



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM010Apr23

In the matter between:

Old Mutual Funeral Services Proprietary Limited

Primary Acquiring Firm

and

Two Mountains Underwriters Proprietary Limited

Primary Target Firms

Two Mountains Burial Services Proprietary Limited

Two Mountains Financial Services Proprietary Limited

Panel:	J Wilson (Presiding Member) A Wessels (Tribunal Member) T Vilakazi (Tribunal Member)
Heard on:	30 June 2023
Date of last submission:	03 July 2023
Order issued on:	03 July 2023
Reasons issued on:	19 July 2023

REASONS FOR DECISION

- [1] On 3 July 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger whereby Old Mutual Funeral Services Proprietary Limited (“OMFS”) intends to acquire sole control over (i) Two Mountains Underwriters Proprietary Limited (“TMU”); (ii) Two Mountains Burial Services Proprietary Limited (“TMBS”); and (iii) Two Mountains Financial Services Proprietary Limited (“TMFS”).

The Merger Parties and their Activities

- [2] The primary acquiring firm is OMFS. OMFS is a wholly-owned subsidiary of Old Mutual Capital Holding Proprietary Limited which is ultimately controlled by Old Mutual Limited (“OML”).
- [3] OML, together with all firms it controls, are referred to below as “the Acquiring Group”.
- [4] The Acquiring Group is a provider of financial services, including long-term insurance (e.g. life cover) and short-term insurance (e.g. motor vehicle, home contents, personal liability and building insurance) to corporate, commercial and individual clients.
- [5] Of relevance to this merger is the Acquiring Group’s provision of funeral cover. Funeral cover is a form of life insurance whereby the insured individual pays a monthly premium, and the beneficiary/ies receive a specified lump sum pay out upon the death of the insured to meet funeral expenses. The Acquiring Group does not offer burial services.
- [6] The primary target firms are TMU, TMBS and TMFS (collectively, the “Target Firms”). The Target Firms are controlled by Two Mountains Holdings Proprietary Limited (“TMH”). TMH is ultimately owned and controlled by the [REDACTED].
- [7] TMU is a micro-insurer which is licensed under the Insurance Act¹ to offer only micro-insurance business offerings for funeral insurance. Micro-insurance includes life insurance policies capped at R100 000 per policy, and short-term insurance product offerings capped at R300 000 per policy. TMU designs these insurance products, and pays claims that enable beneficiaries to purchase burial services.

¹ Act No 18 of 2017.

[8] TMFS is a financial service provider which is licensed to render certain advisory and intermediary services under the Financial Advisory and Intermediary Services Act.² TMFS acts as TMU’s intermediary and sells funeral policies on its behalf.

[9] TMBS provides burial services. TMBS offers various burial service packages, including, *inter alia*, (i) delivery; (ii) storage and collection; (iii) hearse services; (iv) cremation; and (v) repatriation. TMBS has over 300 vehicles and mortuary facilities.

Transaction and rationale

[10] In terms of the proposed transaction, OMFS will acquire █████ of the shares in, and sole control of, the Target Firms from TMH. The remaining █████ of the shares in the Target Firms will be retained by TMH.

[11] OMFS submitted that it wishes to enter the burial services sector in order to offer a complementary offering to its funeral cover customers. As noted above, the Acquiring Group currently does not provide burial services.

[12] █████
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Competition Assessment

Assessment of potential unilateral effects

[13] The Competition Commission (“Commission”) considered the activities of the merging parties and found a horizontal overlap between them in the supply of life insurance (i.e., long-term insurance) and, more specifically, the provision of

² Act No 37 of 2002.

funeral cover to individuals. This is because the Acquiring Group, through OMFS, is active in the provision of funeral cover, whilst the Target Firms, through TMU and TMFS, also offer funeral cover. However, whilst OMFS provides funeral cover under a long-term insurance licence, TMU provides funeral cover under its micro-insurance licence.

- [14] In assessing the relevant market, the Commission had regard to previous mergers in which it was found that there is a broad national market for the provision of long-term insurance, which can potentially be further delineated into separate sub-markets based on the specific type of products and/or customers.³
- [15] In the present case, without taking a definitive view on market definition given the lack of concerns raised, the Commission assessed the impact of the merger on the provision of funeral cover, as this is the narrowest area of overlap between the merging parties' activities. Having regard to the fact that the merging parties and their competitors provide funeral cover throughout South Africa, the Commission assessed this market on a national basis.
- [16] The Commission proceeded to estimate the relative size of the merging parties, and their competitors, in the national provision of funeral cover. This analysis was based on data from the Prudential Authority regarding the Rand amount of funeral insurance premiums underwritten by each insurer. However, because this data relates only to long-term insurers and does not include micro-insurers, the Commission included TMU's revenue relative to the total size of the market to calculate the relative size of the Target Firms (on a 'worst case scenario' basis). This analysis indicated that the merged entity will have a market share of less than ■■■ in the provision of funeral cover, with an accretion of less than ■■■.
- [17] The Commission found further that there are over 60 suppliers of funeral cover nationally, with the largest suppliers being AVBOB (approximately 25%),

³ See, e.g., *Metropolitan Holdings Limited/ Momentum Group Limited* (Tribunal case number 41/LM/Jul10).

Centriq Life Insurance Company Limited (approximately 20%) and Assupol Life (approximately 15%).

[18] Having regard to the low market shares of the merging parties, the low accretion in market share brought about by the merger, and the number of alternative funeral cover providers (and their relative size), the Commission concluded that the merger is unlikely to result in substantial unilateral effects in the provision of funeral cover.

[19] Based on the above facts, we agree with the Commission's assessment in this regard.

Assessment of vertical/ bundling effects

[20] The Commission also considered whether the merger might give rise to vertical or bundling concerns given the relationship between funeral cover and burial services. The Commission ascertained that, in terms of the Long-term Insurance Act,⁴ a provider of funeral cover is not permitted to prescribe that any lump sum payment will be paid to a burial service provider, and that the beneficiaries have the sole discretion to determine how the lump sum payment is spent. Conversely, burial service providers do not require funeral cover as an input for the provision of their burial services.

[21] However, the Commission also found that it is a feature of the funeral industry that the major providers of burial services provide both funeral cover and burial service offerings, and that the two are often marketed together. The Commission therefore investigated whether the merger might give rise to bundling or foreclosure concerns.

[22] As regards the provision of funeral cover, the Commission found that the merged entity will have a market share of less than ■■■, and that there are numerous alternative providers (as set out above). As regards the provision of burial services, the Commission found that the market is highly fragmented and

⁴ Act No 52 of 1998.

has a large number of competitors, including both formal providers (the largest of which are AVBOB, Doves, Martins and Mosaic) and informal providers.

[23] Considering the numerous available alternatives, the Commission concluded that the merged entity is unlikely to be able to exercise market power either in the provision of funeral cover or in the provision of burial services post-merger.

[24] It is unclear to the Tribunal whether the geographic dimension of the burial services market should be defined nationally or more narrowly (e.g., regionally or locally). However, irrespective of what geographic market definition is applied, it does not appear that the proposed merger raises any vertical or bundling concerns given the wide number of providers involved in each market.

[25] Having regard to the above facts, the Tribunal agrees with the Commission's conclusion that the proposed merger is unlikely to give rise to a substantial prevention or lessening of competition in any relevant market. It is unnecessary for the Tribunal to conclude on the precise definition of the relevant markets for purposes of this assessment.

Public Interest

Effect of the proposed transaction on employment

[26] The merging parties submitted that the merger will not have any negative employment effects. In addition, the employee representatives of the Acquiring Group and the Target Firms stated that their respective employees had not raised any concerns regarding the proposed transaction.

[27] [REDACTED]

⁵ Act No 66 of 1995.

[REDACTED]

[28] [REDACTED]

[29] This notwithstanding, the Commission was concerned, in the light of the above restructuring process, that the merged entity might engage in further retrenchments post-merger. The Minister of Trade, Industry and Competition (the “Minister”) raised similar employment concerns and proposed a 36-month moratorium on post-merger retrenchments.

[30] To address these employment concerns, the parties and the Commission agreed to the following conditions, which the Minister confirmed also addressed his concerns:

- a. A three-year moratorium on merger-specific retrenchments;
- b. The introduction by the Target Firms, within [REDACTED] of the implementation date of the merger (the “Implementation Date”), of medical aid cover for employees of the Target Firms in line with the policies of the Acquiring Group; and
- c. Alignment by the Target Firms of their relevant internal human capital policies with those of the Acquiring Group within [REDACTED] of the Implementation Date.

Effect of the proposed transaction on the promotion of a greater spread of ownership

[31] The Commission found that, currently, 43.14% of the shares in OML are held by historically disadvantaged persons (“HDPs”), whilst the Target Firms are ultimately ██████ HDP owned (by Mr Masekwameng). As such, the Commission found that the proposed transaction will result in a dilution of ██████ in the HDP ownership of the Target Firms.

[32] The Minister also expressed concerns that the proposed transaction will result in the exit of a medium-sized HDP business from the market. The Minister therefore requested the Commission to engage with the merging parties with a view to including, in the Commission’s recommendation to the Tribunal, the following commitments to remedy these concerns:

- a. provision of ██████ capital expenditure in the opening of new burial parlours and vehicles;
- b. implementation of an employee share ownership plan (“ESOP”) for the benefit of workers of the Target Firms; and
- c. implementation of specific initiatives to promote HDP operators, especially small- and medium-sized businesses (“SMEs”) owned by black women and other designated groups, as new entrants into the sector.

[33] The merging parties were not amenable to the creation of an ESOP or creating an HDP transaction and submitted that such a condition was not warranted in this case because such an approach would limit the ability of HDP shareholders to realise and/or grow their investments. However, the merging parties were prepared to accept the following merger conditions, on a good faith basis, in order to address the concerns raised by the Commission and the Minister:

- a. In order to support SMEs in the funeral services sector supply chain, particularly those owned by black women and other designated groups,

the Target Firms shall, for a period of [REDACTED] from the Implementation Date, procure at least [REDACTED] of the goods and services it requires for its business from any such local SMEs, provided that the relevant goods and services are available and of sufficient quality, and that it is commercially viable to do so, and that the goods and services can be sourced on competitive terms;

- b. The Target Firms commit to investing [REDACTED] capital expenditure in relation to the Target Firm's facilities and operations over a period of [REDACTED] from the Implementation Date;
- c. The Target Firms will, within [REDACTED] of the Implementation Date, introduce medical aid cover for employees of the Target Firm in line with the policies of the Acquiring Group; and
- d. The Target Firms will, within [REDACTED] of the Implementation Date, align their relevant internal human capital policies with those of the Acquiring Group.

[34] The Commission and the Minister were both amenable to these commitments as satisfactorily addressing their HDP ownership concerns.

[35] In the circumstances, the Commission has recommended the approval of the proposed merger subject to the agreed employment and HDP ownership conditions referred to above.

The Tribunal's assessment

[36] The Tribunal agrees that the employment and HDP ownership conditions referred to above satisfactorily address, in substance, the concerns raised by the Commission and the Minister in that regard.

[37] However, the Tribunal sought clarity on certain elements of the proposed conditions, including (i) the meaning of certain terms in the proposed conditions; (ii) the minimum time period necessary for the alignment of the relevant internal

human capital policies of the Target Firms with those of the Acquiring Group; and (iii) the basis for the value of the capital expenditure commitment agreed by the parties.

[38] Having regard to the responses received from the Commission and the merging parties, the Tribunal clarified and refined the proposed conditions in the manner reflected in the final conditions attached to this merger approval marked “A”.

Conclusion

[39] The Tribunal concludes that the proposed merger is unlikely to lead to a substantial prevention or lessening of competition in any relevant market.

[40] As regards the public interest concerns raised by the Commission and the Minister, the Tribunal considers that these are satisfactorily addressed by the employment and HDP conditions attached hereto marked “A”.

[41] The Tribunal therefore approves the proposed merger subject to the conditions attached hereto marked “A”.

Signed by:Jerome Wilson
Signed at:2023-07-19 11:32:58 +02:00
Reason:Witnessing Jerome Wilson

Jerome Wilson

Presiding Member
Adv. Jerome Wilson SC

19 July 2023

Date

Concurring: Mr Andreas Wessels and Dr Thando Vilakazi

Tribunal Case Managers:	Mpumelelo Tshabalala and Sinethemba Mbeki
For the Competition Commission:	Nolubabalo Myoli, Wiri Gumbie and Tamara Paremoer
For the Merger Parties:	Xolani Nyali, Sivuyise Lutshiti and Kayla Abrahams of Bowmans Attorneys

ANNEXURE A

OLD MUTUAL FUNERAL SERVICES PROPRIETARY LIMITED

and

TWO MOUNTAINS UNDERWRITERS PROPRIETARY LIMITED, TWO MOUNTAINS BURIAL SERVICES PROPRIETARY LIMITED AND TWO MOUNTAINS FINANCIAL SERVICES PROPRIETARY LIMITED

CASE NUMBER: LM010Apr23

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meaning assigned to them below and cognate expressions bear a corresponding meaning -

- 1.1.1. **"Acquiring Firm"** means Old Mutual Funeral Services Proprietary Limited;
- 1.1.2. **"Acquiring Group"** means Old Mutual Limited together with all firms forming part of the Old Mutual group of companies;
- 1.1.3. **"Approval Date"** means the date referred to on the Tribunal's merger Clearance Certificate (Notice CT10) in terms of the Competition Act;
- 1.1.4. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.5. **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission.
- 1.1.6. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.1.7. **"Conditions"** means these conditions, and "Condition" means, as the context requires, any one of them;

- 1.1.8. “**Days**” means any calendar day other than a Saturday, a Sunday or an official public holiday in South Africa;
- 1.1.9. “**Historically disadvantaged persons**” means persons as defined in section 3(2) of the Competition Act;
- 1.1.10. “**Implementation Date**” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.1.11. “**Merger**” means the acquisition of sole control of the Target Firms by the Acquiring Firm;
- 1.1.12. “**Merging Parties**” means the Acquiring Firm and the Target Firms;
- 1.1.13. “**Moratorium Period**” means 36 months from the Implementation Date and includes the period between the Approval Date and the Implementation Date;
- 1.1.14. “**Relevant Internal Human Capital Policies**” means the human capital policies of the Acquiring Group which are applicable to the Target Firms, including those relating to (i) remuneration, (ii) medical aid cover, (iii) learning, development and training, and (iv) other benefits (e.g., leave entitlements, and wellness and reward benefits);
- 1.1.15. “**South Africa**” means the Republic of South Africa;
- 1.1.16. “**SMME**” means a small, medium, or micro enterprise as contemplated in the National Small Enterprise Act, No. 102 of 1996;
- 1.1.17. “**Target Firms**” means (i) Two Mountains Underwriters Proprietary Limited, (ii) Two Mountains Burial Services Proprietary Limited and (iii) Two Mountains Financial Services Proprietary Limited;
- 1.1.18. “**Tribunal**” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and
- 1.1.19. “**Tribunal Rules**” mean the Rules for the Conduct of Proceedings in the Tribunal.

CONDITIONS

2. Employment

- 2.1. The Merging Parties shall not retrench any employee as a result of the Merger, for the duration of the Moratorium Period.
- 2.2. For avoidance of doubt, 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, 66 of 1995; (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.

3. Benefits alignment

- 3.1. The Target Firms are to introduce medical aid cover in line with the policies of the Acquiring Firm for employees of the Target Firms within [REDACTED] of the Implementation Date.
- 3.2. The Relevant Internal Human Capital Policies of the Target Firms shall be aligned with those of the Acquiring Group within [REDACTED] of the Implementation Date.

4. SMME Support

- 4.1. In order to support SMMEs in the funeral services sector supply chain, particularly those owned by historically disadvantaged persons, the Target Firms shall, over a period of [REDACTED] from the Implementation Date, procure at least [REDACTED] of the goods and services required for their businesses from any such local SMMEs, on commercially reasonable terms.

5. Target Firms' Expansion

- 5.1. The Target Firms commit to investing [REDACTED] in capital expenditure in relation to the Target Firms' facilities and operations over a period of [REDACTED] from the Implementation Date.

6. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 6.1. The Acquiring Firm shall inform the Commission in writing of the Implementation Date within 5 (five) Days of it becoming effective.
- 6.2. The Target Firms shall circulate a copy of the Conditions to all their respective employees and employee representatives within 5 (five) Days of the Approval Date.
- 6.3. As proof of compliance with clause 6.2, the Target Firms shall within 30 (thirty) Days of circulating the Conditions, submit to the Commission an affidavit deposed to by a senior official of the Target Firms, attesting to the circulation of the Conditions and providing the necessary documentary evidence.
- 6.4. The Target Firms shall, on the first to the third anniversary of the Implementation Date, submit a report confirming compliance with the condition in clause 2.
- 6.5. The Target Firms shall, on the [REDACTED] of the Implementation Date, submit a report confirming compliance with the condition in clause 3.1.
- 6.6. The Target Firms shall, on the [REDACTED] of the Implementation Date, submit a report confirming compliance with the condition in clause 3.2.
- 6.7. The Target Firms shall, on the [REDACTED] of the Implementation Date, submit a report confirming compliance with the condition in clause 4.1.
- 6.8. The Target Firms shall, on the [REDACTED] of the Implementation Date, submit a report confirming compliance with the condition in clause 5.1.
- 6.9. Each report submitted in terms of paragraphs 6.4 to 6.8 shall be accompanied by an affidavit deposed to by a senior official of the Target Firms, confirming the accuracy of the information contained in the report and attesting to compliance with the Conditions.
- 6.10. The Commission may request any additional information from the Merging Parties, which the Commission from time to time may deem necessary for purposes of monitoring the extent of compliance with these Conditions.

7. APPARENT BREACH

- 7.1. Should the Commission receive 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 these Conditions, the breach shall be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

8. VARIATION

- 8.1. The Merger Parties and/or the Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be lifted, revised or amended.

9. GENERAL

- 9.1. All correspondence in relation to the Conditions must be submitted to the following e-mail addresses: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.