**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**Case No.:** LM034May24

In the matter between:

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| Liquid Cartons (Pty) Ltd | **Primary Acquiring Firm** |
| And | |
| Nampak in respect of Nampak's Liquid Cartons business | **Primary Target Firm** |

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| Panel | : | Liberty Mncube (Presiding Member) |
| | : | Imraan Valodia (Tribunal Member) |
| | : | Geoff Budlender (Tribunal Member) |
| Heard on | : | 30 July 2024 |
| Order issued on | : | 30 July 2024 |
| Reasons issued on | : | 22 August 2024 |

**REASONS FOR DECISION**

**Introduction**

[1] On 30 July 2024, the Tribunal approved a large merger wherein Liquid Cartons ("LC") intends to acquire the Liquid Cartons Business carried on by Nampak Products Ltd ("the Target Business") from Nampak Products Ltd ("Nampak").

[2] In terms of the Sale of Business Agreement, read together with the Implementation Agreement[1], LC will purchase the Target Business from Nampak as a going concern. Post-merger, LC and in turn, DLP will have sole control over the Target Business. Through DLP, Corvest 15 and Dlondlobala will have joint control over the Target Business.

[1] Between Nampak, Nampak International Ltd, Nampak Southern Africa Holdings Ltd, Transmar (Isle of Man) Ltd, Corvest 15, DLP, and LC.

**Parties and their activities**

*Primary Acquiring Firm*

[3] The primary acquiring firm is Liquid Cartons ("LC"), LC is a newly incorporated company and currently does not conduct any business activities. DLP is a special purpose vehicle (SPV) whose principal business will be to hold 99.99% of the shares in Nampak Zambia, 100% of the shares in Nampak Malawi and 100% of the shares in LC. LC, DLP and the firms that control them shall be referred to as the ("Acquiring Group").

[4] DLP is in turn controlled by Corvest 15 (Pty) Ltd. Corvest 15 is one of numerous SPVs controlled by RMB Corvest 2 (Pty) Ltd ("RMB Corvest"). RMB Corvest is a private equity firm which offers, inter alia, funding packages for medium to large leveraged buy-outs and buy-ins, management buy-outs and buy-ins and growth capital solutions. RMB Corvest is ultimately controlled by First Rand, a financial services group which provides a range of financial products including lending, investments and insurance products. FirstRand is listed on the Johannesburg Stock Exchange and is not controlled by any firm.

[5] Dlondlobala is an investment holding company. It is a private equity fund manager that invests in mid-size BEE related opportunities, buy-outs and growth capital investments.

*Primary Target Firm*

[6] The primary target firm is the paper, liquid cartons business ("Target Business") carried on by Nampak Products (Ltd) ("Nampak"). The Target Business is an unincorporated division of Nampak and is comprised of the manufacturing, selling and supplying of paper liquid packaging products including Conipak in South Africa and Botswana, and Pure-Pak in South Africa, Swaziland, and Burkina Faso. Pure-Pak liquid cartons are straight sided cartons used for the packaging of dairy products such as milk, yoghurt and maas, and mageu blends among others (which

are available in 250ml to 2L sizes and generally fresh/extended shelf-life products). Conipak cartons are 1L cone shaped cartons used for the packaging of wet based, fresh traditional or sorghum beer (with a shorter shelf-life of 5-7 days).

**Rationale**

[7] [redacted]. For Nampak, the proposed transaction is in line with its strategic plan to dispose of its non-core assets and to focus on its metal cluster businesses.

**Competition analysis**

[8] In assessing the transaction, the Commission found that there is neither a horizontal nor vertical overlap between the merging parties' activities. The Acquiring Group does not conduct any paper liquid packaging activities in competition with the Target Business.

[9] In addition, the Commission engaged 4 of the 5 biggest customers of the Target Business and 3 of them confirmed that they have no concerns with the merger.

[10] The Commission received a concern from United National Breweries ("UNB"), a customer of the Target Business. UNB is concerned that the merger will enable UNB's competitor, My Urban Africa ("MUA"), to obtain access to UNB's competitively sensitive information such as UNB's volumes packaged by the Target Business. UNB alleges that this concern will arise due to MUA's owner, Mr Perryman, becoming a director and shareholder of the Acquiring Group. UNB is the largest national manufacturer and supplier of sorghum beer and procures paper liquid packaging from the Target Business. MUA is a microbrewery manufacturing and supplying sorghum beer from Gqeberha.

[11] To address this concern, the parties have agreed to a condition ensuring that any director or employee of the Acquiring Firm with access to any competitively sensitive information of UNB, will sign a confidentiality undertaking not to disclose or use that information outside of the Target Business. UNB has confirmed that it is satisfied with this outcome.

[12] We are satisfied that the measures put in place in the conditions address the concerns raised.

*Conclusion on the competition assessment*

[13] We do not believe that the merger is likely to result in a substantial lessening of competition within any of the relevant markets in South Africa.

**Public interest**

*Effect on Employment*

[14] The merging parties provided an unequivocal undertaking that the merger will not result in any employment loss. This was corroborated by the Commission's interactions with the relevant union, CEPPWAWU.

[15] The Commission noted that Nampak has been experiencing financial losses over several years. These losses have been widely publicised and amounted to approximately R[redacted] for the financial year ended September 2023. Consequently, since August 2023, Nampak retrenched employees across its various business divisions for operational requirements i.e., reducing labour costs. It was further noted whilst Nampak effected retrenchments across its operations, there were no pre-merger job reductions at the Target Business. However, Nampak submitted that the sale of non-core assets such as the Target Business, is an integral part of its turnaround strategy to return to profitability.

[16] Although Nampak has been experiencing financial losses, the Commission notes that the Target Business is cash generative and profit-making. However, the Target Business is a non-core asset as it is part of the paper and liquid plastics divisions which Nampak has been disposing to focus on its metal packaging activities. Further, Nampak needs to dispose of its non-core businesses for its restructuring efforts and to meet credit commitments made to its funders. [redacted]

[17] In its assessment, the Commission was of the view that the counterfactual if the merger does not proceed was likely to be the closure of the Target Business which could result in approximately 118 job losses.

[18] Notwithstanding this we note that the Commission and the parties have agreed to a condition of a 3-year moratorium on merger related retrenchments.

*Effect on a greater spread of ownership*

[19] The Minister of Trade, Industry and Competition ("DTIC") notified the Commission of its intention to participate in the proposed transaction. The DTIC requested the Commission to engage the merging parties with regards to implementing an ESOP of at least 5% for the benefit of its South African employees within 36 months; and specific initiatives that are incremental and further promote B-BBEE in its supply chain and support for historically disadvantaged persons, especially small and medium sized businesses owned by black women and other designated groups.

[20] The DTIC's concerns were based on the fact that Nampak's latest B-BBEE certificate records a black economic interest of [redacted]%. Thus, the DTIC considers that the Target Business has higher HDP ownership than the Acquiring Group by virtue of this level of black economic interest. Consequently, the DTIC considers that the proposed merger results in a dilution of HDP ownership.

[21] The merging parties submitted that there is a substantial increase in HDP ownership arising from the proposed transaction. In particular, the level of HDP ownership at the Target Business will increase from [redacted]% to at least, approximately [redacted]%. This they submit is because the B-BBEE certificate referenced by the DTIC, does not contain details of HDP (i.e. black) ownership. Rather, the B-BBEE certificate indicates levels of black economic interest and voting rights attributable to Nampak from its compliance with the relevant provisions of the BBBEE Act.

[22] The Commission considered that section 12A(3)(e) of the Act requires ownership by, amongst others, HDPs as contemplated by section 3(2) of the Act. This would contemplate, for instance, ownership by means of shareholding in a firm. In this instance, the Commission found that whilst Nampak's latest B-BBEE certificate reflects black economic interest levels of [redacted]% and black voting rights of [redacted]%, that same certificate clearly states that Nampak is not [redacted]% black owned. However, the B-BBEE certificate does not reflect the levels of black ownership at Nampak. The Commission's investigation ascertained that the levels of HDP ownership is [redacted]% as attested to by Empowerlogic, Nampak's B-BBEE accreditation body.

[23] The B-BBEE Commission confirmed that the level of black ownership does not necessarily correlate with a firm's level of black voting rights or economic interest. That is because the BBBEE Act facilitates not only ownership by black persons (HDPs as contemplated by the Act) but also recognises initiatives that promote or facilitate participation by those persons in the economy. For instance, the B-BBEE Act provides that a firms can derive black ownership credentials from its management or in some instances, a firm with 51% black ownership, can be deemed to be 100% black owned.

[24] Considering the above submissions, we are in agreement with the Commission's assessment that the proposed transaction may result in the promotion of a greater spread of ownership indirect by HDPs in the Target Business, from [redacted]% to [redacted]%. Further, we accept that the merger will not impact the level of HDP ownership at Nampak as same will remain unchanged post-merger.

[25] We are satisfied that since the Target Business is considered non-core, the HDP shareholders of Nampak will benefit from this sale as same is part of Nampak's turnaround strategy.

*Other public interest considerations*

[26] We received no evidence or submissions that the proposed transaction raises other public interest considerations.

*Conclusion on the public interest assessment*

[27] No third parties, whether customers or competitors, expressed concerns about this aspect of the proposed merger.

[28] We conclude that the proposed transaction is justifiable on public interest grounds.

**Conclusion**

[29] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and is justifiable on public interest grounds.

[30] We therefore approve the proposed transaction with conditions as set out in **Annexure A**.

Signed by:Liberty Mncube
Signed at:2024-08-22 11:18:50 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

**22 August 2024**

**Presiding Member**
**Prof. Liberty Mncube**

**Date**

**Concurring: Prof. I Valodia and Adv. G Budlender**

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| Tribunal Case Manager: | Princess Ka-Siboto |
| For the Merger Parties: | Paul Cleland, Seroshan Padayachy and Kwanele Diniso of Werksmans and Lucinda Verster of Fairbridges Wertheim Becker |
| For the Commission: | Kgothatso Kgobe and Wiri Gumbie |