



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM137Oct20

In the matter between:

K2020704995 (South Africa) (Pty) Ltd

Primary Acquiring Firm

and

Comair Ltd (In Business Rescue)

Primary Target Firm

Panel	:	Y Carrim (Presiding Member)
	:	E Daniels (Tribunal Panel Member)
	:	AW Wessels (Tribunal Panel Member)
Heard on	:	30 October 2020
Decided on	:	30 October 2020

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 marked as "**Annexure A**"; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Signed by: Yasmin Tayob Carrim
Signed at: 2020-10-30 16:16:59 +02:00
Reason: I approve this document

Yasmin Tayob Carrim

Yasmin Carrim
Presiding Member

30 October 2020

Date

Concurring: Mr E Daniels and Mr AW Wessels

PUBLIC CONDITIONS

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings —
- 1.1.1 **“Affected employees”** means a maximum of 200 (two hundred) Comair employees that will be retrenched following the implementation of the Merger;
- 1.1.2 **“Approval Date”** means the date the Tribunal issues a Clearance Certificate (Notice CT10) in terms of the Competition Act;
- 1.1.3 **“B-BBEE”** means broad-based black empowerment as defined in the B-BBEE Act;
- 1.1.4 **“B-BBEE Act”** means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended, and the Codes of Good Practice 2013, as amended;
- 1.1.5 **“B-BBEE initiative”** means the commitment to earmark up to [**Confidential Information Removed**] of the shares in SA Bidco for an appropriate ownership structure which meets the requirements of Statement 100 of the Codes and aligns with the commercial objectives of Comair;
- 1.1.6 **“B-BBEE Purchaser”** means any natural Black person or persons or B-BBEE controlled company or B-BBEE owned company as defined in the B-BBEE Act;
- 1.1.7 **“Black”** means Black People as defined in the B-BBEE Act;
- 1.1.8 **“Codes”** means the Codes of Good Practice on Broad Based Black Economic Empowerment in terms of the B-BBEE Act;
- 1.1.9 **“Comair”** means Comair Limited (in business rescue);

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- 1.1.10 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.11 **"Competition Act"** means the Competition Act, 89 of 1998, as amended;
- 1.1.12 **"Conditions"** means the conditions set out herein;
- 1.1.13 **"Days"** means business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.1.14 **"HDI"** means historically disadvantaged individuals, as defined in the section 3(2) of the Competition Act;
- 1.1.15 **"ESOP"** means Employee Share Ownership Program;
- 1.1.16 **"Flying Start Date"** means the date on which Comair's flying operations recommence, which, subject to all regulatory approvals being in place, is currently scheduled to be 1 December 2020;
- 1.1.17 **"Merged Entity"** means Comair, subject to the control of SA BidCo;
- 1.1.18 **"Merger"** means the acquisition of control over Comair by SA BidCo;
- 1.1.19 **"Merging Parties"** means Comair and SA BidCo;
- 1.1.20 **"Proposed Transaction"** means the proposed acquisition by SA BidCo of a controlling shareholding in Comair;
- 1.1.21 **"SA BidCo"** means K2020704995 (South Africa) (Pty) Ltd;
- 1.1.22 **"South Africa"** means the Republic of South Africa; and
- 1.1.23 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

B-BBEE

- 2.1 In terms of the B-BBEE Initiative, the Merged Entity shall, within [**Confidential Information Removed**] of the Flying Start Date, allocate up to [**Confidential**

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Information Removed] of the shares in SA Bidco for an appropriate B-BBEE ownership structure. In this regard, the Merged Entity commits to securing the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% as well as one or more B-BBEE Purchasers who are agreeable to participating in this initiative on mutually acceptable terms and who are able to demonstrate an alignment of interests and strategic skills which shall support and advance the medium to long-term business case of Comair.

- 2.2 In furtherance of the Merged Entity's commitments in paragraph 2.1 above, the Merging Parties shall conclude an agreement, on mutually acceptable commercial terms, with one or more B-BBEE Purchaser/s to acquire a minority shareholding of up to [**Confidential Information Removed**] in SA Bidco, within [**Confidential Information Removed**] of the Flying Start Date.
- 2.3 In furtherance of the Merged Entity's commitments in paragraph 2.1 above, the Merged Entity shall, within a period of 12 (twelve) months from the Flying Start Date, secure the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% in SA Bidco.
- 2.4 If, at the end of the [**Confidential Information Removed**] period mentioned above (the "**First Period**"), SA BidCo has not entered into an agreement with one or more B-BBEE Purchaser/s in compliance with clause 2.2 above, then SA Bidco shall engage with the Commission in order to extend such period with the written consent of the Commission, which written consent shall not unreasonably be withheld.

EMPLOYMENT

- 2.5 The Merging Parties shall not retrench any employees as a result of the Merger for a period of three (3) years from the Flying Start Date. For the sake of clarity, the Merging Parties will be entitled to retrench the Affected Employees.
- 2.6 Comair will make offers of employment to all Affected Employees who have been retrenched when jobs become available at the new airline post-merger. This commitment will apply for a period of 36 (thirty six) months after the Flying Start Date and is subject to employees being suitably qualified.
- 2.7 For the sake of clarity, retrenchments exclude: (i) voluntary separation arrangements; or (ii) voluntary early retirement packages; (iii) unreasonable

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refusals to be redeployed in accordance with the provisions of the LRA; (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, excluding but not limited to, dismissals as a result of misconduct or poor performance; (vii) any decision not to renew or extend a contract of a contract worker; and (viii) any transfer of employees to the employment of a third party as a result of any sale of business operations, including related assets and liabilities, or any joint venture or similar business arrangements.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1 SA BidCo shall communicate in writing the Flying Start Date to the Commission within 5 (five) days of its occurrence.
- 3.2 Comair shall circulate a copy of the employment related Conditions to all of its employees and/or their employee representatives and/or relevant trade unions in South Africa within 5 (five) Days of the Approval Date.
- 3.3 As proof of compliance herewith, a director of Comair shall, within 10 (ten) Days of the circulation of the Conditions, provide the Commission with an affidavit attesting to the circulation of the Conditions and attach a copy of the said notice that was sent to the employees, the relevant trade unions and/or employee representatives.
- 3.4 SA BidCo shall submit to the Commission a progress report, within 6 (six) months of the Flying Start Date, detailing amongst other the status of the implementation of the B-BBEE initiative including the negotiations with any potential B-BBEE Purchaser/s and the steps taken to comply with condition 2.1, 2.2 and 2.3 above. This report shall be accompanied by an affidavit, attested to by a director of SA BidCo, confirming the accuracy of the report.
- 3.5 SA BidCo shall submit a report on each anniversary of the Flying Start Date, setting out its compliance with clauses 2.1, 2.2, 2.3, 2.5 and 2.6 of the Conditions, for the duration of the Conditions. This report shall be accompanied by an affidavit, attested to by a director of SA BidCo, confirming the accuracy of the report.

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3.6 SA BidCo shall inform the Commission in writing within 5 days after a legally binding written agreement with a B-BBEE Purchaser/s has been signed for the purposes of paragraph 2.2 above.

3.7 The Commission may request any additional information from the Merging Parties which the Commission from time to time might deem necessary for the monitoring of compliance with these Conditions.

4. BREACH

4.1 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of any of the above Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules For the Conduct of Proceedings in the Tribunal.

5. VARIATION

5.1 The Merging Parties and the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

6. GENERAL

6.1 All correspondence in relation to the Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.



Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date: 30 October 2020

To: Werksmans Attorneys

(Name and file number of merger:)
K2020704995 (South Africa) (Pty) Ltd And Comair Ltd (In Business Rescue)
Case No.: LM137Oct20

You applied to the Competition Commission on 1 October 2020 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: