

SOUTH AFRICA / JUDGMENT

WBHO Construction (Pty) Ltd and Another v Grindrod Rail Construction (SA) (Pty) Ltd and Another (LM244Mar17) [2017] ZACT 58 (28 July 2017)

[2017] ZACT 58

COURT

Competition Tribunal

BEFORE

AW Wessels, Fiona Tregenna, Medi Mokuena

CASE / FILE NUMBER

LM244Mar17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM244Mar17

In the matter between:

WBHO CONSTRUCTION (PTY) LTD Acquiring

Firms

FAKU FAMILY ENTERPRISES (PTY) LTD

and

GRINDROD RAIL CONSTRUCTION (SA) (PTY) LTD Target

Firms

GRINDROD RAIL CONSTRUCTION COMPANY (PTY) LTD

Panel

: AW Wessels (Presiding Member)

: Prof. Fiona Tregenna (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on

: 28 June 2017

Order Issued on

: 28 June 2017

Reasons

Issued on

: 28 July 2017

REASONS

FOR DECISION

Approval

- [1] On 28 June 2017, the Competition Tribunal ("Tribunal") approved the proposed transaction involving WBHO Construction (Pty) Ltd ("WBHO Construction"), Faku Family Enterprises (Pty) Ltd ("FFE"), Grindrod Rail Construction (SA) (Pty) Ltd ("GRCSA") and Grindrod Rail Construction Company (Pty) Ltd ("GRCC").
- [2] The reasons for the approval of the proposed transaction follow.

Parties to the proposed transaction

Primary Acquiring Firms

- [3] The primary acquiring firms are WBHO Construction and FFE. Both these companies are incorporated in accordance with the laws of the Republic of South Africa.
- [4] WBHO Construction is a wholly-owned subsidiary of Wilson Bayley Holmes- Ovcon Limited ("WBHO"). WBHO is listed on the Johannesburg Securities Exchange ("JSE") and its shares are widely traded. WBHO controls various firms in South Africa and abroad.
- [5] WBHO Construction is active in the construction industry where it offers a spectrum of services across four major operating divisions. Relevant to the competition assessment of the proposed transaction are its activities in the provision of civil engineering in the rail sector.
- [6] FFE is wholly-owned by the Ntinga Investment Trust.
- [7] FFE is an investment holding company with subsidiaries active in the construction, property, coal and petrochemicals and related logistics services sectors.

Primary Target Firms

- [8] The primary target firms are GRCC and GRCSA. Both these companies are incorporated in accordance with the company laws of South Africa.

- [9] GRCC is a wholly-owned subsidiary of Grindrod Holdings (South Africa) (Pty) Ltd which is ultimately controlled by Grindrod Limited, a firm listed on the JSE. GRCSA is a wholly-owned subsidiary of GRCC.
- [10] GRCC is an investment holding company active through its subsidiaries, GRCSA, GRC Admin and GRC Plant. GRCSA is active in the construction, rehabilitation, electrification and maintenance of rail networks. It engages primarily with state-owned companies and rail and port authorities. In the private sector, GRCSA engages with local and international entities, being primarily large industrial or mining clients that require physical rail infrastructure and associated civil works for mines or substantial manufacturing plants. GRC Admin and GRC Plant provide in-house support to GRCC's business activities within and outside of South Africa. GRC Admin is responsible for the administrative and financial management of GRCC and GRC Plant is responsible for the hire of plant and machinery for use by GRCC.

Proposed transaction and rationale

- [11] The proposed transaction involves a series of inter-conditional and indivisible steps that will ultimately result in WBHO Construction

holding 85% of the shares in GRCC, and retaining a 49% shareholding in GRCSA. FFE will have a 51% shareholding in GRCSA and a 10%

interest in GRCC.[1]

- [12] In terms of rationale, WBHO and FFE submitted that they foresee growth in the rail sector in South Africa and that the proposed transaction represents an opportunity for FFE to partner with experienced players to take advantage of the anticipated growth.
- [13] Grindrod, the seller, indicated that it decided to exit the rail and locomotive assembly business while retaining the rail operating business.

Impact on competition

- [14] The Competition Commission ("Commission") found that the merging parties operate at different levels of the value chain in the rail construction sector, with the acquiring firm providing civil engineering for rail construction and the target firm providing the laying of the rail tracks. To this end the services provided by the merging parties are complementary.
- [15] The Commission furthermore specifically considered potential post-merger bundling, but found that competition concerns were unlikely due to bundling since customers dictate the scope of work to be covered in a project and even if a tender requires a firm to provide a package of services, market participants submitting bids have the option to outsource the competencies which they lack to third parties. This, along with the bidding nature of the relevant market and presence of a number of players, on the Commissions version, would constrain the merged entity from exercising market power.

[16] The Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the affected markets. We have no reason to disagree with this conclusion.

Public interest

Employment

[17] The merging parties in their merger filing confirmed that the proposed transaction will have no negative effects on employment and particularly that

there will be no job losses at either of the merging parties as a result of the proposed transaction.

[2]

[18] The Commission in its report stated that a copy of the non-confidential merger filing was served on the National Union of Mineworkers ("NUM"), Ms Yongezwa Sali, representing FFE employees and the National Union of Metalworkers of South Africa ("NUMSA"). NUM and the FFE employees' representative did not raise any concerns. However, NUMSA indicated that there were job losses at the merging parties prior to the notification of the proposed transaction and the Commission's investigation confirmed that there were retrenchments in a number of entities of the merging parties since 2015.

[19] The merging parties confirmed that there were job losses at WBHO Construction, Masakeni (a subsidiary of FFE) and at GRCSA in the past two years. The merging parties however argued that these retrenchments were the result of operational restructuring and not as a result of the proposed transaction.

[20] After considering the strategic documents of the merging parties, the Commission concluded that the past job losses that occurred are not merger- specific, i.e. they are unrelated to the proposed transaction, stating that the retrenchments were the result of insufficient workload and there being no new work / contracts in the relevant area.

[21] Noting the concerns in the merger record raised by NUMSA the Tribunal invited NUMSA to make representations at the hearing.

[22] The legal representative of NUMSA at the hearing indicated that NUMSA's submissions were necessitated by the fact that the merging parties had not been forthcoming with information pertaining to the details of certain recent retrenchment notices and therefore NUMSA was unable to assess whether or not the notices were done in contemplation of the proposed transaction.[3]

- [23] The Tribunal, with the legal representative of NUMSA present, requested details from the merging parties regarding the number of retrenchments at each of WHBO, Masakeni and GRCSA, the reasons for the retrenchments, as well as the timing of the retrenchments relative to the merger negotiations. The Tribunal also questioned the merging parties regarding potential job duplication, i.e. duplication of roles, as a result of the proposed transaction.
- [24] The merging parties informed the Tribunal that on the target side, GRCC had no retrenchments in the relevant period. With regard to GRCSA, the merging parties submitted that there were only nine employees affected and those employees all accepted voluntary severance packages. They submitted that this was as a result of a severe lack of projects in the Cape Town region at Grindrod Rail Construction Cape Town Operations. A decision was taken to close the Cape Town operations down, because it lost the City of Cape Town contract and furthermore was unsuccessful in winning PRASA tenders.[4]
- [25] With regard to Masakeni, a business bought out of business rescue in April of 2016, the merging parties submitted that there were approximately 75 employees affected by operational restructuring at Masakeni. However, 20 employees were retained and 50 employees accepted voluntary severance packages, with ultimately only 5 involuntarily retrenched employees.[5]
- [26] The merging parties also submitted details on the number of past retrenchments at WHBO and claimed that these retrenchments were the result of an insufficient workload in different divisions of the business.
- [27] The merging parties furthermore submitted that section 189 notices under the Labour Relations Act were issued by one of the Grindrod subsidiaries, Grindrod Locomotives, but said that that business does not form part of this proposed transaction and for all intents and purposes is a completely separate entity.[6]
- [28] The merging parties again confirmed (see paragraph 17 above) that the proposed transaction will not result in any retrenchments and furthermore said that there is no duplication of jobs that arises as a result of the proposed transaction.[7]
- [29] Having received details of the merging parties' past retrenchments through the Tribunal hearing process, the legal representative of NUMSA indicated that his instructions were to accept the merging parties' submissions to the Tribunal at the hearing. He stated that if the information differs from what the Tribunal was told, NUMSA will take appropriate legal steps.[8]

[30] We have found no evidence suggesting that the past retrenchments at the merging parties are related to this transaction. However, we did express a concern regarding the lack of sharing of adequate information on the one hand by the Commission with NUMSA and, on the other hand, by the merging parties with NUMSA on retrenchments at the merging parties' entities.[9] Any trade union must be placed in a position to properly assess the potential implications of a proposed transaction on its members,

including the relationship between past retrenchments at each of the merging parties and the proposed transaction. Non-transparency on these issues may lead to postponements of hearings.

Other public interest issues

[31] No other public interest concerns arise from the proposed transaction.

Conclusion

[32] 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 no significant public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.

28 July 2017

Date

Mr AW Wessels

Ms M Mokuena and Prof. F Tregenna

Tribunal Case Manager: Alistair Dey-Van Heerden

For the Commission:

Zintle Siyo

For the Merging Parties: Gomolemo Kekesi of Bowmans

For NUMSA:

Nkonzo Hlatshwayo of Hogan Lovells (South Africa) Inc.

[1] See merging parties' Joint Competitiveness Report, pages 64 and 65 of the record.

[2] Merger Record, pages 7 and 70.

[3] Transcript, page 34.

[4] Transcript, pages 27 to 29.

[5] Transcript, pages 26 and 27.

- [6] Transcript, pages 37 and 38.
- [7] Transcript, pages 32 to 34.
- [8] Transcript, page 46.
- [9] Transcript, pages 39, 40 and 46.
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