

SOUTH AFRICA / JUDGMENT

Okavango Biology Luxembourg SARL v Sonnedix Solar South Africa Holdings (Pty) Ltd (LM181Feb22) [2022] ZACT 5; [2022] 1 CPLR 12 (CT) (11 April 2022) [2022] ZACT 5

COURT

Competition Tribunal

BEFORE

Y Carrim, T Vilakazi, S Goga

CASE / FILE NUMBER

LM181Feb22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM181Feb22

In the matter between:

Okavango Biology Luxembourg SARL

Primary Acquiring Firm

And

Sonnedix Solar South Africa Holdings (Pty) Ltd Primary Target Firm

Panel: Y Carrim (Presiding Member)

T Vilakazi (Tribunal Member)

S Goga (Tribunal Member)

Heard on: 11

April 2022

Decided on: 11 April 2022

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(a) of the Act; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Signed by: Yasmin Tayob Carrim

Signed at: 2022-04-11 11:34:31 +02:00

Reason: I approve this document

Presiding Member

Ms Yasmin Carrim

11 April 2022

Concurring: Dr Thando Vilakazi and Ms Sha'ista Goga

Case no: LM181Feb22

In the large merger between:

Okavango Biology Luxembourg SARL (Primary Acquiring Firm)

Sonnex Solar South Africa Holdings (Pty) Ltd (Primary Target Firm)

REASONS

FOR DECISION

1. On 11 April 2022, the Tribunal unconditionally approved the large merger between Okavango Biology Luxembourg SARL ("Okavango Luxembourg") and Sonnex Solar South Africa Holdings Proprietary Limited ("Sonnex").
2. The proposed transaction involves Okavango Luxembourg's acquisition of the entire issued share capital of Sonnex, and the acquisition of all shareholder loan claims held by Sonnex Africa B.V.[1] against Sonnex. Post-transaction, Okavango Luxembourg will have sole control of Sonnex.
3. The primary acquiring firm, Okavango Luxembourg, is incorporated in accordance with the laws of Luxembourg.[2] Okavango Luxembourg is a holding company that forms part of a wider group of companies that are wholly owned by Actis Energy 4 LP and Actis Energy 4A LP ("Actis Fund").[3]
4. In South Africa, the Actis Group[4] has investments in the renewable energy sector. Approximately 85% of these investments are attributable to wind projects, with the

remaining 15% being attributable to solar projects. Okavango has interests in the renewable energy industry and has invested significantly into projects within the Renewable Energy Independent Power Producer Procurement Programme ("REIPPPP") in South Africa. Okavango holds the entire issued share capital of BioTherm Energy (Pty) Ltd (BioTherm Energy), and further, owns two photovoltaic (PV) solar projects in the Northern Cape: (i) Aggeneys, a 46MW project; and (ii) Konkoonies, an 86MW project.

5. The primary target firm, Sonnedix, is a firm incorporated in accordance with the laws of South Africa and is a subsidiary of the Sonnedix Group.[5]
6. Sonnedix has 60% shareholding in Mulilo Sonnedix Prieska PV (RF) Proprietary Limited ("MSP").
7. Sonnedix is engaged in the development, construction, and operation of projects to be used for the generation and sale of electrical energy through solar power sources, specifically, through its investment in MSP.[6] The Sonnedix Group develops, builds, owns, and operates solar power plants across Organisation for Economic Co-operation and Developments

("OECD") markets.

Competition assessment

8. While assessing the proposed transaction, the Competition Commission (the "Commission") found no vertical overlap between the activities of the merging parties but found a horizontal overlap in the activities of the merging parties in that both are active in the supply of renewable energy (solar PV in particular), to Eskom. Furthermore, both the merging parties have entered into Power Purchase Agreements ("PPAs") with Eskom.[7]
9. The Commission assessed the effect of the proposed transaction in the national market for the supply of PV solar energy.
10. The Commission found that the merging parties account for a very small percentage of the national market for the supply of renewable energy using PV solar energy. Post- transaction, the merged entity will have a combined market share of approximately [...] and the merged entity is likely to be constrained as the national market for the supply of electricity using Solar PV energy is fragmented, with 50 other Solar PV energy producers.
11. The Commission also assessed the competitive dynamics under REIPPPP. REIPPPP is a competitive tender process that has been designed to facilitate private sector investment into grid-connected renewable energy generation in South Africa. Independent Power Producers ("IPPs") are invited to submit bids for the supply of renewable energy.[8]
12. The Commission found that the pricing of IPPs and energy allocation is determined upfront when the bid is awarded and cannot be altered for the duration of the IPP project. As IPPs are limited to supplying a specific amount of power at a specific tariff, to only one customer-- Eskom, the merged entity is unable to unilaterally change prices, the volumes of power supplied to Eskom, the type of renewable energy generated, or determine which

customers other than Eskom can be supplied. Consequently, the Commission viewed the proposed transaction not changing the structure of the market as both merging parties are invested in IPPs that have already signed long-term agreements with Eskom.

13. In light of the above, we agree with the Commission that the transaction is unlikely to substantially prevent or lessen competition in any relevant market in South Africa.

Public interest

Employment

14. The merger parties have stated that the proposed transaction will not have a negative effect on employment in any of the firms involved.

[9] In particular, the merging parties have provided an undertaking that the proposed transaction will not result in any retrenchments or job losses.[10]

15.

The Commission engaged the relevant employee representatives of Okavango and Sonnedix who confirmed that the employees were made aware of the proposed transaction and no concerns had been raised by any of the employees.[11]

16. The Commission concluded that the proposed transaction is unlikely to result in any job losses.

Spread of Ownership

17. Okavango does not have any shareholding by historically disadvantaged persons ("HDPs").
18. Sonnedix itself, as a holding company, does not have any shareholding by HDPs, however, as mentioned above, Sonnedix has a 60% shareholding in MSP.
19. MSP as the project company, does have a B-BBEE shareholding of approximately 20%, broken down as follows:
 - a) 5% of MSP is indirectly held by a Community Trust, the beneficiaries of which are 100% black
 - b) 15% of MSP is held by Ixowave (Pty) Ltd, which is a 100% black-owned entity.
20. The merging parties have submitted that this shareholding will remain in place.
21. The Commission concluded that proposed transaction does not raise any public interest concerns and the Tribunal concurs with this.

Conclusion

22. In conclusion we find that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Furthermore, the proposed transaction raises no public interest concerns.

Signed at:2022-04-11 10:28 59 +02:00

Reason:Witnessing Yasmin Tayob Carri

Dr Thando Vilakazi and Ms Sha'ista Goga concurring

Tribunal Case Managers: Juliana Munyembate and Leila Raffee

For the Merging Parties: Katherine McLean and Judd Lurie of Bowmans

For the Commission:

Nomthandazo Mndaweni and Ratshidaho

Maphwanya

- [1] Sonnedix Africa B.V. is a holding company within the larger Sonnedix Group, of which Sonnedix is a wholly owned subsidiary. Sonnedix

Africa B.V. is a private company with limited liability duly incorporated in accordance with the laws of the Netherlands.

- [2] Okavango Luxembourg Controls the following firms in South Africa [...]

- [3] Actis Fund is an investment vehicle managed by Actis GP LLP, which is responsible for managing the Actis Fund in its capacity as a fund manager. Actis GP LLP is ultimately controlled for competition purposes by Actis LLP, a limited liability partnership registered in accordance with the laws of England.

- [4] Actis Fund, Actis LLP, Actis GP LLP, and any other funds or firms controlled, managed, or advised by these entities shall be referred to as the "Actis Group".

- [5] Sonnedix forms part of a wider group of companies ultimately controlled by Sonnedix Power Holdings Limited ("Sonnedix

Holdings"), which is in turn, ultimately owned and controlled by IIF Int'I Holding L.P. ("Int'I Holding"). Int'I Holding is part of the Infrastructure Investments Fund (IIF).

- [6] MSP owns an operational 75-megawatt (MW) Renewable Energy IPP3 solar project (the "Project").

- [7] PPAs are standard form agreements that all endure for a period of 20 years from the date of commencement.

[8] 8 This includes bids for the supply of onshore wind, solar photovoltaic concentrated solar power, small hydro, biomass, biogas

or landfill gas projects.

[9] CC4(1) form submitted by the merging parties (Record p10, para 5)

[10] Joint Competitiveness Report (Record p361, para 3.1.1.1)

[11] Email from the employee representative at Okavango dated 08 February 2022 (Record p1757) and email from the employee representative at Sonnedix dated 11 February 2022 (Record p1754)

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