

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM144Jan20

In the matter between:

Thabong Coal (Pty) Ltd

Primary Acquiring Firm

And

South32 SA Coal Holdings (Pty) Ltd

Primary Target Firm

Panel : AW Wessels (Presiding Member)
: M Mazwai (Tribunal Panel Member)
: E Daniels (Tribunal Panel Member)
Heard on : 3,4,7, 9,10,17 and 18 December 2020
Decided on : 23 December 2020

NON-CONFIDENTIAL 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).

Presiding Member
Mr Andreas Wessels

23 December 2020

Date

Concurring: Ms Mondo Mazwai and Mr Enver Daniels

ANNEXURE A

MERGER CONDITIONS

IN THE MERGER INVOLVING:

THABONG COAL PROPRIETARY LIMITED

and

SOUTH32 SA COAL HOLDINGS PROPRIETARY LIMITED

CT Case Number: LM144Jan20

CONDITIONS

DEFINITIONS

The following expressions shall bear the meanings assigned to them below, and cognate expressions bear corresponding meanings:

- 1.1. **“Acquiring Firm”** or **“Thabong”** means Thabong Coal Proprietary Limited, a private company incorporated in accordance with the laws of South Africa, a wholly owned subsidiary of Seriti;
- 1.2. **“Affected Employees”** mean 25 skilled employees employed in job positions within the Merged Entity and that fall within the Paterson job grading of grade D and above. The positions [**confidential**];
- 1.3. **“Affiliate Companies”** mean companies in which Shareholders of Seriti have a stake;
- 1.4. **“Approval Date”** means the date the Tribunal issues a Clearance Certificate

(Notice CT10) in terms of the Competition Act;

- 1.5. **“Business Days”** mean any day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.6. **“Commission”** means the Competition Commission of South Africa;
- 1.7. **“Commission Rules”** mean the Rules for the Conduct of Proceedings in the Commission;
- 1.8. **“Competition Act”** means the Competition Act 89 of 1998, as amended from time to time;
- 1.9. **“Competitively Sensitive Information”** means any competitively sensitive trade, business, strategic or industrial information including but not limited to that relating to:
 - 1.9.1. pricing – including pricing related to specific products, prices/discounts/rebates offered to specific customers and planned price reductions or increases;
 - 1.9.2. margin information by product or by customer;
 - 1.9.3. cost information, including production and logistical/transportation costs;
 - 1.9.4. information on specific customers and customer strategy - including information with respect to sales’ volumes of customers;
 - 1.9.5. budgets, business plans, marketing strategies and any other strategic document containing competitively sensitive information; and
 - 1.9.6. agreements and other (non-standard) terms and conditions relating to supply and distribution.
- 1.10. **“Conditions”** mean these conditions;
- 1.11. **“Divestiture”** means the transfer of any pending or awarded prospecting right(s) and/or mining right(s) associated with the Leandra Project;

- 1.12. **“Divestiture Agreement”** means the agreement(s) to be entered into between Thabong and/or SAEC and the Purchaser;
- 1.13. **“Divestiture Period”** means a period of [confidential] from the Implementation Date;
- 1.14. **“Divestiture Trustee”** means one or more natural or legal person(s), independent of the Merging Parties, who is/are appointed in accordance with paragraph 8 of the provisions of these Conditions;
- 1.15. **“Divested Business”** means any pending or awarded prospecting right(s) and/or mining right(s) associated with the Leandra Project;
- 1.16. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.17. **“Labour Relations Act”** means the Labour Relations Act 66 of 1995 (as amended);
- 1.18. **“Leandra Project”** means the thermal coal project located approximately 100 km east of Johannesburg on the Gauteng / Mpumalanga border region and which comprises what are known as the following areas: *“Leandra Gauteng”*, *“Leandra Leeuwkop”*, *“Leandra Mpumalanga”*, *“Leandra Balance of Delmas”* and *“Leandra Winterhoek”*;
- 1.19. **“Merged Entity”** means the Target Firm, subject to the control of the Acquiring Firm;
- 1.20. **“Merger”** means the acquisition of control over the Target Firm by the Acquiring Firm;
- 1.21. **“Merging Parties”** mean the Acquiring Firm and Target Firm and their respective subsidiaries;
- 1.22. **“Mining Charter”** means the 2018 Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry promulgated in terms of section 100 of the Mineral and Petroleum Resources Development Act 28 of 2002;

- 1.23. “**Off-take Agreement**” means an agreement (on terms to be agreed) between [confidential];
- 1.24. “**Purchaser**” means the identified purchaser(s) of the Divested Business, which meet(s) the requirements set out in 7.1 and which has the technical, financial and operational capability to develop and operate the Leandra Project;
- 1.25. “**SAEC**” means South32 SA Coal Holdings Proprietary Limited, a private company incorporated in accordance with the laws of South Africa;
- 1.26. “**Seriti**” means Seriti Resources Holdings Proprietary Limited;
- 1.27. “**Seriti Coal**” means Seriti Coal Proprietary Limited;
- 1.28. “**Shareholders of Seriti**” mean Masimong Beneficiation Proprietary Limited, Kamanda Investments Proprietary Limited, Thebe SPV 011 Proprietary Limited and CIH Projects Proprietary Limited;
- 1.29. “**South Africa**” means the Republic of South Africa;
- 1.30. “**Target Firm**” means SAEC;
- 1.31. “**Tribunal**” means the Competition Tribunal of South Africa;
- 1.32. “**Tribunal Rules**” mean Rules for the Conduct of Proceedings in the Tribunal;
- 1.33. “**Trustee Divestiture Period**” means the period of [confidential] following the expiry of the Divestiture Period;
- 1.34. “**Trustee’s Mandate**” means the duties of the Divestiture Trustee as set out in the specimen **Annexure B**; and
- 1.35. “**Trustee team**” means advisors, assistants and other personnel appointed by the Divestiture Trustee to assist him or her in the execution of the Divestiture Trustee’s Mandate.

RECORDAL

- 2.1. On 10 December 2019, the Commission received a notice of the Merger. The Commission investigated the Merger and received potential public interest concerns.
- 2.2. The Merging Parties' undertakings in relation to the public interest include:
 - 2.2.1. Seriti will continue to provide an opportunity to HDP suppliers to continue to supply to it in terms of the Mining Charter.
 - 2.2.2. Seriti intends that SAEC will comply with its statutory duties in terms of the relevant provisions of the MPRDA relating to social and labour plans.

CONDITIONS TO THE APPROVAL OF THE MERGER: EMPLOYMENT

- 3.1. With the exception of the 25 Affected Employees which have been identified as being potentially duplicative, the Merged Entity shall not retrench any permanent or fixed-term contract employees of the Merging Parties as a result of the Merger for a period of 24 months from the Implementation Date.
- 3.2. For the sake of clarity, merger specific retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

CONDITIONS TO THE APPROVAL OF THE MERGER: INFORMATION EXCHANGE CONCERNS

- 4.1. For as long as the Shareholders of Seriti are entitled to appoint or nominate representatives to the board of directors of Seriti, Seriti Coal, and other Seriti

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coal operating subsidiaries and/or of SAEC they shall ensure that their respective representatives on such board(s):

- 4.1.1. are not the same person serving or appointed on any board or management committees of any holding companies and/or any Affiliate Companies of the Shareholders of Seriti which are involved/active in the supply of coal, or any other entity which may have the potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with the Target Firm; and
- 4.1.2. shall only become eligible for appointment on the board of SAEC, three years after they have resigned as a director or a member of the board or management committee in any Affiliated Companies of the Shareholders of Seriti that are active in the supply of coal.
- 4.2. The directors of SAEC, Seriti and Seriti Coal shall not disclose Competitively Sensitive Information relating to SAEC to the Shareholders of Seriti's holding companies and/or any Affiliate Companies of the Shareholders of Seriti that are involved/active in the supply of coal to Eskom or any other entity or have potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with the Target Firm.
- 4.3. The Shareholders of Seriti shall not disclose to the directors of Seriti and Seriti Coal Competitively Sensitive Information relating to any holding companies and/or any Affiliate Companies of the Shareholders of Seriti that are involved/active in the supply of coal to Eskom or any other entity or have potential (prospecting and/or mining rights) to supply coal to Eskom or any other entity in the future, in competition or potential competition with the Target Firm.
- 4.4. Every individual that serves on the SAEC, Seriti and Seriti Coal board of directors shall be required to sign a Confidentiality Undertaking giving effect to paragraph 4.2 of these Conditions.

CONDITIONS TO THE APPROVAL OF THE MERGER: THE EMPLOYEE AND COMMUNITY TRUST

- 5.1. The transaction entails the acquisition of shareholdings in SAEC by Thabong and also by an Employee Trust and a Community Trust on a “carried interest” basis as defined in the Mining Charter as follows: “...shares issued to qualifying employees and host communities at no cost to them and free of any encumbrance...”.
- 5.2. The Employee Trust shall acquire ordinary shares constituting five percent of the issued share capital of SAEC pursuant to the implementation of the Merger. No less than 85% of the benefits allocated to employees will be allocated to participants who are black persons.
- 5.3. The Community Trust shall acquire ordinary shares constituting five percent of the issued share capital of SAEC pursuant to the implementation of the Merger.
- 5.4. The beneficiaries of the Community Trust shall reside in the "Affected Areas", being the areas which are adjacent to the operational mines of SAEC and being the relevant “host communities” for the purposes of the Mining Charter (the “Affected Areas”). At least 85% of the beneficiaries will be historically disadvantaged individuals who will benefit from the trust activities (as listed in the Trust Deed of the Community Trust (the “Trust Deed”).
- 5.5. At least one of the individuals to be appointed as trustee to the Community Trust shall be a person who has been nominated by the communities in the Affected Areas (through the Community Consultative Forum structure established by Seriti/Thabong) who meets the requirements of a trustee as stipulated in the Trust Deed.
- 5.6. Thabong will procure that the trustees of the Community Trust engage with the communities in the Affected Areas (through the Community Consultative Forum structure established by Seriti/Thabong) to identify appropriate trust activities which are suitable for the Community Trust to undertake and/or fund.

- 5.7. Thabong will, within nine months of the Implementation Date, (i) procure that the trustees of the Community Trust identify the initial activities and/or projects to be undertaken for the benefit of the beneficiaries of the Community Trust and (ii) finalise, and/or procure that the trustees of the Community Trust finalise, the further appointments of trustees of the Community Trust.

CONDITIONS TO THE APPROVAL OF THE MERGER: DIVESTITURE OF THE DIVESTED BUSINESS

- 6.1. Following the Implementation Date and subject to receipt of the Commission's approval pursuant to paragraph 6.3, Thabong shall procure that SAEC shall divest the Divested Business to the Purchaser within the Divestiture Period, subject to receipt of all relevant regulatory approvals being obtained. The disposal [**confidential**].
- 6.2. In the event that any regulatory approvals have not been obtained within the Divestiture Period, including but not limited to the grant of any pending mining right/s to SAEC, then such period will be extended for a period of [**confidential**]. Should a further extension become necessary, the Commission will consider the request for a further extension, for which an approval will not be unreasonably withheld.
- 6.3. Should SAEC and/or Thabong reach an agreement in principle with a potential Purchaser to dispose of the Divested Business in terms of paragraph 6.1 above, prior to concluding the Divestiture Agreement, Thabong shall:
- 6.3.1. Submit, in writing, the name of the Purchaser together with any relevant documentation in respect of the Purchaser that the Commission may reasonably request, as well as the proposed terms of the purchase, for approval by the Commission within 15 Business Days after such submission (which approval shall not be unreasonably withheld), prior to concluding the Divestiture Agreement with the Purchaser;
- 6.3.2. in the event that the Commission rejects any proposed Purchaser, providing written reasons for such rejection, Thabong shall notify the

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Commission of another proposed Purchaser in writing, the approval of which may not be unreasonably withheld; and

- 6.3.3. the Purchaser shall provide the Commission with an affidavit deposed to by the Chief Executive Officer or Senior Official of the Purchaser confirming the accuracy of all information relating to the Purchaser.
- 6.4. If the Divestiture meets the stipulated financial thresholds, it must be notified as a merger to the Commission.

THE PURCHASER

- 7.1. The Purchaser shall be independent and shall not directly or indirectly be affiliated or related to either of the Merging Parties and shall include junior miners. In selecting the Purchaser, a Purchaser which meets the following requirements shall enjoy preference:
 - 7.1.1. employee participation (5%);
 - 7.1.2. community participation (5%);
 - 7.1.3. youth participation;
 - 7.1.4. the participation of BEE controlled junior miners (being smaller scale miners operating in the domestic market); and
 - 7.1.5. BEE female participation (5%).

THE APPOINTMENT OF THE DIVESTITURE TRUSTEE

- 8.1. Thabong shall propose to the Commission, in writing and for the Commission's consideration, a nominee to be appointed by Thabong as an independent Trustee within fifteen (15) Business Days from the Implementation Date. The Commission must approve or reject the proposed Divestiture Trustee within 10 (ten) Business Days of receipt of such nominee.
- 8.2. The Divestiture Trustee shall be an employee of an auditing firm independent of the Merged Entity that does not, at the time of appointment, provide auditing

or advisory services to the Merged Entity or its holding company, shall possess the necessary qualifications to carry out his or her mandate and shall, at the date of appointment, not be exposed to a conflict of interest.

- 8.3. The proposal shall contain such information as is necessary for the Commission to determine whether the proposed Divestiture Trustee is suitable and able to execute the Divestiture Trustee's Mandate and shall include, *inter alia*, the proposed Divestiture Trustees' contact details and curriculum vitae.
- 8.4. Should the Commission reject the proposed Divestiture Trustee, the Commission must provide written reasons explaining the rejection of the proposed Divestiture Trustee.
- 8.5. Thabong shall appoint the Divestiture Trustee within fifteen (15) Business Days of the Commission's approval of the proposed Divestiture Trustee *inter alia* on the terms contained in **Annexure B**.
- 8.6. If the proposed Divestiture Trustee is rejected by the Commission, Thabong shall submit the names of at least two (2) more proposed Divestiture Trustees within ten (10) Business Days of obtaining the reasons explaining the rejection.
- 8.7. If the Commission rejects the further proposed Divestiture Trustees, the Commission (i) must provide written reasons explaining the rejection of the proposed Divestiture Trustees and (ii) Thabong shall provide additional proposed Divestiture Trustees to the Commission.
- 8.8. Thabong shall pay the reasonable fees and expenses of the Divestiture Trustee and the Divestiture Trustee team on the terms and conditions agreed upon in writing between Thabong and the Divestiture Trustee.
- 8.9. Thabong shall provide the Divestiture Trustee with a comprehensive and duly executed power of attorney on the first Business Day after the Divestiture Trustee's appointment.
- 8.10. A certified copy of the power of attorney shall be submitted to the Commission

within ten (10) Business Days of the Divestiture Trustee's appointment.

- 8.11. The power of attorney shall enable the Divestiture Trustee to perform actions which the Divestiture Trustee considers strictly necessary or appropriate for purposes of the discharge of his or her mandate, including the power to appoint advisors and to execute the Divestiture Trustee's Mandate attached hereto.
- 8.12. The power of attorney granted to the Divestiture Trustee shall expire on the earlier of the termination of the Divestiture Trustee's Mandate or the discharge of the Trustee's duties.

THE ROLE OF THE TRUSTEE

- 9.1. The Divestiture Trustee shall ensure that Thabong complies with all its obligations in terms of the Divestiture and shall furnish the Commission with a written report in this regard on a quarterly basis from the Implementation Date.
- 9.2. The Divestiture Trustee shall have a mandate with the necessary power of attorney to effect the Divestiture as set out below and in accordance with his or her mandate as set out in **Annexure B**.
- 9.3. Thabong shall indemnify the Divestiture Trustee and the Divestiture Trustee team and hold the Divestiture Trustee and the Divestiture Trustee team harmless against any liabilities arising from the performance of the Divestiture Trustee's duties under the Divestiture Trustee's Mandate, except to the extent that such liabilities result from the wilful default, recklessness and/or negligence of the Divestiture Trustee or the Divestiture Trustee team.
- 9.4. During the Trustee Divestiture Period the Divestiture Trustee shall have an exclusive mandate to cause a disposal in terms of paragraph 10.

TRUSTEE DIVESTITURE: SALE OF THE DIVESTED BUSINESS

- 10.1. If Thabong fails to dispose of the Divested Business within the Divestiture Period (or such extensions thereof as provided for in paragraph 6.2), the Divestiture Trustee shall then dispose of the Divested Business to a

Purchaser.

- 10.2. The Divestiture Trustee will have an exclusive mandate and power of attorney to dispose of the Divested Business within the Trustee Divestiture Period, **[confidential]**.
- 10.3. The Divestiture Trustee **[confidential]**.
- 10.4. Once the Divestiture Trustee has disposed of the Divested Business within the Trustee Divestiture Period, the parties to that disposal agreement must use their reasonable commercial endeavours to ensure that the disposal agreement becomes unconditional and that the disposal is implemented as soon as practicably possible after the signature date of the agreements. This shall be included as a provision of the Divestiture Agreement.
- 10.5. The salient provisions of the Divestiture Trustee Mandate are annexed hereto marked "**Annexure B**".
- 10.6. Should the Divestiture Trustee fail to conclude a disposal in terms of paragraph 10.1, the Divestiture Trustee may apply to the Commission on good cause shown for a maximum of one (1) further period to do so, which period shall not exceed **[confidential]**. The Commission's consent to an extension may not be unreasonably withheld.
- 10.7. The Divestiture Trustee shall inform the Commission of the identity of the Purchaser mentioned in terms of paragraph 10.1 and shall:
 - 10.7.1. submit, in writing, the name of the Purchaser together with any relevant documentation in respect of the Purchaser that the Commission may reasonably request, as well as the proposed terms of the purchase, for approval by the Commission within 20 Business Days after such submission (which shall not be unreasonably withheld), prior to concluding any sale agreement with the Purchaser;
 - 10.7.2. in the event that the Commission rejects any proposed Purchaser, providing written reasons for such rejection, the Divestiture Trustee shall

notify the Commission of another proposed Purchaser in writing, the approval of which may not be unreasonably withheld; and

- 10.7.3. the Purchaser shall provide the Commission with an affidavit deposed to by the Chief Executive Officer or Senior Official of the Purchaser confirming the accuracy of all information relating to the Purchaser.

OBLIGATIONS OF THABONG IN RESPECT OF THE DIVESTITURE

- 11.1. Thabong shall comply with the following during the entire Divestiture Period in respect of the Divested Business:
 - 11.1.1. preserve and maintain the economic and competitive value of the Divested Business in accordance with good commercial practice;
 - 11.1.2. manage the Divested Business in the ordinary course of business with reasonable care and skill, pursuant to good business practices;
 - 11.1.3. not carry out any act intentionally that might negatively alter the nature and scope of the current activity or the current commercial strategy of the Divested Business; and
 - 11.1.4. provide reasonably sufficient resources for the maintenance of the Divested Business, in accordance with any approved strategic business plan during the Divestiture Period.

MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 12.1. The Merging Parties shall notify the Commission in writing of the Implementation Date within five (5) Business Days of it becoming effective.
- 12.2. The Merging Parties shall circulate a copy of the employment conditions to their employees, the trade union representatives and employee representatives within 5 (five) Business Days of the Approval Date.
- 12.3. As proof of compliance with paragraph 12.2, the Chief Executive Officer of Thabong shall within 10 (ten) Business Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the

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Conditions and provide a copy of the notices that were circulated to the employees and their employee representatives.

- 12.4. The Merging Parties shall provide a copy of the Off-take Agreement to the Commission, within 15 (fifteen) Business Days of it being concluded.
- 12.5. The Merging Parties shall submit a report on an annual basis to the Commission within 3 months after the anniversary of the Implementation Date detailing compliance with these Conditions, for the duration of these Conditions.
- 12.6. On completion of the nine month period provided in paragraph 5.7, Thabong shall, within 15 (fifteen) Business Days of completion, provide the Commission with (i) a list of the trustees appointed to the SAEC Community Trust, (ii) the initial activities and/or projects selected and (iii) a copy of the revised Trust Deed, in the event that any changes have been made to the Trust Deed.
- 12.7. Each report submitted in terms of paragraph 12.5 shall be accompanied by an affidavit of the Chief Executive Officer of Thabong confirming the accuracy of the information contained in the report and attesting to the compliance with the Conditions.
- 12.8. The Commission may, for the duration of the Conditions, request additional information on compliance with these Conditions.
- 12.9. In the event that the Commission receives a complaint regarding non-compliance by the Merged Entity with these Conditions, or otherwise determines that there has been an apparent breach by the Merged Entity, the matter shall be dealt with in terms of Rule 37 of the Tribunal Rules read with Rule 39 of the Commission Rules.
- 12.10. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

THE OFF-TAKE AGREEMENT

- 13.1. In the event that [confidential].

13.2. The [**confidential**].

VARIATION

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