

SOUTH AFRICA / JUDGMENT

Tegeta Exploration and Resources (Pty) Ltd v Optimum Coal Mine (Pty) Ltd (in business rescue) and Others (LM212Jan16) [2016] ZACT 30; [2016] 1 CPLR 258 (CT) (12 April 2016) [2016] ZACT 30

COURT

Competition Tribunal

BEFORE

Norman Manoim, Imraan Valodia, Fiona Tregenna

CASE / FILE NUMBER

LM212Jan16

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM212Jan16

In the matter between:

Tegeta Exploration and Resources (Pty) Ltd

Primary Acquiring Firm

and

Optimum Coal Mine (Pty) (in business rescue)

Optimum Coal Terminal (Pty) Ltd

Koornfontein Mines (Pty) Ltd

Optimum Nekel Mining and Exploration (Pty) Ltd

Optimum Vlakfontein Mining and Exploration (Pty) Ltd

Optimum Overvaal Mining and Exploration (Pty) Ltd

Optimum Mpefu Mining and Exploration (Pty) Ltd

Primary Target Firm

Panel

: Norman Manoim (Presiding Member)

: Imraan Valodia (Tribunal Member)

: Fiona Tregenna (Tribunal Member)

Heard on

: 17 February 2016

Order Issued on

: 22 February 2016

Reasons

Issued on : 12 April 2016

Reasons

for Decision

Approval

[1] On 22 February 2016, the Competition Tribunal ("Tribunal") conditionally approved the merger between the primary acquiring firm, Tegeta Exploration and Resources (Pty) Ltd ("Tegeta") and the target firms Optimum Coal Mine (Pty) (in business rescue) ("OCM"), Optimum Coal Terminal (Pty) Ltd ("OCT"), Koornfontein Mines (Pty) Ltd ("Koornfontein"), Optimum Nekel Mining and Exploration (Pty) Ltd ("Nekel"), Optimum Vlakfontein Mining and Exploration (Pty) Ltd ("Vlakfontein"),

Optimum Overvaal Mining and Exploration (Pty) Ltd ("Overvaal"), Optimum Mpefu Mining and Exploration (Pty) ("Mpefu").

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

Parties to transaction

Primary acquiring firm

[3] The primary acquiring firm Tegeta is jointly controlled by Oakbay Investments (Pty) Ltd ("Oakay") and Mabengela Investments

(Pty) Ltd ("Mabengela"). Oakbay is held by Islandsite Investments 180 (Pty) Ltd, Mr Atul Gupta and Mrs Chetali Gupta.

Mabengela's largest shareholder is Duduzani Zuma.

[4] Tegeta is a registered holder of the new order mining rights in respect of farms in Brakfontein and Brakfontein Extension on which the Brakfontein coal mine is situated. Eskom is Tegeta's largest customer of coal with its remaining supply being taken up by the residual domestic market. Oakbay is an investment holding company which has various interests, of relevance to this transaction is its ownership of the Idwala Coal Mine. However

this mine is not yet operational and Oakbay is awaiting the outcome of its mining rights application. Mabengela is a consulting agent which engages in prospecting on behalf of mining companies and on its own behalf.

Primary target firms

- [5] OCM operates a large opencast and underground coal mining complex referred to as Optimum Collieries which supplies the domestic market as well as minimal exports supplied through the Richards Bay Coal Terminal. Koornfontein is an underground mining operation located in Witbank. OCT is party to an off take agreement where it agreed to sell export coal produced by OCM to Glencore International AG. Vlakfontein, situated in Ermelo, is an opencast coal development project which has submitted a mining rights application to the Department of Mineral Resources. Overvaal which is situated in Mpumalanga which has a new order prospect. Mpefu's mining rights have lapsed and it does not operate.
- [6] These firms are directly controlled by Optimum Coal Holdings (Pty) Ltd ("Optimum Coal Holdings") and will hereinafter be referred to as the Target Group.

Proposed transaction and rationale

- [7] The proposed transaction involves Tegeta acquiring the shares and claims on loan account held by Optimum Coal Holdings in the seven target firms. [1] As a result of the proposed transaction Tegeta will acquire control over the target firms. However of the seven firms, only two are operational mines at present (OCM and Koornfontein), the third is the interest in the Richards Bay coal terminal while the remaining firms are either dormant or await the necessary rights. Our reasons therefore relate to the two operating firms.[2]
- [8] The reason for the transaction is that two of the target firms, OCM and Optimum Coal Holdings, are presently in business rescue in terms of the Companies Act, due to what they consider unprofitable commercial supply agreements they currently have with Eskom.
- [9] Tegeta, whose other mine Brakfontein also supplies Eskom, believes it can turn this business around. According to the testimony of Nazeem Howa, its representative at the hearing, Tegeta believes by changing mining techniques and increasing supply so that some coal can be exported at higher export prices, the mines can become profitable.

Impact on competition

- [10] The merger leads to an overlap in the activities of the merging firm. OCM and Koornfontien produce thermal coal for what is termed the domestic tied market as does the acquiring firms Brakfontein mine. The domestic tied market is a technical term used to describe the market for supply of thermal coal to a single domestic customer Eskom in terms of supply agreements to power stations located in the proximity of these mines.

- [11] Since the respective mines are not competitors to supply the powers stations located near them the merger does not lead to a geographic market concern. Nor will the merger change the power relations between the merged firm and its customer in terms of bargaining power. Tegeta post-merger will only supply under 5 % of Eskom's coal needs.
- [12] Representatives of Eskom, at the request of the Tribunal, presented themselves at the hearing and confirmed that they had no concerns about the merger.
- [13] We thus agree with the Commission's recommendation to us that the merger raises no competition concerns and this aspect does not need to be considered any further.

Third party view

- [14] At the hearing, a Mr. Temane representing another potential buyer of the target firms, the Endulwini Consortium complained that his offer to purchase had been rejected by the business rescue practitioners. The business rescues practitioners advised that the offer was unsuitable as it did not, amongst other reasons, include proof of funding. It is not within the jurisdiction of the Tribunal to dictate to sellers who they should sell to. The Act only gives us powers to consider the transaction before us. We can therefore not take Mr Temane's concerns any further.

Public interest

- [15] At the time of the Commission's investigation into the proposed transaction the acquiring firm had not undertaken a comprehensive due diligence on the Target Group specifically because the number of retrenchments is contingent, in part, on Eskom's renewal of a certain supply contract. As such the merging parties were unable to indicate how many employees might be retrenched post-merger.
- [16] It is common cause that the Target Group presently employs 3 055 people, of which 1920 are contractors. It is also common cause that the two operational firms are in financial distress because of the uncertainty of the Eskom contracts. In relation to Koornfontein the present contract has expired and has been renewed for a brief period until the end of the business rescue process on the current terms. It is by no means clear if Eskom will agree to improved terms and Eskom at this stage was not willing to commit itself. In relation to OCM the present contract expires in 2018. The sellers also considered this contract uncommercial so here too, a new negotiation will determine the operational fate of the mine.
- [17] The Commission and merging parties came to the hearing with an agreed proposal for a condition to place a moratorium on merger specific retrenchments. In essence this condition placed a moratorium on merger specific retrenchments indefinitely as no time period was stipulated.

- [18] During the hearing after questions from the panel it emerged that the Commission and the merging parties differed in their interpretation of the condition: in particular what the term merger specific contemplated. For the merging parties this meant only merger created redundancies; for the Commission the term also covered retrenchments brought about by a change in business policy at the mine .We decided to give them the opportunity the come to a common understanding or submit separate proposals.
- [19] They were, after deliberations, unable to come to a common agreement so we need to consider their separate proposals.
- [20] The Commission proposed a blanket ban on all post-merger retrenchments. It justified this on the basis that the merging parties had not conducted a rational process to identify the necessity for retrenchments and therefore all post-merger requirements should be considered on that basis to have merger specificity. A similar position was also articulated at the hearing by one of the unions,

UASA, whose representative Mr Van Heerden who had argued for a three year blanket moratorium on all retrenchments.

- [21] The merging parties argued that it was difficult for them to come to a more specific position on retrenchments, as the fate of the Eskom contracts, was, at the time of the hearing, inconclusive. Hence whether retrenchments would be necessary could not yet be determined. The argument was that if retrenchments became necessary, they would be operational, rather than merger specific. Put differently if retrenchments had to be effected this would have been due to the viability of the mines in terms of the Eskom contracts not the merger. We agree with this contention. The merging parties were however agreeable to a moratorium on retrenchments in respect of merger created redundancies and hence we have accepted their draft in on this aspect.
- [22] Despite this concession the merger is unlikely to lead to many redundancies as the Brakfontein mines and the target mines are located far apart and synergies will occur at head office not operational level. However as we have previously held the public interest concerns under the Act are limited to merger specific concerns and hence the distinction with those that are independent of the merger for which the term operational has been used in the past and which is the preserve of labour law. We were urged to consider whether the new owners might change the focus of the target firms in a way that differed from that prior to the merger a fact we had taken into account in Adcock Ingram where a change in business policy post-merger rather than mere redundancies had led to an apprehension about retrenchments which in our view in that case had justified a blanket moratorium on retrenchments for a period of one year.[3] However in this case there is no evidence on any change in policy. To the extent that there might be a change the evidence of Mr Howa suggests that post-merger the acquiring firm might be less likely to retrench than the prior owners. However what is fundamental is that two of the Target group firms are in business rescue with no other better prospects. We thus differ with the Commission on this issue

[23] We did however prefer the Commission's draft in relation to the monitoring of the conditions and this version of their draft has been retained.

Conclusion

[14] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition we find that the conditions we imposed address any public interest concerns

12 April 2016

DATE

Mr Norman Manoim

Prof Imraan Valodia and Prof Fiona Tregenna concurring

Tribunal Researcher: Aneesa Ravat

For the merging parties: MJ Engelbrecht instructed by Strauss Scher Attorneys for KPMG

For the Commission: Daniela Bove and Thabelo Masithulela

[1] OCM, OCT, Koomfontein, Nekel, Vlakfontein, Overvaal and Mpefu. In terms of the sale of shares agreement Tegeta will be acquiring 51% of Nekel's issued share capital.

[2] The target firms will continue to operate as standalone firms and will not be integrated into the business operations of Tegeta.

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operations of Tegeta.

[3] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd CT case no: 018713

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