COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM144Jan20/INT130Sep20

In the application of:

Zurivision (Pty) Ltd	First Applicant
Zokusize (Pty) Ltd	Second Applicant
Paciflex Coal Mining (Pty) Ltd	Third Applicant
Tantodex (Pty) Ltd	Fourth Applicant
Inavision (Pty) Ltd	Fifth Applicant
Asabisource (Pty) Ltd	Sixth Applicant

And

Thabong Coal (Pty) Ltd	First Respondent
South32 SA Coal Holdings (Pty) Ltd	Second Respondent
Competition Commission	Third Respondent

In the large merger between:

Thabong Coal (Pty) Ltd	Primary Acquiring Firm

And

South32 SA Coal Holdings (Pty) Ltd — Primary Target Firm

Panel	: AW Wessels (Presiding Member)
	: E Daniels (Tribunal Member)
	: M Mazwai (Tribunal Member)
Heard on	: 26 October 2020
Order Issued on	: 04 November 2020
Reasons Issued on	: 04 November 2020

ORDER AND REASONS FOR DECISION

Introduction

1. On 26 October 2020, the Competition Tribunal ("Tribunal") heard an application by Zurivision (Pty) Ltd and Others (collectively referred to as "the Applicants") to be granted leave to intervene in the merger proceedings concerning the proposed transaction between Thabong Coal (Pty) Ltd ("Thabong Coal") and South32 SA Coal Holdings ("South32") (collectively referred to as "the merger parties").

2. The merger parties opposed the intervention.

3. The Competition Commission ("Commission") remained neutral in the Zurivision intervention proceedings and indicated that it would abide by the decision of the Tribunal.[1]

4. In terms of section 53(1)(c)(v) of the Competition Act 89 of 1998, as amended ("the Act"), the Tribunal has the discretion to recognise, as a participant in merger proceedings, a person that is not a party to the merger.

5. We have decided to dismiss the intervention application by the Applicants. Our reasons for doing so follow.

[1] Commission's E-mail of 2 October 2020.

Background

6. The proposed merger was notified with the Commission in late 2019. During its investigation of the merger, the Commission engaged various competitors of the merger parties, customers, trade unions and other stakeholders. The Applicants were one of the stakeholders that participated in the Commission's investigative processes. On 29 November 2019, the Applicants sent a letter to the Commission which outlined the objections by the Applicants to the proposed transaction. The Applicants' cardinal objection to the proposed transaction was their allegation that South32 has contravened the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act), the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the 2010 Mining Charter.[2] The Applicants averred that regulatory approval of the proposed transaction would constitute an illegal approval of the merger.

7. The Applicants had applied to obtain mineral rights and a mining license with the Department of Mineral Resources and Energy (DMRE) in relation to the rights for coal on Portion 2 of the Farm Geluk 276 JS (referred to as the "Pegasus Project"). The DMRE rejected the Applicants' application for the mining rights for the Pegasus Project and, subsequently, granted the mining rights for the Pegasus Project to South32. Pursuant to the granting of the mining rights to South32, the DMRE approved a section 11 application by the merger parties which allowed the control of South32 to be transferred to the owner of Thabong Coal, Seriti Resources Holdings (Pty) Ltd ("Seriti").

8. The Applicants lodged appeals with the DMRE, following its decision to reject the Applicants' applications for mining rights. The Applicants also lodged High Court proceedings against the DMRE and the merger parties in relation to the above. In essence, the Applicants allege that the regulatory approval of the proposed transaction by the DMRE was marred by irregularity and illegality. The above broadened the scope of the Applicants' objections to the proposed transaction.

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[2] Part B of the Merger Record, pg. 2584.

9. The Applicants informed the Commission that they also object to the proposed transaction on the grounds of the appeals and the High Court proceedings, and cautioned the Commission, that if it proceeds with its investigation into the merger, it must do so on the condition that its consideration of the proposed transaction will not include the disputed mining rights.[3] The Commission completed its investigation, and ultimately concluded that the Applicants' concerns are not merger specific. It recommended to the Tribunal that the proposed transaction be approved subject to a set of conditions agreed to by the merger parties.

Tribunal intervention proceedings

The Applicants arguments

10. The Applicants applied to this Tribunal to intervene in the abovementioned merger proceedings on, *inter alia*, the following grounds:
    (i) allegations of illegality and irregularity during the regulatory approval of the proposed transaction by the DMRE;
    (ii) allegations of multiple inconsistencies regarding the purported shareholding which Thabong is acquiring (owing to a misrepresentation by the merger parties);
    (iii) that the Applicants have an interest in the merger proceedings because a merger approval by this Tribunal will have a bearing on the further conduct of the litigation between the Applicants and the merger parties and the DMRE appeals;
    (iv) allegations that the Commission's merger investigation report is flawed; and
    (v) that the alleged Community Trust to be established by the merger parties may be a sham.

11. On the first point, the Applicants submitted that this Tribunal must have regard to the processes that unfolded at the DMRE and the pending High Court litigation. Further to the above, the Applicants submitted that the mere fact that the Commission engaged the DMRE during its merger investigation is enough

[3] Part B of the Merger Record, pg. 2592.

grounds to conclude that the DMRE processes and that of the Competition Authorities are interlinked. The attorney for the Applicants argued that this should be enough to grant the Applicants leave to intervene.

12. On the second point, the Applicants alleged that there were inconsistencies in the purported shareholding which Thabong intends to acquire in South32. The Applicants aver that these arise from certain misrepresentations by the merger parties. The Applicants submitted that they can help the Tribunal in its truth-seeking function in this regard.

13. On the third point the Applicants submitted that if the Tribunal approves the proposed transaction, its decision would be moot and ineffective if the High Court sets aside the DRME's approval of the proposed transaction.

14. On the fourth point, the Applicants submitted that they can assist the Tribunal in pinpointing deficiencies in the Commission's investigation. However, the Applicants did not demonstrate how they would achieve that.

15. On the last point, the Applicants aver that the inconsistencies in the purported shareholding that Thabong intends to acquire in South32 are reason to believe that a Community Trust and Employees Trust will not be established post-merger as submitted by the merger parties to the competition authorities.

The Merger Parties arguments

16. In response, the merger parties argued that despite the allegations being false, none of the arguments raised by the Applicants constitute a valid basis for intervention before the Tribunal. The merger parties argued that the High Court proceedings between them and the Applicants are irrelevant to the merger approval process under the Act, and any approval of the proposed transaction by this Tribunal under the Act will have no effect on the High Court proceedings. The competition authorities, according to the merging parties, do not have any jurisdiction to consider the issues which are subject to the High Court litigation or those that fall within the purview of the DMRE appeal processes. In addition, the

Applicants' ability to litigate on the disputed mining rights will not be affected in any way by the Tribunal's decision in relation to the proposed transaction.

17. The merger parties also stated that the allegations of inconsistencies regarding the purported shareholding that Thabong intends to acquire in South32 are false as there are no inconsistencies in their submissions. The merger parties argued that this issue is not relevant to the nature or analysis of the proposed transaction that has been notified to the competition authorities and for which the merger parties seek approval, viz., the ultimate acquisition of sole control by Seriti over South32.

18. With regards to the Tribunal's decision having a likely effect on the Applicants' High Court proceedings and the DMRE appeals, the merger parties argued that the Tribunal's consideration of this merger is not contingent on the outcome of the proceedings of the disputed mining rights, nor are those processes contingent on the outcome of these merger proceedings. Furthermore, the merger parties aver that these are distinct stand-alone regulatory processes in terms of two separate regulatory frameworks, with their own regulatory bodies and procedures and neither is contingent on the other. The fact that the proposed transaction requires the approval of both the competition authorities under the Act and the MPRDA is, therefore, no basis for any form of intervention. The merger parties contend that the concerns raised by the Applicants are neither merger specific, nor do they fall within the jurisdiction of the competition authorities under the Act. The merger parties also argued that there is no factual basis advanced by the Applicants for contending that a portion of the shares in South32 will not post merger be acquired by an Employees Trust and a Community Trust. In addition, the Applicants do not have any material interest in the precise shareholding that will be acquired by Seriti in terms of the proposed transaction. The effect of any approval by the competition authorities will merely permit Seriti to acquire (sole) control of South32 from a competition law perspective.

19. In conclusion, the merger parties aver that the Applicants do not have any legitimate concerns regarding the effects of the proposed merger on competition or on the public interest. Rather, the Applicants are seeking to abuse the merger

hearing process to advance a private commercial interest relating to its disputes with the merger parties regarding the mining rights underlying the Pegasus Project, and regarding the regulatory approval by the DMRE in respect of the proposed transaction in terms of section 11 of the MPRDA.

Applicable principles and Tribunal analysis

Principles

20. As a point of departure, it is trite in South African competition law that the mandate of the competition authorities is dual in nature. Owing to its *sui generis* nature and backed by an historical context of past imbalances, the Act allows for the Tribunal's authority in a merger consideration to transcend competition concerns and to also delve into the domain of the public interest. As such, parties who may assist the Tribunal with regards to competition and / or public interest issues in the latter's consideration of the merger transaction in terms of the Act may be admitted as intervenors.

21. In terms of section 53(1)(c)(v) of the Act, a party may only intervene in merger proceedings if it is given leave by the Tribunal to do so. The Tribunal has a discretion to grant a party leave to participate in merger proceedings. The Competition Appeal Court ("**CAC**") explained in *Anglo South Africa Capital* that this is a "*wide discretion*", which "*must be exercised judiciously or according to rules of reason and justice".*[4]

22. In terms of rule 46(1) of the Tribunal Rules, only a person that has a *'material interest in the relevant matter'* may apply to intervene in a Tribunal hearing. Rule 46(2)(b) provides in turn that the Tribunal must refuse an application to intervene "*if the [Tribunal] concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding*". It has been (<u>unsuccessfully</u>) argued by parties in previous cases that Tribunal Rule 46 limits the exercise of the Tribunal's discretion to admit a party as an intervenor, allowing only parties with a <u>material interest</u>, to intervene in proceedings. However, the CAC has ruled that:

[4] *Anglo South Africa Capital (Pty) Ltd & Others v Industrial Development Corporation of South Africa & Another* [2003] 1 CPLR 10 (CAC) at 22.

"*The requirement of material and substantial interest, which is manifestly the appropriate test for ordinary litigation, was too restrictive a test to be applied by the Tribunal in the exercise of its discretion in terms of section 53(1)(c)(v).*"[5]

23. In exercising its inquisitorial powers to consider merger transactions, the Tribunal is at liberty to institute its own investigation and call for its own evidence. In the light of this, the Tribunal is not confined to submissions or evidence placed before it by the parties to the merger or persons who have an interest in the merger.

24. In exercising its discretion as to whether or not to admit a party as an intervenor, the Tribunal may permit a third party to intervene in merger proceedings only if it has shown (i) a material and substantial interest in the matter, or (ii) that it can provide evidence of its ability to assist the Tribunal in the merger proceedings. Commercial interests or strategic aspirations are insufficient to warrant participation in merger proceedings.[6] However, a party who is unable to show a material or substantial interest in the matter may still be admitted as an intervenor if it is able to provide evidence of its ability to assist the Tribunal in its consideration of the proposed transaction. An intervention application may therefore succeed if the applicant demonstrates a genuine ability to assist the Tribunal in discharging its statutory mandate.

25. Inference or speculations will not suffice. The founding papers must detail the unique contribution that the applicant is able to make.[7]

Analysis

26. The Tribunal adopts a two-stage approach to intervention applications such as this one. It first identifies the applicant's interest and then determines the scope of the intervention, consistent with that interest.

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[5] *Community Healthcare Holdings (Pty) Ltd and another v The Competition Tribunal and others* [2005] 1 CPLR 38 (CAC) Para 28.1

[6] In *Community Health* (CAC) para 32.5, the Applicants argued that they required information to determine whether the merger would negatively impact them, this was found to be an insufficient motivation for intervention.

[7] *Community Healthcare* (Tribunal) para 56.

27. We have adopted this approach in relation to the Applicants' application to intervene.

28. Prior to the hearing, the Applicants provided the Tribunal with a draft order in which they sought:

> "*2.2 To deliver a written submission which will be limited to:*
>
> *2.2.1 the evidence that the investigations undertaken by the Commission are flawed and have been considered on incorrect facts;*
>
> *2.2.2 the evidence indicating that the conclusions and recommendations of the Commission are misdirected and unreliable;*
>
> *2.2.3 the evidence indicating the misrepresentations and falsities submitted by the merger parties in respect of this transaction;*
>
> *2.2.4 the factors that demonstrate the impact of other legislation and statutes on this transaction and the Tribunal's proceedings; and*
>
> *2.2.5 the legal basis for the pending proceedings to be stayed pending the finalisation of the litigation between the Applicants and the merger parties*."

29. However, at the intervention hearing, the Applicants abandoned the last prayer that pertains to the request to stay the merger proceedings pending finalisation of the High Court proceedings.

30. In this matter, we did not find that the Applicants made out a proper case for intervention. This is because the Applicants did not demonstrate that they have a material or any other interest in the merger proceedings involving Thabong Coal and South32. At best, the Applicants demonstrated a purely commercial interest, which, in the context of the merger, is not a sufficient ground for being granted the right to intervene. The Applicants have also failed to establish a nexus between the mining rights issues and appeals they have raised and the consideration of this merger.

31. The issue pertaining to the alleged inconsistency in the shareholding to be acquired by Thabong in South32 has been clarified by the merger parties. At the

hearing, counsel for the merger parties iterated that there has never been an inconsistency in the shareholding because the merger parties have disclosed all the relevant information regarding shareholding to the Commission from the outset. Counsel for the merger parties further submitted that even if there are inconsistencies (which there are not), this would not be an issue that warrants intervention. We agree with this averment because the nature of our competition analysis focuses on the change in control as envisaged in the Act, and of relevance to the merger proceedings is the acquisition of sole control by Seriti over South32. The Applicants have not shown how they will add value in this regard.

32. The issues of contention pertaining to the shareholding by the Community Trust (and Employees Trust) has been canvassed in the papers of the Phola Community and the merger parties. The Phola Community, as an interested party regarding the Community Trust, has since been admitted as an intervenor to deal with public interest issues that affect the communities in that region and the Community Trust. The Applicants have not shown what their interest is with regards to the Trusts. We are of the view that the Applicants are not affected parties with regards to the Trusts and therefore do not see how they will add value on this point. The Phola Community does appear to have a material interest in the proposed merger and is better placed than the Applicants to make submissions on the envisaged Community Trust and related matters.

33. We are also of the view that the issue raised by the Applicants pertaining to the High Court proceedings and DMRE processes are irrelevant to the merger proceedings which this Tribunal must consider. This is because the dispute over mineral rights and DMRE processes which the Applicants wish to intervene on have no impact on the competition assessment this Tribunal must embark upon. These issues are within the purview of the DMRE and the MPRDA. The issues raised by the Applicants on this point are not merger specific and furthermore fall outside the jurisdiction of the Tribunal and therefore cannot be considered by us.[8]

[8] *Sibanye Gold Ltd and Lonmin Plc* (LM315Mar18), at 66.

34. The Applicants have furthermore not demonstrated how they intend to assist the Tribunal in its consideration of this transaction, nor have they demonstrated how they will provide evidence proving there are flaws in the Commission's recommendation. Mere speculation or promising to uncover certain facts if admitted do not suffice in helping Applicants to be granted leave to intervene.

35. It is our view that the Applicants bear the onus to prove a nexus between their legal dispute with the merger parties and the Tribunal merger proceedings. The Applicants have not proven how the consummation of the Thabong/South32 transaction would affect them from a competition and public interest perspective. They have failed to elucidate issues that will be of significance in the consideration of the merger vis-à-vis the mineral rights disputes. In this light, one could easily infer that the Applicants are seeking to intervene in order to access some information that may give them an advantage in the High Court proceedings. The CAC in *Community Health Care*[9] has indirectly cautioned against facilitating fishing expeditions by potential intervenors. In other words, we should be wary of admitting persons who may be seeking to advance their own commercial interests.[10] The papers by the Applicants and their arguments do not indicate how the proposed merger would affect them, nor do they provide any indication of evidence that could assist this Tribunal.

36. Finally, it is also simply not clear on what basis the Applicants wish to intervene, nor is it clear how they will add value to the Tribunal's consideration of the merger.

Conclusion

37. Having failed to show either that they have a material interest in the merger proceedings or that they will be able to assist the Tribunal in its consideration of the merger, we dismiss this application.

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[9] *Community Health* (CAC).
[10] Ibid para 34.

Order

38. The intervention application is dismissed.

39. There is no order as to costs.

	04 November 2020
Mr Enver Daniels	**Date**

Mr Andreas Wessels and Ms Mondo Mazwai concurring.

Tribunal Case Managers	: Mr Kgothatso Kgobe and Ms Busisiwe Masina
Tribunal Economist	: Ms Karissa Moothoo Padayachie
For the Applicants	: Mr K Maponya
For the Merger Parties	: Adv J Wilson SC instructed by Nortons Inc. and ENS
For the Commission	: Mrs N Sakata