

In the matter between:

OPTIMUM COAL INVESTMENTS (PTY) LTD

Acquiring Firm

And

OPTIMUM COLLIERY, A BUSINESS DIVISION OF

BHP BILLITON ENERGY COAL SOUTH AFRICA LTD

CHALDEAN TRADING 46 (PTY) LTD AND LITHA

RESOURCES (PTY) LTD

Target firms

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member), and
U Bhoola (Tribunal Member)

Heard on : 6 February 2008

Order issued on : 6 February 2008

Reasons issued on : 31 March 2008

REASONS FOR DECISION

Introduction

1. On 6 February 2008 the Tribunal approved the merger between the above mentioned parties.

The Parties

2. The primary acquiring firm is Optimum Coal Investments (Pty) Ltd ("OCI"), a newly formed black empowerment company which controls Optimum Coal Mine (Pty) Ltd ("OCM"), Optimum Coal Terminal (Pty) Ltd ("OCT"), and Grey Jade and

Invest 121 (Pty) Ltd. The majority shareholder of OCI is Warrior Coal Investments (Pty) Ltd (“Warrior”).¹

3. Warrior has minority interests in various firms with interests in the coal exploration industry.²
4. There are three primary target firms; the first one is Optimum Colliery (“Optimum”) which is a business division of BHP Billiton Energy Coal South Africa Ltd (“BECSA”). Optimum is active in the production of steam or thermal coal, which is a type of bituminous coal used to generate electricity or produce synthetic fuels. Eskom is the largest customer of thermal coal in South Africa which consumes approximately 62% of the thermal coal produced, followed by Sasol which consumes approximately 26%; there is then the inland market and the export market.³
5. The second target firm is Chaldean Trading 46 (Pty) Ltd (“Chaldean”)⁴, and the third target firm Litha Resources (Pty) Ltd (“Litha”)⁵, which both hold prospecting rights.

The Transaction and its Rationale

¹ Warrior holds 53.7%, Monkoe Coal Investments (Pty) Ltd hold 34.1%, and Mobu Resources (Pty) Ltd holds 12.2%.

² These include: Champion Diamond Mining (Pty) Ltd a coal company which holds rights to explore coal in Tuli coal field in the Western Musina, in which Warrior holds 48%, Holgoun Energy (Pty) Ltd an exploration company with prospecting rights in the Bela Bela region, in which Warrior holds 20%, Chaldean Trading 46 (Pty) Ltd which owns Vlakfontein deposit, in which Warrior holds 45%, African Carbon Energy (Pty) Ltd, a company set up to explore the commercialization of underground gasification technology, in which Warrior holds 49%, Canyon Springs Investments 80 (Pty) Ltd, which holds a major coal deposit in Mpumalanga province, in which Warrior holds 30%, Grey Jade Trade and Invest (Pty) Ltd which holds prospective coal mining rights in Tuli coal field in West of Musina, in which Warrior holds 49%, and Ibutho Coal (Pty) Ltd, which has applied for prospective license in Gumtreespruit in KwaZulu-Natal, in which Warrior holds 35% interests.

³ In 2007 Optimum produced approximately 11.971Mt of which 0.458 Mt was sold in the inland market out of a total of 22Mt, 6.224 Mt was sold to Eskom out of a total of 108Mt, and 5.289Mt was exported out of total exports of 68Mt.

⁴ Chaldean is controlled by Micsan Investments (Pty) Ltd (“Micson”) which holds 55% shares, and Warrior which holds 45% shares.

⁵ Litha is controlled by representatives of Kwini Family who hold 70% shares and Warrior which holds 30% shares.

6. In terms of the proposed transaction, OCI, through its subsidiary OCM, intends to acquire the coal exploration, development, mining beneficiation and transportation business from BECSA.
7. The transaction also involves a transfer of 65 000 ordinary shares which are held by BECSA in the Richards Bay Coal Terminal Company Limited (“RBCT”), to OCT, another subsidiary of OCI, which will result is OCT having the right to export 6.5 million tons of coal through RBCT (“Throughput entitlement”).
8. The merging parties entered into an agreement in terms of which post merger, firstly; BHP will retain certain rights on the mine, and will purchase the export coal produced by Optimum from OCM, render certain mining support services to OCM for a non renewable period of 12 months, and act as agent to manage OCT’s throughput entitlement which will be used for the storage and export of the Optimum mine to ensure that the mine within its first year of operation, complies with its obligations and has all the key ingredients in place to make it successful. Secondly, Warrior and Miscan will transfer all their shares in Chaldean to OCI in exchange for 180 shares in OCI (“Chaldean Agreement”), and thirdly, Warrior and Kwini family will transfer 100% of their shares in Litha in exchange for 160 shares in OCI (“Litha Agreement”).
9. According to the merging parties, this transaction is in line with BECSA’s black empowerment strategy, and BHP intends to dispose of the colliery because it does not fit its core asset list. OCI sees this transaction as an opportunity to grow a diverse portfolio of coal assets in order to generate value for its key stakeholders.

Competition Evaluation

10. The Commission found that there is no overlap in the current activities of the merging parties because although the target firm comprises both active mines

and mining rights, the acquiring firm is only the holder of mining rights that have yet to be exploited. However, because there will be amalgamation of coal mining rights, the Commission considered the effect on competition assuming the mining rights were developed into fully operational mines in the future, and found that post merger, the merged entity would have an estimated 9% market share, which is too low to raise any competition concerns.

11. In terms of the agreement, the acquiring firm is obliged to sell all its coal to BECSA, save for a certain amount reserved for the domestic customers.⁶ The Tribunal's concern was that the coal available to domestic producers is getting diverted because of the expansion of RBCT to the export market, where coal miners achieve higher prices than they do on the domestic market, and also that the acquiring firm's ability to make their own decisions regarding how best to supply, and where to supply in the domestic or export market in relation to the Optimum mine, is limited.
12. When asked about this at the hearing, the merging parties firstly said that their agreement was to ensure that BECSA fulfils its existing obligations in terms of its agreements with its existing customers in relation to coal supply. Had it not been able to honour these obligations from Optimum the merger would not have been possible. Insofar as domestic customers are concerned, the amount reserved reflects the current demand for coal for the target firms domestic customers. The major customer here is Eskom, and we were assured that Eskom's present contract with Optimum, would not be affected by the agreement and that post merger, the merged firm would have sufficient coal available to serve Eskom's needs.

⁶ The precise figure is claimed as confidential information.

13. The acquiring firm believes that this merger will increase the supply of coal in the market because the merger will give it the economies of scale and investment that make it better able to exploit the mining rights it will now enjoy.

Conclusion

14. In light of the above, we find that this merger will not result in substantial lessening or prevention of competition in the relevant market. Accordingly, we approve the merger without conditions.

15. There are no public interest issues.

N Manoim
Tribunal Member

31 March 2008

Date

Y Carrim and U Bhoola **concur** in the judgment of N Manoim

Tribunal Researcher: L Xaba

For the merging parties : Bowman and Gilfillan
For the Commission : Makgale Mohlala and Mogalane Matsimela
(Mergers and Acquisitions)