The Commission ultimately concluded that the proposed transaction would ensure that over 1600 jobs were saved as, if not for the transaction, the target business would not be in a position to remain operational and would be liquidated.

Spread of ownership

[29] During the course of the Commission's investigation the Minister of the Department of Trade Industry and Competition (the Minister) raised additional public interest concerns. The minister was of the view that the proposed transaction appears to be inconsistent with section 12A(3)(e) of the Competition Act, that requires an evaluation of whether a merger promotes a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms

in the market. The Minister suggested the merged entity offer the employees equity (through an Employee Share Ownership Program

equivalent to the value of unpaid salaries). The Minister proposed that the merged entity commit a minimum of 5% shareholding towards an employee share ownership program (ESOP) with a total Broad-Based Black Economic Empowerment (BBBEE) /ESOP participation of [....].

[30] In line with the concerns raised by the Minister, the Commission considered and engaged with the merging parties as to whether a suitable remedy could be agreed to. The merging parties ultimately agreed to a condition to earmark up to of the shares in Bidco for [....] an appropriate ownership structure which meets the requirements of the Codes of Good Practice

on Broad-Based Black Economic Empowerment issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended)

and aligns with the commercial objectives of Comair.

[31] The merged entity was willing, within this [....] to commit to secure (i) the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% as well as (ii) one or more Black Investor Groups who are agreeable to participating in this initiative on mutually acceptable terms and who are able to demonstrate an alignment of interests and strategic skills which shall support and advance the medium to long-term business case of Comair. Thus, the combined BBBEE/ ESOP initiative will comprise a shareholding of up to [....] in Bidco.

[32] The Commission is of the view that the proposed B-BBEE initiative is a positive public interest outcome and will promote the public interest objectives in the Competition Act.

[33] We agree with the Commission's conclusions.

Conclusion

[34] 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, any public interest concerns raised by the merger could be cured by the conditions agreed to by the Commission and the merging parties. Accordingly, we approved the proposed transaction subject to the conditions attached as Annexure A.

Date: 22 December 2020

Ms Y Carrim

Mr E Daniels and Mr AW Wessels concurring.

Tribunal Case Manager: Alistair Dey- van Heerden.

For the Merging Parties: Paul Coetser of Werksmans

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: Derushka Chetty and Wade Graaf of ENSAfrica for the acquiring firm

For the Commission: Zanele Hadebe and Grashum Mutizwa

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