

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

In The Large Mergers Between:

Case no: 110/LM/Nov05

Vodafone Group PLC

Acquiring Firm

And

Venfin Limited

Target Firm

AND

Case no: 111/LM/Nov05

Business Venture Investments No 951 Limited

Acquiring Firm

And

Venfin Group Finance (Pty) Ltd and others

Target Firm

Reasons for Decision

Approval

1. On 11 January 2006 the Competition Tribunal issued Merger Clearance Certificates approving the transactions between Vodafone Group Plc and Venfin Limited, as well as Business Venture Investments No 951 Limited and Venfin Group Finance (Pty) Ltd and others. Although the transactions were filed separately, they are interdependent. Both transactions were heard by the Tribunal simultaneously and will accordingly be analysed collectively. The reasons for approving the transactions follows.

The Transaction

2. The parties to the first transaction are:

- 2.1. Vodafone Group Plc ("Vodafone"), an English company, not directly or indirectly controlled by any firm.¹ Vodafone owns 35% of the issued share capital in Vodacom Group (Pty) Ltd ("Vodacom").
- 2.2. Venfin Limited ("Venfin"). Rembrandt Trust (Pty) Ltd ("Rembrandt Trust") currently holds all the B ordinary shares in Venfin the effect of which is its ability to exercise an aggregate of 46,5% of the voting rights in Venfin. According to the parties though, Rembrandt Trust does not control Venfin.² Venfin, through its

¹ Shareholders holding more than 3% of the issued share capital of Vodafone are: Bank of New York - 12.5%; The Capital Group Companies Inc. - 7.92%; Fidelity Management & Research Company - 3.52%; Legal & General Investment - 3.69%; Barclays Plc -3.65%.

² Other ordinary shares in Venfin are mostly held by institutional shareholders and private individuals.

subsidiary Venfin Telecommunication Investments Ltd, holds 15% of the issued share capital of Vodacom.³ Venfin also has the following wholly owned subsidiaries: Venfin Group Finance (Pty) Ltd ("Venfin Group Finance"), RPII Holdings Ltd, Venfin Shareholding (Pty) Ltd, Venfin Media Investments (Pty) Ltd, Venfin Technology (Pty) Ltd and Venfin Risk Services (Pty) Ltd.

3. The parties to the second transaction are:

- 3.1. Business Venture Investments No 951 Limited ("Newco"). According to the parties, Newco is likely to be controlled by Rembrandt Trust.⁴
- 3.2. Venfin's wholly owned subsidiaries listed in 2(b) above.

3. In terms of the first transaction, Vodafone will acquire all Venfin's B ordinary shares,⁵ which Rembrandt Trust holds in Venfin. In addition, Vodafone will also make a general offer to acquire all or at least 90% of the Venfin ordinary shares from the other shareholders of Venfin.

4. As a result of the first transaction, Vodafone will acquire not only Venfin's interest in Vodacom but also the various other investments of Venfin. According to the parties, Vodafone is only interested in Venfin's interest in Vodacom and the parties have therefore entered into a "sale of surplus assets" agreement, in terms of which Venfin will dispose of its other interests to Newco. This constitutes the second transaction.

5. According to the parties, Vodafone wishes to increase its interest in Vodacom.

The Merging parties' activities

6. Vodafone is a global mobile telecommunications company. Vodafone's only interest in South Africa is its 35% shareholding in Vodacom.

7. Vodacom is a national cellular telecommunications network operator. Through its subsidiary, Vodacom Service Provider Company (Pty) Ltd, Vodacom provides services such as selling and distributing cellular handsets, cellular accessories and Vodacom cellular airtime (both contract and pre-paid).

8. Venfin and its subsidiaries are investment holding companies, with interests in telecommunications,⁶ technology,⁷ media and sport,⁸ financial and risk services,⁹ as well other private equity businesses and start-up opportunities.¹⁰

³ Telkom South Africa Limited ("Telkom") owns the remaining 50% of Vodacom.

⁴ Rembrandt Trust was established to hold investments in Venfin and Remgro Ltd on behalf the Rupert family. Rembrandt Trust also controls M&I Management Services (Pty) Ltd. M&I holds 100% of M&I Group Services (Pty) Ltd.

⁵ The effect of the shareholding that Rembrandt Trust currently holds of Venfin is that it is able to exercise an aggregate of 46,5% of the voting rights in Venfin.

⁶ Through Venfin Telecommunications' interest in Vodacom.

⁷ Through Venfin Technology and Venfin Shareholding.

⁸ Through Venfin Media Investments.

⁹ Through Venfin Group Finance.

¹⁰ A detailed description of the activities of these subsidiaries can be found from page 409 of the Commission's Merger record.

9. Newco is an investment company which has been dormant and does not have any operational activities in South Africa.

Competition analysis

10. The effect of the first transaction is an increase in Vodafone's shareholding in Vodacom from 35% to 50%. Telkom South Africa ("Telkom") owns the remaining 50%. According to the parties, pre-merger, Vodafone, Telkom and Venfin exercised joint control over Vodacom.¹¹ The transaction does not lead to a change in control. Vodacom will still, post merger, be subject to joint control.
11. Furthermore, the second transaction i.e. the disposal of the surplus assets of Venfin to Newco, will not have any impact on competition in any of the markets that the parties to the second transaction are currently active in. As stated above, Newco has not operated before and according to the parties Rembrandt Trust will likely control Newco. Neither Rembrandt Trust nor its controlling shareholders control any other firm except for M&I Management Services (Pty) Ltd, which provides management and administration services to Rembrandt Trusts' subsidiaries Venfin and Remgro Ltd.¹² No vertical relationships arise as a result of the transaction.
12. In light of the above, we find that the transaction is not likely to lead to a substantial prevention or lessening of competition in any market.

Public Interest

13. The Tribunal received a last-minute objection to the merger, in the form of a joint written statement from two groupings called MYBICO¹³ and HBR¹⁴ Foundation. The objection arrived after the proceedings were due to begin. However, fortuitously, it was received by the panel minutes before the hearing actually began. The objection was nevertheless put to the merging parties, who argued that it should not be admissible. We were of the view that the written submission containing the objection should be considered despite the unprocedural manner in which it was brought. The authors of the objection did not attend the hearings and therefore did not speak to their submissions. Note that although we have agreed to consider the objection as a submission this does not mean that we have recognized the objecting parties as intervenors for the purpose of section 53 of the Act.
14. It is not easy to discern precisely what issues are being raised in the objection. However, on the face of it, it would appear to be related solely to the public interest. The nub of the issues appears in Clause 25 of the objection which reads

¹¹ This joint control arose from the fact that the shareholders needed to co-operate to pass resolutions in respect of certain strategic matters. See page 405 of the Commission's Record.

¹² The parties state as page 413 of the Commission's Record that: "*Neither Newco nor Rembrandt Trust is involved in any business activities nor do they produce any products or provide any services in South Africa which can be considered by customers as reasonably interchangeable with or a substitute for any products or services provided by any of Venfin's subsidiaries or the firms controlled by them.*"

¹³ Mzansi Youth Business In Coalition on opportunities.

¹⁴ Hola Bon Renaissance.

“Venfin has failed to place its 15 percent stake in Vodacom in an open bid and advancing a broader participation of the economy of this country but preferred to offer Vodafone a British company the sale of stake.”

15. The objectors then go on to say that the stake should be sold to *“a true BBBEE with the same or even subsidized share value of R47,25.”*
16. In terms of the Competition Act, the Tribunal does not have the power to tell parties whom they should sell to. At most, the Tribunal is empowered to prohibit a merger on the grounds listed in the Act. It is axiomatic that if the Tribunal cannot order a firm who they should sell to that it follows that a party who feels disaffected, because the seller has not sold the target firm to it, has no remedy under the merger provisions of the Competition Act on that ground. The nearest relevant provision in the Act is section 12A(3)(c) which states:

“ When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect the merger will have on ability of small firms or firms controlled by historically disadvantaged persons to become competitive.”

17. It would take an enormously ambitious reading of this provision to contend that it empowers us to require parties to sell the interest, which is the subject of the merger, not to their chosen acquirer but to a person, or class of persons, of our making. We have also previously expressed a deferential view to public interest issues in our interpretation of the Competition Act, where other instruments of regulation deal with issues. In the Shell/Tepco decision,¹⁵ the Tribunal noted that *“the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments.”* In this case, the Telecommunications Act, the ICASA Act and the ICT charter come to mind. These *inter alia* address more directly and appropriately the equity issues raised by the objectors than do the Act’s merger control provisions Accordingly, we find that the objection has no substance.

Conclusion

18. . We accordingly approve the transactions without conditions.

D Lewis

23 February 2006

Date

Concurring: N Manoim and M Mokuena

For the merging parties: A Le Grange (Hofmeyer Herbstein and Gihwala Incorporated), J Katz and R Hollingworth (Webber Wentzel Bowens)

For the Competition Commission: E Mtantato (Mergers and Acquisitions)

¹⁵ Case Number: 66/LM/Oct01.