



## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: LM167Dec22**

In the matter between:

IDEAS Infrastructure I GP (Pty) Ltd

**Primary Acquiring Firm**

and

SolarAfrica Energy (Pty) Ltd

**Primary Target Firm**

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Panel	:	J Wilson (Presiding Member)
	:	I Valodia (Tribunal Member)
	:	F Tregenna (Tribunal Member)
Heard on	:	22 February 2023
Order issued on	:	22 February 2023
Reasons issued on	:	23 March 2023

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## REASONS FOR DECISION

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- [1] On 22 February 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger between IDEAS Infrastructure I GP (Pty) Ltd (“IDEAS”)<sup>1</sup> and SolarAfrica Energy (Pty) Ltd (“SolarAfrica”)<sup>2</sup>, in terms of which IDEAS intends to acquire [30-40]% of the issued share capital in SolarAfrica. Post-merger, IDEAS will exercise negative control over SolarAfrica.

### The Parties

- [2] IDEAS is a domestic private infrastructure fund managed by African Infrastructure Investment Managers (“AIIM”), a private equity and infrastructure fund manager, which is in turn ultimately controlled by Old Mutual Limited

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<sup>1</sup> IDEAS and all the firms controlling it and all the firms controlled by those firms, will be referred to as the “Acquiring Group”.

<sup>2</sup> SolarAfrica Energy and the firms controlled by it will be referred to as the “Target Group”.

(“OM”).<sup>3</sup> Of relevance for purposes of the proposed merger, the Acquiring Group, through the funds managed by AIIM (i.e., IDEAS and African Infrastructure Investment Fund 3 (“AIIF3”)), is active in the supply of energy infrastructure solar photovoltaic (solar PV).

- [3] The Acquiring Group’s solar PV activities include supplying solar PV to Eskom through the Department of Mineral Resources and Energy’s Renewable Energy Independent Power producer Procurement Programme (“REIPPPP”), and to commercial and industrial customers through Orionis Holdings RF (Pty) Ltd (“Orionis”) and AIIM C&I Clean Energy Assets Co. Platform (Pty) Ltd (“AIIM C&I”).
- [4] The primary target firm is SolarAfrica, which is currently wholly owned by SolarAfrica (Africa) Ltd.<sup>4</sup> The Target Group is a supplier of solar PV to the commercial and industrial sectors through a power purchase agreement, fixed roof rental or an outright cash sale of the solar system. The target firm also provides battery energy storage, wheeling<sup>5</sup> and hybrid power solutions as part of its product offering to commercial and industrial customers. The Target Group does not participate in the REIPPPP.
- [5] In a related, but separate, transaction, which was also conditionally approved by the Tribunal on 22 February 2023, Starsight Energy Africa Holding Ltd (“Starsight”) will first acquire the entire issued share capital in SolarAfrica from SolarAfrica (Africa) Ltd. The transaction in this matter will therefore involve IDEAS acquiring a [30-40]% interest in SolarAfrica from Starsight.<sup>6</sup>

## **Rationale**

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<sup>3</sup> AIIM is controlled by Old Mutual Limited.

<sup>4</sup> SolarAfrica (Africa) is wholly owned by SolarAfrica (Mauritius) Ltd which is in turn controlled by Morgan Trust, Morgan Trust does not control any other firms in South Africa.

<sup>5</sup> Wheeling involves the delivery of energy from a renewable energy generator to an end-user in a different location using existing distribution and transmission networks.

<sup>6</sup> Starsight Energy Africa Holding Ltd and SolarAfrica Energy (Pty) Ltd, Case No.: LM157Dec22.

[6] The Target Firm submitted that the proposed merger [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>7</sup> [REDACTED]  
[REDACTED]  
[REDACTED].

[7] The Commission was informed that the Acquiring Group [REDACTED]  
[REDACTED]  
[REDACTED]. The merger therefore facilitates [REDACTED]  
[REDACTED].

## **Competition Assessment**

### *Overlaps*

- [8] The Commission considered the activities of the merger parties and found that the proposed transaction raises a horizontal overlap as the parties are both active in the supply of solar PV.
- [9] The Commission found that the proposed merger does not give rise to any vertical overlap between the merger parties.

### *Market definition*

#### *Product Market*

- [10] The merger parties submitted that the relevant market is that for the supply of solar PV to the commercial and industrial sectors. According to the merger parties, there are differences between the supply of solar PV under the

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<sup>7</sup> The merger parties submitted that, in 2022, the Department of Mineral Resources removed the requirement for a licence for embedded generation (the production of power from small-scale projects) outside formal government procurement programmes such as the REIPPPP. The regulatory changes also allow for wheeling.

REIPPPP and to private users. One such difference is that, under the REIPPPP, Eskom is the only customer, whereas supply to private users includes servicing multiple customers. Furthermore, supply to private users occurs pursuant to bilateral negotiations and not a bidding process as is the case with supply to Eskom under the REIPPPP.

- [11] In its assessment, the Commission considered that the Tribunal has previously accepted that the supply of energy consists of two sub-categories, namely: (i) renewable energy sources: wind, solar PV, biogas, biomass, landfill gas and hydroelectric power; and (ii) non-renewable energy sources: Coal, gas and/or diesel.<sup>8</sup>
- [12] The Commission also found that there are differences in the supply of solar PV to Eskom in terms of the REIPPPP, and supply to the commercial and industrial sectors. The supply of solar PV to Eskom occurs through an annual tender process where independent power producers (“IPPs”) compete to be appointed as the preferred renewable solar energy supplier. In the commercial and industrial sectors, by contrast, suppliers enter into PPAs with customers pursuant to bilateral agreements that are concluded on an ongoing basis. Further, supply to the commercial and industrial sectors requires a dedicated marketing and sales team to acquire customers. This is not required when supplying to Eskom.
- [13] The Commission also found that the technical specifications required to supply Eskom are different from those required to supply commercial and industrial customers. For example:
  - a. An Eskom solar project involves generating a minimum quantity of power which forms part of Eskom’s available energy deployment capacity (i.e., there is no limit to production capacity as Eskom uses all of the energy generated). By contrast, the energy needs of every commercial and

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<sup>8</sup> See *Brookfield Asset Management Inc and TerraForm Global Inc* (Case No. LM155Nov20); and *K2014158795 (Pty) Ltd and Intikon Energy (Pty) Ltd*, Case No.: 020511

industrial customer are different, and the supplier must therefore design a solar energy solution to custom fit the specific customer's requirements.

- b. The design of the solar panels for Eskom is generic in nature and the panels are usually mounted on the ground with limited need for specialised technical capability. However, the design of solar panels to commercial and industrial customers can be highly technical depending on the availability of roof space, the design (angle) of the roof, the client's specific load requirements etc.
- c. Supply to Eskom usually requires an environmental impact assessment as the solar panels are mounted on the ground. This is not required for supply to commercial and industrial clients as the solar panels are mounted on existing structures, such as the roof of a building.

- [14] The Commission concluded that it was not necessary to define the exact scope of the product market as the merger is unlikely to result in competition concerns on any plausible definition. However, for the purposes of assessing the proposed transaction, the Commission considered both a broad market for the supply of solar PV via the REIPPPP and to the commercial and industrial sectors; and a narrow market for the supply of solar PV to the commercial and industrial sectors only.

#### *Geographic market definition*

- [15] The merger parties submitted that IPPs supply renewable solar energy to customers located throughout South Africa and that the relevant geographic market is accordingly national.
- [16] In assessing the geographic market, the Commission considered Tribunal case precedent in *Globeleg/Springbok and Okavango Biology Luxembourg SARL*

*and Sonnedix Solar South Africa Holdings (Pty) Ltd*,<sup>9</sup> where the Tribunal accepted a national market.

- [17] The Commission also noted that, given that solar PV can now be supplied to customers via wheeling, it is not necessary to have a solar plant at each and every location where solar PV is supplied. Given the national energy crisis, it is likely that more firms will supply solar PV through wheeling as demand for alternative sources of energy increases. Further, the merging parties in the current transaction are active nationally.
- [18] The Commission therefore assessed the effects of the proposed transaction in (i) the national market for the supply of solar PV via the REIPPPP and to commercial and industrial customers (the broad market); and (ii) the national market for the supply of solar PV to commercial and industrial customers only (the narrow market).
- [19] Having regard to the evidence before it, the Tribunal assessed the effects of the proposed merger on the same basis.

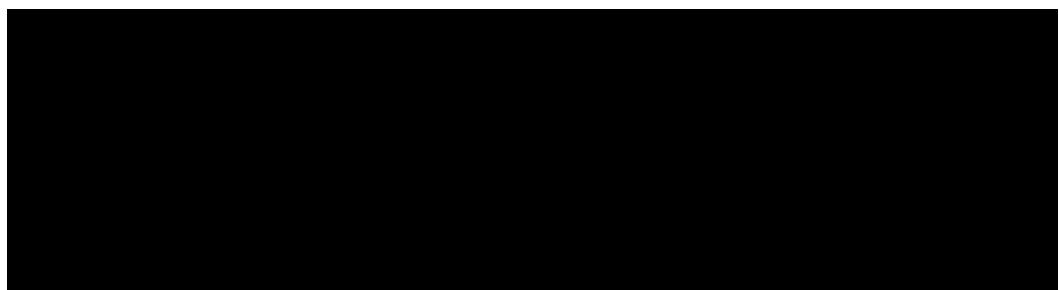
#### *Market Shares and Levels of Concentration*

- [20] The merger parties submitted that there is no publicly available information on the basis of which to estimate market shares in the above relevant markets. However, they stated that there are numerous players active in the markets, and estimated their market shares in the narrow market as follows:

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<sup>9</sup> *Okavango Biology Luxembourg SARL and Sonnedix Solar South Africa Holdings (Pty) Ltd*, Case No.: LM181Feb22.

**Table 2: Merging parties' estimated market shares for the supply of solar PV to the commercial and industrial sectors in South Africa**

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*Source: merging parties' submission*

- [21] The Commission assessed the merger parties' market shares based on information obtained from the National Energy Regulator of South Africa ("NERSA") on the total contracted capacity (MW) of each solar project registered with it.
- [22] In its assessment of the broad market, the Commission found that the total contracted capacity of solar PV to the REIPPPP and commercial and industrial sectors nationally was [REDACTED] MW in 2022. The Acquiring and Target Groups have a total contracted capacity in the broad market of [REDACTED] MW and [REDACTED] MW respectively. The Commission therefore estimated that the merger parties have a combined market share of [10-20]% in the broad market for the supply of solar PV nationally, made up of the Acquiring Group's market share of [10-20]% and the Target Group's market share of [0-10].%
- [23] In its assessment of the narrow market, the Commission found that the total contracted capacity for the supply of solar PV to the commercial and industrial sectors nationally was [REDACTED] MW in 2022. The Acquiring and Target Groups have a total contracted capacity in the narrow market of [REDACTED] MW and [REDACTED] MW respectively. In the result, the Commission estimated that the merger parties have a combined market of [0-10]% in the narrow market, made up of the Acquiring Group's market share of [0-10]% and the Target Group's market share of [0-10].%
- [24] The Commission was also informed that there are over 100 players in the narrow market, and that, based on the number of projects registered with

NERSA it is growing exponentially - in 2019 only 41 projects were registered, whereas by 2022 this number had increased to 406 projects.

- [25] The Commission also found that the loosening of regulatory constraints on embedded generation (the production of power from small-scale projects) in South Africa, and the ongoing energy crisis in the country, makes it likely that more firms will enter the relevant markets as demand for alternative sources of energy increases.
- [26] Based on all of these factors, the Commission concluded that the proposed merger is unlikely to give rise to unilateral effects irrespective of whether the relevant market is defined broadly or narrowly.
- [27] The Tribunal agrees with this assessment. The proposed transaction is unlikely to give rise to unilateral effects given the merger parties' relatively small market shares and the wide (and growing) number of alternative suppliers in the market.

#### *Information Exchange Assessment*

- [28] The Commission also assessed whether the merger is likely to give rise to coordination concerns given the shareholdings that IDEAS has in competitors of the Target Group, namely Orionis and AIIM C&I. IDEAS has sole control of AIIM C&I with a [70-80]% shareholding, and joint control of Orionis with a [40-50]% shareholding, and the right to appoint directors to the boards of both companies. The proposed merger will result in IDEAS having a minority [30-40]% controlling interest in the Target Group, with the power to appoint directors at the Target Group. The Commission found that these firms are not constituent firms within a single economic entity because they are not wholly-owned by the same shareholder.

[29] The Commission found that IDEAS' ability to appoint directors at each of the Target Group, AIIM C&I and Orionis would enable it to have access to competitively sensitive information of competitors in the narrow market, including [REDACTED]  
[REDACTED].

[30] To address these concerns, the Commission and the merging parties agreed to the information exchange undertakings contained in the conditions referred to below.

[31] The Tribunal agrees that these conditions will assist in mitigating the information exchange concern identified by the Commission.

## **Public Interest**

### *Effect on employment*

[32] The merger parties submitted that the proposed transaction will not result in any retrenchments. The Commission contacted the employee representative of SolarAfrica, who confirmed that the employees were notified of the proposed merger and that no concerns were raised.

[33] Accordingly, the Tribunal agrees with the Commission's conclusion that the proposed transaction is unlikely to raise any employment concerns.

### *Effect on the spread of ownership*

[34] The merger parties submitted that [30-40]% of the shareholding in OM (IDEAS' ultimate controller) is held by HDPs and as such, the Proposed Transaction will result in the increase of the B-BBEE credentials of SolarAfrica (which is not currently controlled by HDPs).

[35] The Commission concluded that the proposed transaction does not raise any public interest concerns on this or any other basis.

[36] The Tribunal concurs with the Commission's findings in this regard.

## Conclusion

- [37] The Tribunal concludes that, having regard to the information exchange conditions annexed hereto as **Annexure A**, the proposed transaction is unlikely to give rise any significant competition or public interest effects.
- [38] The Tribunal accordingly approves the proposed merger subject to the conditions annexed hereto as **Annexure A**.

Signed by: Jerome Wilson

Signed at: 2023-03-23 17:26:37 +02:00

Reason: Witnessing Jerome Wilson

*Jerome Wilson*

23 March 2023

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Presiding Member

Date

Adv Jerome Wilson SC

## Concurring: Professor Imraan Valodia and Professor Fiona Tregenna

Tribunal Case Managers: Sinethemba Mbeki and Matshidiso Tseki

For the Merger Parties: Lebohang Mabidikane for Bowmans Inc.

For the Competition Raksha Darji and Wiri Gumbie

Commission: