

SOUTH AFRICA / JUDGMENT

Thebe Renewable Energy Holdings (RF) (Pty) Ltd vPhembani Solar Energy 1 (Pty) Ltd and Others (LM273Jan18) [2018] ZACT 39 (13 April 2018) [2018] ZACT 39

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Medi Mokuena, Fiona Tregenna

CASE / FILE NUMBER

LM273Jan18

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM273Jan18

In the matter between:

Thebe Renewable Energy Holdings (RF) (Pty) Ltd

Primary Acquiring Firm

and

Phembani Solar Energy 1 (Pty) Ltd

Shanduka Black Umbrellas Energy (Pty) Ltd

Phembani Renewables (Pty) LtdPulida Energy (RF) (Pty) Ltd

Primary Target Firms

Panel

: Yasmin Carrim (Presiding Member)

: Medi Mokuena (Tribunal Member)

: Fiona Tregenna (Tribunal Member)

Heard on

: 14 March 2018

Order Issued on : 14 March 2018

Reasons

Issued on : 13 April 2018

Reasons

for Decision

Approval

[1] On 14 March 2018, the Competition Tribunal ("Tribunal") approved the proposed transaction between Thebe Renewable Energy Holdings (RF) (Pty) Ltd and Phembani Solar Energy 1 (Pty) Ltd, Shanduka Black Umbrellas Energy (Pty) Ltd, Phembani Renewables (Pty) Ltd, and Pulida Energy (RF) (Pty) Ltd.

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

Parties to proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is Thebe Renewable Energy Holdings (RF) (Pty) Ltd ("Thebe Renewable"), a private company incorporated in accordance with the laws of South Africa. Thebe Renewable is a wholly owned subsidiary of Thebe Investment Corporation ("TIC"),

which itself is controlled by a number of firms.

[4] TIC is an investment holding company that manages investment portfolios in various industries. Of relevance to the proposed transaction are TIC's investments in the energy industry. In the energy industry, TIC operates through Thebe Renewable, which holds and manages the entire group's renewable energy (solar energy and wind energy) investments through special purpose ring-fenced investment companies. Thebe Renewable has a minority (non-control conferring) shareholding in a number of renewable energy projects.

Primary target firms

[5] The primary target firms are Phembani Solar Energy 1 (Pty) Ltd ("Phembani Solar"), Shanduka Black Umbrellas Energy (Pty) Ltd ("Shanduka Black Umbrellas"), Phembani Renewables (Pty) Ltd ("Phembani Renewables"), and Pulida Energy (RF) (Pty) Ltd ("Pulida"), collectively referred to as the Target Firms.

[6] The Target Firms are special purpose companies created by the sellers to hold shareholding interests in two renewable energy projects namely; the Nobelsfontein Wind Project and the Pulida Solar Park Project.

- [7] Phembani Solar and Phembani Renewables are wholly owned subsidiaries of Phembani Energy (Pty) Ltd ("Phembani Energy"). Phembani Energy is ultimately controlled by the Phembani Group (Pty) Ltd ("Phembani Group").[1]
- [8] Shanduka Black Umbrellas Energy is controlled by Shanduka Black Umbrellas B-BBEE Investment Trust ("Shanduka 8-BBEE Trust").[2]
- [9] Pulida Energy is controlled by Enel Green Power RSA (Pty) Ltd ("Enel Green Power"). Enel Green Power is ultimately controlled by Enel S.p.A, a public company listed on the Borsa Italiana. Other shareholders in Pulida Energy include Phembani Solar and Shanduka

Black Umbrellas Energy.

- [10] Given that Thebe Renewable will acquire both Phembani Solar and Shanduka Black Umbrellas Energy and their shareholding in Pulida Energy, this implies that Thebe Renewable will acquire negative control in Pulida Energy.

Proposed transaction and rationale

Primary acquiring firm

- [11] Thebe Renewable submitted that the Target Firms presented the primary acquiring firm with the opportunity to increase its exposure in the renewable energy industry.

Primary target firm

- [12] The Target Firms had made the strategic decision to exit their renewable energy investments to focus on other investments.
- [13] In terms of the proposed transaction, Thebe Renewable intends to acquire direct control over Phembani Solar, Phembani Renewables and Shanduka Black Umbrellas Energy as well as indirect control in Pulida Energy.
- [14] The merging parties submitted that the proposed transaction comprises of a single and composite transaction from both a factual and legal point of view. This is because the acquiring firm's rationale for the various transactions is the same. Further, the various transactional agreements provides for the cross-conditionality of each acquisition. The Commission considered whether there was a factual link as well as a legal link between the proposed transactions.
- [15] The Commission found that the ultimate target firms are the Nobelsfontein Wind Project and the Pulida Solar Park Project. The Target Firms are special purpose companies created by the sellers to hold the shareholding interests in the ultimate target firms. In order for Thebe Renewable to acquire the ultimate target firms as intended, it needed to acquire the special purpose companies i.e. the Target Firms.

- [16] The Commission concluded that there is a link between the Target Firms in that both Phembani Solar and Phembani Renewables are controlled by the same holding company, Phembani Energy. The Commission noted that although Shanduka Black Umbrellas is controlled by a different shareholder, Phembani Solar and Shanduka Black Umbrellas are common shareholders in Pulida Energy (the holding company for the Pulida Solar Project).
- [17] Further, the Commission found that there was a legal link between the transactions as the proposed merger between Thebe Renewable, Phembani Solar and Phembani Renewables will not take place without a sale agreement having been signed by Thebe Renewable and the Shanduka 8-BBEE Trust for the sale of Shanduka Black Umbrellas Energy and vice versa.
- [18] The Commission thus concluded that the transactions are both factually and legally linked and should be considered as one indivisible

transaction.

Impact on competition

- [19] The Commission found that there were no overlaps arising out of the transaction. Although the acquiring group holds interests in renewable energy projects, none of these interest confer control, as such there is no overlap between the acquiring group and the Target Firms.
- [20] The Commission did consider whether the transaction was likely to enhance or create a platform for coordination. This is because the renewable energy projects have one customer (Eskom) and Thebe Renewable is able to appoint at least one director in all its renewable energy projects.
- [21] In this regard, the Commission found that coordination was unlikely to result from the transaction. The target projects are already in existence and have already signed Purchase Power Agreements and Implementation Agreements with Eskom and the Department of Energy ("DOE"). The prices to Eskom and escalation rates have already been agreed to when these contracts were signed.
- [22] The Commission also found that the renewable energy market is tender based and the DOE decides the maximum capacity (MW) available for tender per technology and price caps per technology to ensure that bid tariffs are within acceptable limits. For every tender bidders must submit a proposal that will involve establishing a new renewable energy power generation facility, in line with the requirements of the tender and/or the socio-economic objectives of the DOE.

Public interest

[23] The merging parties submitted that the proposed transaction will have no adverse effect on employment.[3]

[24] The Commission noted that Enel manages a number of projects besides the Pulida Project, thus regardless of what happens to the Pulida

Project, Enel's employees should remain unaffected and no job losses are likely to occur as there are other projects for its employees to manage at Enel.

Conclusion

[25] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Accordingly, we approved the proposed transaction unconditionally.

Ms Yasmin Carrim

Mrs Medi Mokuena and Prof. Fiona Tregenna concurring

13 April 2018

Case Manager: Kameel Pancham

For the merging parties: Mmadika Moloi from Webber Wentzel on behalf of Thebe

Renewable Energy Holdings

Rick van Rensburg from ENSAfrica on behalf of

Phembani Renewables and Shanduka Black Umbrellas

For the Commission: Billy Mabatamela and Raksha Darji

[1] The Phembani Group is controlled by Mr Phuthuma Nhleko through a number of firms.

[2] The Shanduka B-BBEE Trustees are: Allan John Hannie, Brian John Stephenson Wilkinson and Yvonne Nokukhanya Themba.

[3] Inter alia Commission's Recommendation page 23.

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