

SOUTH AFRICA / JUDGMENT

Takatso Aviation (Pty) Ltd v South African Airways State Owned Company Ltd (LM054Jun22) [2023] ZACT 45 (25 July 2023) [2023] ZACT 45

COURT

Competition Tribunal

BEFORE

M Mazwai, T Ngcukaitobi, T Vilakazi

CASE / FILE NUMBER

LM054Jun22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM054Jun22

In the matter between:

Takatso Aviation (Pty) Ltd Primary Acquiring Firm

And

South African Airways State Owned Company Ltd Primary Target Firm

Panel: M Mazwai (Presiding Member)

T Ngcukaitobi (Tribunal Panel Member)

T Vilakazi (Tribunal Panel Member)

Heard on: 20

June 2023

Last submission on: 24 July 2023

Decided on: 25

July 2023

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)(b) of the Act subject to the conditions attached hereto as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Date: 25 July 2023

Ms Mondo Mazwai

Presiding Member

Concurring: Adv. Tembeka Ngcukaitobi SC and Dr. Thando Vilakazi

Merger Clearance Certificate

To : Bowmans Attorneys

You applied to the Competition Commission on 03 June 2022 for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal

approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to: no conditions the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

This form is prescribed by the Minister of Trade and Industry in terms of section 27 (2) of the Competition Act 1998 (Act No. 89 of 1998).

ANNEXURE A

IN THE LARGE MERGER BETWEEN TAKATSO AVIATION PROPRIETARY LIMITED

AND

SOUTH AFRICAN AIRWAYS STATE OWNED COMPANY LIMITED

CASE NUMBER: LM054Jun22

CONDITIONS

1. DEFINITIONS

1.1 “Acquiring Firm” means Takatso;

1.2 “Act” means the Competition Act 89 of 1998, as amended;

1.3 “Affected Employees” means the Target Firm employees (including pilots) that were retrenched during the business rescue proceedings at the Target Firm from December 2019 until 30 April 2021;

1.4 “Approval Date” means the date the Tribunal issues a Clearance Certificate (Form CT10) in terms of the Act;

1.5 “Commission” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

1.7 “Competing Firm” means any firm that conducts any activities that compete with those of the Target Firm. In relation to the Minorities, this specifically includes the passenger airline activities conducted under the Lift brand.

1.8 “Conditions” mean, collectively, the conditions referred to in this document;

1.9 “Days” mean business days, being any day other than a Saturday, Sunday, or official public holiday in the Republic of South Africa;

1.10 “Divestiture” means the Minorities each disposing of their entire respective shareholding in the Acquiring Firm as contemplated in these Conditions;

1.11 “Implementation Date” means the date, occurring after the Approval Date, and after the Divestiture, on which the Merger is implemented by the Merger Parties;

1.12 “Merger” means the Acquiring Firm’s acquisition of 51% of the issued share capital of the Target Firm;

1.13 “Merger Parties” means the Acquiring Firm and the Target Firm;

1.14 “Minorities” means Global Aviation Operations Proprietary Limited and Syranix Proprietary Limited, which each respectively hold 10% of the issued share capital in the Acquiring Firm;

1.15 “Moratorium Period” means a period of 5 (five) years from the Implementation Date, and includes a period between the Approval Date and the Implementation Date;

1.16 “Purchaser” means the identified purchaser or purchasers of the Minorities’ respective 10% shareholding in the Acquiring Firm which must be an independent third party/ies unrelated to the Minorities and not a Competing Firm.

1.17 “South Africa” means the Republic of South Africa;

1.18 “Takatso” means Takatso Aviation Proprietary Limited;

1.19 “Target Firm” means South African Airways State Owned Company Limited, as well as its subsidiaries, excluding Mango Airlines State Owned Company Limited;

1.20 “Tribunal” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and

1.21 “Tribunal Rules” mean Rules for the Conduct of Proceedings in the Tribunal.

2. EMPLOYMENT

2.1 The Merger Parties shall not retrench any employee as a result of the Merger, for the duration of the Moratorium.

2.2 Any retrenchment during the Moratorium Period, will be presumed to be Merger specific, unless the Merger Parties / Merged Entity can demonstrate otherwise.

2.3 For the avoidance of doubt, the Merger Parties shall provide the Commission with details of any proposed retrenchments for operational reasons during the Moratorium Period, at least 30 calendar days prior to such retrenchments being implemented. These details, to be provided to the Commission in writing, include details of the number of employees proposed to be retrenched; the qualifications of each employee proposed to be retrenched; a detailed explanation of the operational reasons for the proposed retrenchments and any other documents or information requested by the Commission.

2.4 For avoidance of doubt, Merger specific retrenchments do not include (i) voluntary retrenchments and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 66 of 1995; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

2.5 The Merger Parties shall use their best endeavours to communicate available vacancies at the Target Firm to Affected Employees for a period of 24 (twenty-four) months after the Approval Date.

2.6 For a period of 24 (twenty-four) months after the Approval Date, the Merger Parties shall give first preference to the Affected Employees to apply for any vacancies that may arise at the Target Firm, on terms mutually acceptable to the Affected Employees and the Merger Parties, provided that the Affected Employees have the requisite qualifications, skills, know-how and experience required for those specific vacancies.

2.7 The Merger Parties shall, during the Moratorium Period, maintain the total aggregate minimum number of permanent employees of the Target Firm, at 1647.

3. DIVESTITURE

3.1 The Merging Parties shall procure that the Minorities shall each entirely divest of their respective 10% shareholding in the Acquiring Firm to a Purchaser.

3.2 The Merger cannot be implemented prior to the successful implementation of the Divestiture.

3.3 Prior to the implementation of the Divestiture, the Acquiring Firm shall provide the Commission with details of the proposed Divestiture. These details shall include, but is not limited to, the transaction structure; details of the Purchaser; confirmation that the Purchaser is independent and unrelated to the Minorities; confirmation that the Purchaser is not a Competing Firm; and any other documents or information requested by the Commission.

3.4 The Commission shall, within 60 (sixty) calendar days of being notified of the proposed Divestiture, provide its written confirmation of whether the proposed Divestiture complies with this Condition.

3.5 For the avoidance of doubt, should the Divestiture constitute a merger for the purposes of the Act, the Divestiture cannot be implemented until same has been notified to the Commission in the prescribed form (whether or not the mandatory thresholds are met) and approved either unconditionally or subject to conditions.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1 The Merger Parties shall circulate a copy of the Conditions to all employees, relevant trade unions and employee representatives within 5 (five) Days of the Approval Date.

4.2 As proof of compliance with clause 4.1, the Merger Parties will within 10 (ten) Days of circulating the Conditions, submit to the Commission an affidavit by a senior official of the Acquiring Firm attesting to the circulation of the Conditions and provide a copy of the notices that were circulated to the employees, relevant trade unions and employee representatives.

4.3 Within 3 (three) months of each anniversary of the Approval Date up until the 5th (fifth) anniversary of the Implementation Date, the Merger Parties shall provide a suitable and appropriately detailed annual report to the Commission regarding the Merger Parties' compliance with these Conditions.

4.4 The Acquiring Firm shall inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.

4.5 The Acquiring Firm shall within 10 (ten) Days of implementing the Divestiture, provide the Commission with an affidavit by a senior official of the Acquiring Firm attesting to the implementation of the Divestiture. This affidavit shall be provided to the Commission together with supporting documents such as the Acquiring Firm's amended shareholders agreement and memorandum of incorporation.

5. APPARENT BREACH

5.1 Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merger Parties of these Conditions, the breach will be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

6. VARIATION

6.1 The Commission and/or Merger Parties shall be entitled to apply to the Tribunal, on good cause shown, for the relaxation, modification or substitution of any aspect of the conditions.

7. GENERAL

7.1 All correspondence in relation these Conditions must be submitted to the following email addresses: mergerconditions@compcom.co.za and ministry@thedtic.gov.za

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