

SOUTH AFRICA / JUDGMENT

Namane Logistics (Pty) Ltd v Crossroads Distribution (Pty) Ltd (LM067Jul19) [2019] ZACT 59 (20 September 2019) [2019] ZACT 59

COURT
Competition Tribunal

BEFORE
Yasmin Carrim, Enver Daniels, Andreas Wessels

CASE / FILE NUMBER
LM067Jul19

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Competition tribunal

SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM067Jul19

In the matter between:

Namane Logistics (Pty) Ltd Primary Acquiring Firm

and

Crossroads Distribution (Pty) Ltd Primary Target Firm

Panel : Yasmin Carrim (Presiding Member)

: Enver Daniels (Tribunal Member)

: Andreas Wessels (Tribunal Member)

Heard on: 21 August 2019

Order Issued on: 23 August 2019

Reasons

Issued on: 20 September 2019

Reasons

for Decision

Conditional approval

[1] On 23 August 2019, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between Namane

Logistics (Pty) Ltd ("Namane") and Crossroads Distribution (Pty) Ltd ("CRD").

[2] The reasons for the conditional approval follow.

Parties to proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is Namane Logistics, a wholly owned subsidiary of Namane Resources (Pty) Ltd ("Namane Resources").

The shareholders of Namane Resources are Inkonkoni Investment Holding Trust, Merino Investment Holding Trust and Mantokozo Investment

Holding Trust (hereafter "the Trusts").

[4] Namane Resources controls, amongst others, Namane Energy Ltd, Anker Coal and Mineral Holdings SA (Pty) Ltd and Arrow Creek Investments 78 (Pty) Ltd.[1] Namane Logistics does not control any firm.

[5] The Trusts control a number of firms, the most relevant of which, for purposes of the proposed transaction, is Community Investment Holdings (Pty) Ltd ("CIH").[2] Specifically, CIH's shareholding in Community Logistics (Pty) Ltd ("Community Logistics") which, in turn, has an indirect shareholding, through Crossroads Distribution Holdings (Pty) Ltd ("CRD Holdings"), in CRD, the primary target firm in the instant transaction.

[6] Namane Resources, its controllers and subsidiaries are, hereafter, referred to as the Namane Group.

[7] The Namane Group comprises of several holding firms with interests in various sectors, namely Healthcare, ICT, Power and Energy, Mining, Logistics and Infrastructure. Relevant for purposes of the proposed transaction is the Group's activities in the mining

of coal. In particular, the Namane Group owns four colliery fields. Of these fields, only Elandsfontein Colliery (Pty) Ltd ("Elandsfontein") and Golfview colliery are in operation, while Temo Golf Mining (Pty) Ltd ("Temo") and Vanoudshoornstroom Coal (Pty) Ltd ("VOC") are in a development stage.

Primary target firm

- [8] The primary target firm is CRD, a company incorporated in accordance with the laws of South Africa. CRD is jointly controlled by CRD Holdings, with a 55% shareholding, and Nedcor Investments Ltd, with a 43% shareholding ("NIL").
- [9] CRD controls a number of firms, including Crossroads Distribution Namibia (Pty) Ltd, Crossroads Distribution Lesotho (Pty) Ltd, CR Distribution (Pty) Ltd and Moripane Transport Holdings (Pty) Ltd.[3]
- [10] CRD provides transport services, specifically the transport of fuel, gas, chemicals, explosives and general freight. CRD owns [...] trucks which it utilises to render such transport services.
- [11] CRD also transports coal on behalf of Namane Commodities ("NC"), which is part of the acquiring firm, from its Elandsfontein colliery to Eskom's Kusile Power Station. CRD does not own trucks for coal transportation and uses third party trucks which it leases to render this transportation service. CRD does not transport coal for any party other than NC.

Proposed transaction and rationale

- [12] The Namane Group intends to acquire 43% of the issued capital of CRD, from NIL and will, post-merger, control CRF through Namane

Logistics. The acquisition therefore effectively entails a shift from joint to sole control.

- [13] In terms of the rationale, NIL, in compliance with its mandate to exit its investments after [...] years, has decided to sell its

shares and claims in CRD. Consequently, the ultimate owners of CRD Holdings are, in line with the Umbrella Shareholder's Agreement,

exercising their pre-emptive rights to purchase shares held by NIL in CRD, through Namane Logistics.

- [14] Further to the above, the CEO of Namane Logistics, John Schoeman, explained the rationale as follows:[4]

"[I]t's a matter of increasing its BEE status... as well as black women- owned status ...[which] will assist in Crossroads being more competitive or being able to secure further contracts."

- [15] Mr Schoeman further indicated that by virtue of acquiring an additional 43% in CRD, Namane Logistics would be adding an additional 43% black ownership to the company itself.
[5]

Impact on competition

- [16] The Commission found that there is a horizontal overlap only insofar as the Namane Group already has a shareholding in CRD. Further, the Commission found that there is a pre-existing vertical relationship between the merging parties, in that CRD provides coal transport services to the Namane Group.

- [17] In consideration of the pre-existing vertical overlap between the merging parties, the Commission found that the Namane Group is a small player in the market for the production and sale of coal, with a market share of approximately 1%. The Commission also found that the merged entity will continue to face competition from major players in the market, such as BHP, Billiton Energy Coal South Africa, Anglo American Thermal Coal and Xstrata Coal.
- [18] The Commission further concluded that the vertical relationship between the merging parties is unlikely to result in foreclosure since the target firm renders coal transport services to the Namane Group and does not transport coal for any third parties.
- [19] Insofar as the horizontal overlap is concerned, the Commission was of the view that the proposed transaction will not result in any

market share accretion or change the structure of any relevant market since the Namane Group, through CRD Holdings, already exercises joint control over the target firm. The acquiring group is therefore increasing its shareholding from 55.5% to 98.5%. The Commission

therefore concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

- [20] The merging parties asserted that the proposed transaction will have no adverse effect on employment. In particular, they indicated that there will be no job losses as a result of the merger.[6]
- [21] On the contrary, so the merging parties averred, the proposed transaction is likely to have a positive effect on employment, since the Namane Group is in the process of developing multiple coal mines that will result in additional coal production capacity being added to its current coal production within South Africa.[7]
- [22] As a matter of transparency, the merging parties disclosed that there had been 100 pre-merger retrenchments at the target firm due to economic hardships. In particular, the merging parties submitted that these retrenchments were triggered by a loss of business from some of the target firm's major clients.
- [23] Further to the above, the merging parties submitted that a reduction in labour force was therefore necessary in order to ensure its survival and not as a result of the proposed transaction.
- [24] The Commission, having regard to the merging parties' strategic documents, was satisfied that the retrenchments occurring between March 2017 and November 2018, were contemplated well before engagements regarding the proposed transaction commenced between the

merging parties. Accordingly, the Commission concluded that the pre-merger retrenchments at CRD were not linked to the proposed

transaction.

[25] During its investigation, the Commission found that a section 189A notice had been sent out, by CRD, to its employees, employee representatives and relevant trade unions, on 10 July 2019. CRD explained that it was currently in consultations with staff regarding

the potential need to retrench an additional 100 employees, based on operational requirements.

[26] In this regard, the merging parties clarified that discussions with employees are still ongoing and that no retrenchments had taken

place as yet. They did, however, indicate that the affected employees are likely to be in Gauteng, Rustenburg, Kimberly, Port Elizabeth,

East London, Cape Town and Durban. They further stipulated that the retrenchments may impact drivers, general workers/assistants,

supervisors, contract managers, admin clerical staff, mechanics and other workshop staff and warehouse staff.

[27] The merging parties explained that the anticipated retrenchments are as a result of a steady decline in the target firm's Fuel and Bulk Channel business, with a number of routes being curtailed. Further, the parties averred that these potential retrenchments are in no way related to the exit of NIL and the internal restructuring by the remaining shareholders in the target firm.

[28] In its determination of the merger specificity of the anticipated retrenchments, the Commission considered the logistical nature of the company. In particular, the Commission found that the target firm is highly dependent on acquiring and maintaining contracts with its respective clients. Consequently, some contracts may come to an end and are not renewed for various reasons. Accordingly, the Commission noted that a firm like CRD might find itself in an excess of employees after a contract comes to an end and it may, in an attempt to continue running a viable business, be forced to let some employees go.

[29] The Commission therefore concluded that, given the nature of CRD's business and the recent loss of contracts by the target firm,

the anticipated retrenchments are for operational reasons and are unlikely to be merger specific.

[30] At the hearing, the Tribunal queried whether Namane Logistics would be opposed to the imposition of a condition requiring that there be no merger related retrenchments.[8] It was further suggested that the merging parties provide a list of anticipated retrenchments (which would act as a baseline), indicating the number of retrenchments, the positions held, the locations and the gender of the employees that are expected to form part of the anticipated retrenchments.[9] Following the finalisation of their consultation process, the acquiring firm is then expected to provide an affidavit, signed by the CEO of the acquiring firm at the time, listing the number of actual retrenchments.[10]

[31] The merging parties indicated that they would be in a position to uphold the commitments imposed upon them.[11]

Conclusion

[32] In light of the above, we approved the proposed transaction subject to the set of public interest conditions, attached hereto marked as "Annexure A". In our view, these conditions adequately address any public interest concerns that may arise from the proposed transaction.

Ms Yasmin Carrim

20 September 2019

DATE

Mr Enver Daniels and Mr Andreas Wessels concurring

Case Manager: Helena Graham

For the merging parties: Heather Irvine of Falcon & Hume Attorneys Inc.

For the Commission: Zintle Siyo and Mogau Aphané

IN THE COMPETITION TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

Case Number: LM067JUL19

In Re the large merger between:

NAMANE LOGISTICS (PTY) LTD ("NAMANE") Acquiring Firm

And

CROSSROADS DISTRIBUTION (PTY) LTD ("CRO") Target

firm

CONDITIONS

1. DEFINITIONS

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

1.1 "Acquiring Firm" means Namane Logistics (Pty) Ltd;

1.2 "Approval Date" means the date referred to in the Tribunal's merger Clearance Certificate (Form CT10);

1.3 "Commission" means the Competition Commission of South Africa;

1.4 "Competition Act" means the Competition Act No. 89 of 1998, as amended;

1.5 "Competition Authorities" mean the Commission and the Tribunal;

1.6 "Commission Rules" mean the Rules for the Conduct of Proceedings in the Commission;

1.7 "Conditions" mean these conditions;

1.8 "Days" mean business days, being any day other than a Saturday, Sunday or official public holiday;

1.9 "Implementation Date" means the date on which the Proposed Transaction is implemented by the Merging Parties;

1.10 "LRA" means the Labour Relations Act 66 of 1995;

1.11 "Merging Parties" mean the Acquiring Firm and the Target Firm;

1.12 "Proposed Transaction" means the acquisition of a 43% shareholding in the Target Firm by the Acquiring Firm, as set out in greater detail in the joint competitiveness report and Schedule 4 to Form CC 4(2) of the Acquiring Firm, submitted to the Commission as part of the merger filing;

1.13 "Target Firm" means Crossroads Distribution (Pty) Ltd; and

1.14 "Tribunal" means the Competition Tribunal of South Africa.

2. CONDITIONS

2.1 The Target Firm shall not retrench any employees as a result of the Proposed Transaction for a period of 3 (three) years from the

Implementation Date.

2.2 For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation agreements; (ii) voluntary

early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Proposed Transaction; and (vi) terminations in the ordinary course of business, including but not limited to dismissals as a result of misconduct or poor performance.

2.3 The Target Firm shall circulate a copy of these Conditions to all employees of the Target Firm and their trade unions.

2.4 On or before the Approval date, the Merging Parties shall submit to the Competition Authorities a list of each employment position in the Target Firm which is potentially affected by the retrenchments contemplated in the Section 189A Notice provided to affected staff in the Target Firm on 10 July 2019 ("the Section 189A Notice"). This list must specify the gender and geographic location of each employee holding each such potentially affected employment position

as at the Approval Date.

2.5 Within 10 (ten) business days of the consultations in terms of the Section 189A Notice being concluded and retrenchments being effected by the Target Firm in terms of that Section 189A Notice, the Merging Parties shall submit to the Competition Authorities an affidavit deposed to by the Managing Director of the Target Firm which confirms and provides:

2.5.1 the name, job description, gender and geographic location of each employee of the Target Firm who has been retrenched as a result of the operational requirements of the Target Firm, as set out in the Section 189A Notice;

2.5.2 that these retrenchments were based on the operational requirements of the Target Firm set out in the Section 189A Notice and are not related to the Proposed Transaction;

2.5.3 a description of the operational requirements of the Target Firm that lead to the retrenchments; and

2.5.4 that all employees of the Target Firm and their trade unions have been notified of these Conditions, in accordance with clause 2.3.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

As proof of compliance with the condition set out in clause 2.1, the Target Firm shall submit an affidavit deposed to by the Managing

Director of the Target Firm on each anniversary of the Implementation Date, during the 3 (three) year period that this condition remains in place.

4. VARIATION

The Merging Parties and the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

5. BREACH

In the event that the Commission receives any complaint in relation to non-compliance with the Conditions, or otherwise determines that there has been a breach by the Merging Parties of the Conditions, the breach will be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

6. GENERAL

7.1. All correspondence in relation to the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.

[1] Namane Resources also controls Namane Commodities (Pty) Ltd, Namane Mining Properties (Pty) Ltd and Namane Oil and Gas (Pty) Ltd.

- [2] CIH is an investment holding company with interests in various sectors, including, Healthcare, ICT, Power and Energy, Mining, Logistics and Infrastructure.
- [3] CRD also controls CRD Investments (Pty) Ltd, Crossroads Distribution East Africa Ltd and Xroads (Pty) Ltd.
- [4] Transcript, p16 lines 23 - 25 and p17 lines 1 - 8.
- [5] Mr Schoeman explained that CRD is a 100% black-owned entity, with 40% female participation.
- [6] See Record, p11.
- [7] As above.
- [8] Transcript, p31 lines 3-10.
- [9] Transcript, p31 lines 18-23.
- [10] Transcript, p31 lines 20-23.
- [11] Transcript, p31 lines 24-25; p32 lines 1- 2.
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