

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM041Jun15

In the matter between:

Pembani Group Proprietary Limited

Primary Acquiring Firm

And

Shanduka Group Proprietary Limited

Primary Target Firm

Panel	:	Norman Manoim (Presiding Member), Andiswa Ndoni (Tribunal Member) Yasmin Carrim (Tribunal Member)
Heard on	:	19 August 2015
Order issued on	:	19 August 2015
Last submissions on	:	17 September 2015
Reasons issued on	:	18 September 2015

Reasons for Decision (Public version)

Approval

- [1] On 19 August 2015 the Competition Tribunal ("Tribunal") conditionally approved the large merger between Pembani Group Proprietary Limited (Pembani") and Shanduka Group Proprietary Limited ("Shanduka Group"). The reasons for approving the transaction follow.

Parties to the transaction

- [2] The primary acquiring firm is Pembani an investment holding firm, which holds both controlling and minority shareholdings in a number of subsidiaries in South Africa. Pembani is ultimately controlled by Mr Phutuma Nhleko ("Mr Nhleko") and companies under his control ("Nhleko Entities"), and Old Mutual Life Assurance Company (South

Africa) Limited ("OMLACSA")¹. As a result of their control in Pembani, the Nhleko Entities and OMLACSA² are also acquiring firms in the proposed transaction, along with Pembani Development Trust ("PDT"), Lexshell 849 (Pty) Ltd ("Lexshell 849"), Jadeite (Pty) Ltd ("Jadeite"),³ Standard Bank of South Africa Limited ("Standard Bank")⁴ and Micawber 799 (Pty) Ltd ("Micawber 799"). Micawber has a shareholding in Shanduka Group.

- [3] Pembani has non-controlling interests in various companies, with a primary focus on oil, gas and mineral resources sectors. Of relevance to the proposed transaction, as we discuss later, is Pembani's 6% shareholding interest in BHP Billiton Energy Coal South Africa Proprietary Limited ("BECSA").⁵ BECSA is active in the production and sales of thermal coal in South Africa. Pembani also has an approximate 1% shareholding interest in Exxaro Resources Limited ("Exxaro") and controlling interests in Pembani Coal Carolina (Pty) Ltd ("PCC"), Afric Oil (Pty) Ltd ("Afric Oil") and AfriSam Group (Pty) Ltd ("AfriSam").
- [4] The primary target firm is Shanduka Group, which is the holding company for Shanduka Restaurants (Pty) Ltd ("Shanduka Restaurants") and Shanduka Resources (Pty) Ltd ("Shanduka Resources"). The merger has different consequences for these two subsidiaries.
- [5] Shanduka Restaurants holds a single investment; a 100% shareholding in McDonald's South Africa (Pty) Ltd ("McDonald's SA") the well-known fast food outlet. This stake will remain the only asset retained post-

¹Mr Nhleko controls Pembani as a result of his direct and indirect shareholding in Pembani, his indirect shareholding being through Micawber 766 Proprietary Limited ("Micawber 766") and Richtrau Number 94 Proprietary Limited ("Richtrau"). Micawber 766 and Richtrau are special purpose ring-fenced entities that do not conduct any business activities other than holding shares in Pembani.

² OMLACSA is a registered financial services provider, which provides a variety of products and services, including long-term and short-term insurance products, financial planning products and services, investment and asset management services and fund administration.

³ Jadeite is a subsidiary of the Chinese Investment Corporation, a sovereign wealth fund of the People's Republic of China.

⁴ Standard Bank is a wholly-owned subsidiary of Standard Bank Group Limited, which is listed on the JSE, and is a leading provider of financial services.

⁵ This interest is held through a special purpose vehicle, Newshelf 1129 (Pty) Ltd ("Newshelf"). Pembani holds 75% of Newshelf which in turn holds 8% of BECSA. Newshelf can thus nominate one director and one alternate director to the BECSA board.

merger by the Shanduka Group although Pembani will acquire a non-controlling interest in the Shanduka Group.⁶For ease of reference we have attached to these reasons a post-merger diagram of how the holdings change in respect of McDonald's SA marked Annexure "B".⁷

[6] Shanduka Resources is invested in a wide portfolio of listed and unlisted companies ranging from resources, financial services, energy and telecommunications amongst others. Some of these interests are purely investment stakes whilst others allow Shanduka or its subsidiaries to control or jointly control underlying operating companies. At the hearing the merging parties identified the following companies as one's where the merger would lead to a change of control or joint control, namely The Coca Cola Shanduka Beverages, Shanduka Coal Proprietary Limited ("Shanduka Coal"), McDonald's SA, McDonald's Property Portfolio, Diepkloof Square, 18 Acacia Road, Chislehurst, Icon House, Ghana, Attacq (Atterbury), Mondi Shanduka Newsprint ("Mondi Shanduka") Zebediela Platinum Exploration Project and Incwala Resources.⁸

[7] In respect of one of the operating companies, Mondi Shanduka, we were advised at the hearing that although Shanduka holds a 42% stake in it, this is not a controlling stake and the company is controlled by Mondi.

[8] For competition analysis purposes, of relevance to the proposed transaction is Shanduka Resources' coal mining interest in Shanduka Coal, which also has mining interests in various companies that are active in the mining and sale of coal. These companies are namely: Kangra Coal Proprietary Limited ("Kangra"), Graspan Colliery (Pty) Ltd ("Graspan"), Wakefields Investments (Pty) Ltd ("Wakefields"), Springlake Holdings (Pty) Ltd ("Springlake Holdings"), Springboklaagte Mining (Pty) Ltd ("Springboklaagte") and Dialstat Trading 115 (Pty) Ltd ("Dialstat"). The other firms relevant to the proposed transaction is Lexshell 849

⁶ The Shanduka Group shareholding will be held as follows;[CONFIDENTIAL

INFORMATION.....]

⁷ This Annexure is omitted from the public version as it contains confidential information.

⁸ See pages 10-13 of the transcript of hearing.

(Pty) Ltd ("Lexshell 849), a special purpose investment-holding vehicle for the empowerment shareholdings in Umcebo Mining (Pty) Ltd ("Umcebo") and Optimum Coal Holdings Ltd ("Optimum"). Lexshell 849 does not conduct any operational business.

Proposed transaction and rationale

- [9] The proposed transaction, which will take place through a series of repurchase, dilution, share exchanges and subscription agreements, involves the acquisition by Pembani of Shanduka Group's shareholding and loan claims in a portfolio of investments held by Shanduka Group. The proposed transaction will take place in three steps. We have not burdened this decision with the details of these steps which involve many entities and much complexity. Nevertheless for ease of reference we have attached a post-merger diagram marked hereto as Annexure "C".⁹
- [10] Our concern is to analyse the transaction after all three steps have been implemented to consider the impact of the transaction as finally consummated. As we go on to consider below there are only two consequences to be considered; one in relation to competition and the other the public interest.
- [11] As far as the rationale is concerned Pembani submits that the proposed transaction provides it with a platform to create a sizeable black controlled natural resources and industrial company, whilst the Shanduka Group submits that it has identified Pembani as a suitable and complementary strategic Black Economic Empowerment ("BEE") partner.¹⁰

⁹ This Annexure is omitted from the public version as it contains confidential information.

¹⁰ See page 13 of Transcript of hearing.

Competition assessment

Unilateral effects

[12] Despite the complexity of the transaction and the number of entities involved, the only one with an implication for competition is a horizontal overlap in the national market for the mining and sale of thermal coal and access to the export allocation capacity at the Richards Bay Coal Terminal ("RBCT"). This is because both the merging parties, through their shareholding interests in various firms (viz. Shanduka Coal and Pembani's investment stake in BECSA) are active in the market for the mining and sale of thermal coal, as well as access to export allocations at RBCT. Typically in past cases coal mining mergers have distinguished between two market segments - what is termed the tied domestic market and the residual market. In relation to the tied domestic market, the post-merger market shares will be less than 14%. In the residual domestic market the post-merger market shares will be less than 21%. Note that the merging firms themselves do not own all this interest, rather this is the combined market share of all the operating firms in which they have controlling and non-controlling interests. The proposed transaction is thus unlikely to raise any unilateral effects competition concerns as the merged entity will continue to be constrained by firms such as Anglo Coal (Pty) Limited ("Anglo Coal") and Exxaro Resources amongst others. In relation to the export market at RBCT, the Commission found that the proposed transaction will increase the export allocation of the merged entity to less than 15%. The Commission again concluded that such an increase does not raise competition concerns. We agree with the Commission's findings.

Co-ordinated effects - concerns on information exchange

[13] As noted Pembani currently holds 6% shareholding interest in BECSA. This shareholding allows Pembani to appoint a director to the board of

BECSA. The Commission's main concern was that this cross-directorship between the Shanduka coal entities ('Coal Entities') and BECSA would facilitate the sharing of competitively sensitive information which might diminish competitive constraints between the Coal Entities and BECSA, through the medium of Pembani, which would now have board access to both companies. BECSA is a significant player in the coal markets with market shares of approximately 15% in the tied domestic market and approximately 1% market share in the residual market as well as having access to RBCT. The Commission thus recommended that the merger be approved subject to a condition that will address its concerns on possible information exchange. The condition can be summarised as follows:

[14] The person elected to sit on the board of directors of BECSA ("the Pembani BECSA Nominee"), may not at the same time be –

14.1 a director on the board of directors of any of the Coal Entities; or

14.2 an employee of Pembani occupying a coal marketing position;
or

14.3 an employee of the Coal Entities occupying a coal marketing position;

14.4 and the Pembani BECSA Nominee may not have held such a position for a period of one year prior to the Pembani BECSA Nominee's appointment to the BECSA board of directors, nor may any person be appointed to hold a director or coal marketing position during a period of one year following that person having ceased to be the Pembani BECSA Nominee.

[15] Pembani confirmed that it had no objection to the imposition of the conditions, as they are in line with its existing governance practice not to

facilitate the flow of competitively sensitive information between subsidiaries.

- [16] Based on the above analysis, the Commission came to the conclusion that the proposed transaction will not substantially prevent or lessen competition in the identified markets. We concur with the Commission on this finding.

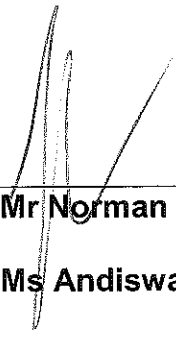
Public Interest

- [17] The proposed transaction may have an impact on employment. Post-merger the positions of eight employees may become redundant. Although the potential job losses are thus merger specific we see no reason to impose a condition in this respect for the following reasons. Firstly, the nature of the jobs is such that those who may be affected are highly qualified with post graduate qualifications. Secondly, the number affected is small and thirdly, the impact of any retrenchment will be delayed for at least one year post- merger and that those affected had been informed of this. We were also told that depending on the merged firm's fortunes after the year, no retrenchments may be required. These factors suggest that the merger does not give rise to a substantial public interest concern in respect of employment. Nor did the Commission or any of the affected employees suggest a condition was required.¹¹ The proposed transaction raises no other public interest concerns.

CONCLUSION

- [18] We agree with the Commission's findings that the proposed transaction is unlikely to substantially prevent or lessen competition in the identified market provided concerns over potential co-ordinated effects are constrained by preventing the possibility of information exchange as discussed earlier. We therefore approve the transaction subject to the conditions attached hereto as Annexure "A".

¹¹ See pages 7-8 of the Transcript.


Mr Norman Manoim

18 September 2015

DATE

Ms Andiswa Ndoni and Ms Yasmin Carrim concurring.

Tribunal Researcher:

Caroline Sserufusa

For the merging parties:

Paul Cleland of Werksmans Attorneys and Lital

Avivi of Bowman Gilfillan

For the Commission:

Rakgole Mokolo

Pembani Group (Proprietary) Limited and Shanduka Resources (Proprietary) Limited

Cc Case Number: 2015May0255

1 DEFINITIONS

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

- 1.1 "BECSA" means the company previously named BHP Billiton Energy Coal Proprietary Limited, recently renamed to South32 SA Coal Proprietary Limited;
- 1.2 "Coal Entities" mean all companies that conduct coal mining activities in respect of whom Pembani will, as a result of this merger, acquire control, being Shanduka Coal Investments Proprietary Limited, Shanduka Coal Proprietary Limited, Umcebo Mining Proprietary Limited and their subsidiaries. For the purpose of these conditions, the Coal Entities include Kangra Coal Proprietary Limited and Optimum Coal Holdings Proprietary Limited and their subsidiaries, if any;
- 1.3 "Commission" means the Competition Commission of South Africa;
- 1.4 "Competition Act" means the Competition Act 89 of 1998, as amended;
- 1.5 "Competitively sensitive information" includes all pricing information including but not limited to prices charged for thermal coal, rebates, discounts and planned thermal coal volumes to be supplied; information on thermal coal purchasing contract; information on production capacity; information on tendering; information on customers including sales volumes of clients; marketing strategies of each coal mining entity; investment strategies; budgets, Business Models and Business Plans; Promotion Plans and expansion plans.
- 1.6 "Conditions" mean these conditions;
- 1.7 "Implementation Date" means the date of implementation of this merger;
- 1.8 "Merger" means the transaction notified to the Commission on 19 May 2015 under case number 2015May0255, in terms of which *inter alia* Pembani will acquire the entire issued

share capital of Shanduka Resources and will acquire 37% of the issued share capital of Shanduka;

- 1.9 "Merging Parties" mean, for the purpose of these conditions, Pembani, Shanduka and the Coal Entities (although there are other merging parties, named in the merger filing submission, who are not relevant to these Conditions);
- 1.10 "Newshelf" means Newshelf 1129 Proprietary Limited; a firm in which Pembani holds 75% of the issued share capital and which in turn holds 8% of the issued share capital of BECSA, a company involved in coal mining activities in South Africa;
- 1.11 "Pembani" means Pembani Group Proprietary Limited, one of the primary acquiring firms in this merger, and its subsidiaries including (without limitation) Newshelf;
- 1.12 "Pembani BECSA Nominee" means the person nominated by Pembani to the BECSA board of directors from time to time;
- 1.13 "Shanduka" means, collectively, Shanduka Group, Shanduka Resources and their subsidiaries;
- 1.14 "Shanduka Group" means Shanduka Group Proprietary Limited, one of the primary target firms in this merger; and
- 1.15 "Shanduka Resources" means Shanduka Resources Proprietary Limited, one of the primary target firms in this merger.

2 CROSS-DIRECTORSHIPS

The person elected to sit on the board of directors of BECSA ("the Pembani BECSA Nominee"), may not at the same time be –

- 2.1 a director on the board of directors of any of the Coal Entities; or

2.2 an employee of Pembani occupying a coal marketing position; or

2.3 an employee of the Coal Entities occupying a coal marketing position,

and the Pembani BECSA Nominee may not have held such a position for a period of one year prior to the Pembani BECSA Nominee's appointment to the BECSA board of directors, nor may any person be appointed to hold a director or coal marketing position referred to in clauses 2.1, 2.2 or 2.3 during a period of one year following that person having ceased to be the Pembani BECSA Nominee.

3 LIMITATION IN RESPECT OF COMPETITIVELY SENSITIVE INFORMATION

3.1 To the extent that the Pembani BECSA Nominee has access to competitively sensitive information pertaining to BECSA, the Pembani BECSA Nominee shall –

3.1.1 ensure that he/she shall not communicate such competitively sensitive information to any other Newshelf or Pembani personnel, or facilitate or permit the use of such information by Pembani, other than such information in aggregated, historical or summary form; and

3.1.2 not communicate any competitively sensitive information to any person who is a director of, or holds a coal marketing position within, any of the Coal Entities.

3.2 Within three months of the Implementation Date, the Pembani BECSA Nominee shall sign a confidentiality undertaking confirming that he/she will protect the competitively sensitive information of BECSA and comply with the provisions of clause 3.1.

3.3 Any newly appointed Pembani BECSA Nominee shall sign a similar confidentiality undertaking within 1 month of being elected confirming that he/she will protect the competitively sensitive information of BECSA and comply with the provisions of clause

3.1. Such undertaking signed by any newly appointed Pembani BECSA Nominee shall be sent to the Commission within 1 month of signature.

4 MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1 Within three months of the Implementation Date, Pembani shall provide the Commission with –

4.1.1 written confirmation that it has circulated a copy of these conditions to the current Pembani BECSA Nominee and to BECSA;

4.1.2 written confirmation that the current Pembani BECSA Nominee meets the requirements set out in clause 2; and

4.1.3 a copy of the confidentiality undertaking referred to in clause 3.2.

4.2 Within one month of the first and second yearly anniversaries of the Implementation Date, if there has been any change in the identity of the Pembani BECSA Nominee in the preceding twelve months, Pembani shall –

4.2.1 notify the Commission of that change and confirm that such person meets the requirements set out in clause 2; and

4.2.2 provide the Commission with written confirmation that the new Pembani BECSA Nominee has been provided with a copy of these conditions and has signed a confidentiality undertaking as required by clause 3.2 and 3.3.

4.3 All correspondence in relation to these conditions must be submitted to the following email address: mergerconditions@compcom.co.za.

5 DURATION

- 5.1 These Conditions will apply for as long as Pembani through its shareholding in Newshelf has the right to nominate one director to the board of directors of BECSA. Should Pembani no longer have this right, it shall notify the Commission in writing and provide proof that the right no longer exists.
- 5.2 The Merging Parties may nevertheless apply to the Competition Tribunal at any time to lift, revise or amend these Conditions on good cause shown.