COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 86/LM/Dec09

In the matter between:

Optimum Coal Holdings (Pty) Ltd and	
Optimum Koornfontein Investments (Pty) Ltd	Acquiring Firms
And	
Main Street 431 (Pty) Ltd	Target Firms
Twin Cities Trading 39 (Pty) Ltd	
Dunrose Trading 191 (Pty) Ltd	

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member), and Andreas Wessels (Tribunal Member)
Heard on	:	10 March 2010
Order Issued	:	10 March 2010
Reasons Issued:		28 May 2010

Reasons for Decision

Approval

[1] On 10 March 2010, the Competition Tribunal ("Tribunal") unconditionally approved the merger between the above-mentioned parties. The reasons for approving the transaction follow.

The parties

[2] The first acquiring firm is Optimum Coal Holdings (Pty) Ltd ("Optimum"), a private company which controls a group of companies and a number of assets all of which are involved in the mining of thermal and metallurgical coal.

Optimum is 56% controlled by Broad Based Black Economic Empowerment shareholders.[1] Optimum wholly controls *inter alia* Optimum Overvaal Mining and Exploration (Pty) Ltd ("Overvaal"), which in turn wholly controls Universal Pulse Trading 75 (Pty) Ltd ("Universal Pulse"). The second primary acquiring firm is Optimum Koornfontein Investments (Pty) Ltd ("OKI"), a wholly owned subsidiary of Optimum. Premerger OKI holds a 32.8% interest in Main Street 431 (Pty) Ltd ("MS 431") - the primary target firm (see paragraph [3] below).

[3] As stated in paragraph [2] above, the primary target firm is MS 431. MS 431 is a special purpose vehicle which is indirectly and jointly controlled by (i) Optimum (with a 32.8% interest in MS 431 through OKI and a 6% interest through Universal Pulse) and (ii) Siyanda Resources (Pty) Ltd ("Siyanda Resources") (with a 43.73% combined interest in MS 431 through Twin Cities Trading 39 (Pty) Ltd ("Twin Cities") and Dunrose Trading 191 (Pty) Ltd ("Dunrose")). The following entities have a direct interest in MS 431:

• OKI	32.8%
• Universal Pulse	6%
• Twin Cities (wholly owned by Siyanda Resources)	32.8%
• Dunrose (wholly owned by Twin Cities)	10.93%
• Inkwali Engineering Services (Pty) Ltd	10%
• The Employee Trust (a sharing incentive trust)	8%

[4] MS 431 has a joint controlling interest of 50.02% in Siyanda Coal (Pty) Ltd ("Siyanda Coal"), formerly known as Main Street 432 (Pty) Ltd ("MS 432").[2] Siyanda Coal owns the Koornfontein Mine.

[5] The second and third target firms are Twin Cities and Dunrose.

[1] The shareholders of Optimum are: Warrior Coal Investments (Pty) Ltd (21%); AMCI Capital Warrior Mauritius Limited (21%); Executive Employee Share Incentive Trust (1%); Henry Christo White (1%); The Optimum Employees Benefit Trust (12.5%); The Optimum Community Trust (12.5%); Miscan Investments (Pty) Ltd (13.5%); Monkoe Coal Investments (Pty) Ltd (7%); Mlungisi Kwini (5.5%); Mobu Resources (Pty) Ltd (3%); and Miranda Kwini (2%).

[2] The other shareholder in Siyanda Coal is Sentula Coal (Pty) Ltd.

The transaction

[6] Optimum entered into a restated sale of shares agreement with Siyanda Resources and Twin Cities to acquire: (i) all of the issued share capital of Twin Cities from Siyanda Resources; and (ii) all of the shares in the issued share capital of Dunrose from Twin Cities: thus indirectly Siyanda Resources' entire interest in MS 431. As such the proposed transaction consists of two steps that are interrelated and intricately intertwined. In the first step, Optimum shall purchase from Siyanda Resources all of the shares in the issued share capital of Twin Cities (and debts owed to Siyanda Resources by Twin Cities, MS 431 and MS 432). In the second step Optimum shall purchase from Twin Cities all the shares in the issued share capital of Dunrose (and debts owed to Twin Cities by Dunrose).

[7] Upon conclusion of the proposed transaction Optimum will have sole control of Dunrose, sole control of Twin Cities, and a controlling interest (i.e. a 82.53% shareholding) in MS 431. The control dynamic over MS 431 thus changes from joint control by Optimum and Siyanda Resources premerger to sole control by Optimum post-merger. The proposed deal therefore constitutes a merger as defined in section 12 of the Competition Act, 1998 (Act No. 89 of 1998).

Rationale for the proposed transaction

[8] According to the acquiring parties this transaction enables Optimum, as a mining and exploration group supplying both local and international coal consumers, to grow its local coal business. Optimum, through its contiguous mine, has the ability to fully utilise the extensive Siyanda Coal infrastructure. Siyanda Resources does not have the ability to leverage the Koornfontein Mine assets as it has no other assets within a 100 km radius of the Koornfontein Mine. Optimum states that it has other reserves beyond the infrastructural advantages that could be exploitable through the Koornfontein Mine. From the target firms' perspective, Optimum's offer to Siyanda Resources for its shares was deemed to be fair and commercially sound in light of the infrastructure utilisation.

THE PARTIES' ACTIVITIES

Optimum

[9] As stated in paragraph [2] above, Optimum controls a group of companies and a number of assets all of which are involved in the exploration and mining of thermal and metallurgical coal.

[10] Of relevance to the instant transaction is that Optimum through Optimum Coal Mine (Pty) Ltd ("Optimum Coal Mine") owns the Optimum Colliery, a thermal coal mining complex located near Middelburg, Mpumalanga. Coal is supplied from this colliery to the export market through the Richards Bay Coal Terminal ("RBCT") to various domestic customers as well as to Eskom's Hendrina power station. In addition, Optimum wholly owns Optimum Coal Terminal (Pty) Ltd ("Optimum Coal Terminal") which in turn owns 8.68% of the issued share capital of Richards Bay Coal Terminal Company Limited ("RBCT Company"). There is an agreement between Optimum Coal Terminal and Optimum Coal Mine in terms whereof Optimum Coal Mine is entitled to use the throughput capacity of Optimum Coal Terminal at the RBCT.

MS 431

[11] As stated in paragraph [4] above, MS 431 holds a 50.02% interest in Siyanda Coal which owns the Koornfontein Mine. The Koornfontein Mine is involved in the exploration, development, mining and transportation of thermal coal.

[12] Siyanda Coal has a 2% shareholding in RBCT Company which gives it throughput capacity at the RBCT through which it supplies thermal coal to the export market. Siyanda Coal does not export thermal coal itself but has agreements with a number of firms that arrange shipping to their foreign buyers. Siyanda Coal produces and transports the thermal coal to the RBCT utilising its throughput quota. Siyanda Coal also supplies Eskom with thermal coal, in particular its Camden and Mabuja power stations. Siyanda Coal furthermore indirectly supplies Eskom through supply agreements it has with other domestic firms.

The relevant markets

Relevant product markets

[13] Form the above-mentioned activities of the merging parties' businesses it is clear that there is a horizontal overlap in these activities with regard to the mining and sale of thermal coal. Thermal coal is a type of bituminous coal that is most commonly used to generate electricity and produce synthetic fuels.

[14] The Tribunal has in previous decisions distinguished between the following coal markets: first, a delineation of bituminous coal from other types of coal; and second, a delineation between two types of bituminous coal, namely thermal and metallurgical coal.[3] The Competition Commission ("Commission") further submitted that in line with a previous Tribunal decision the broader bituminous thermal coal market can be further divided into three separate relevant product markets, i.e.:[4]

a. the export market, i.e. bituminous thermal coal exported by South African producers (mainly to the Atlantic Basin and the Pacific Rim);
b. the domestic market, i.e. bituminous thermal coal sold primarily to two domestic customers, namely Eskom and Sasol; and
c. the residual domestic market, i.e. the sale of bituminous thermal coal to domestic companies other than Eskom and Sasol, for example cement companies and smaller coal mines requiring coal for market blending.

Relevant geographic markets

[15] The merging parties submitted that the relevant geographic markets are national in scope. However, the exact geographic parameters of the said domestic markets, i.e. whether they are national in scope or narrower (i.e. regional), can be left open in the instant case since it does not alter our conclusion regarding the competitive effects of the instant deal.

[16] Be that as it may, certain information submitted by the Commission and the merging parties is clearly indicative of potential regional domestic markets. The Commission *inter alia* explains that coal is expensive to transport via road and

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[3] See, for example, the large merger involving *Anglo South Africa Capital (Pty) Ltd and Arnot North Mining Business and Additional Reserves*, Case no. 44/LM/May05.

[4] See, for example, the large merger between *Lexshell 668 Investments (Pty) Ltd and Wakefield Investments (Pty) Ltd*, Case no. 82/LM/Oct06.

that there are relatively few power stations that can accept significant quantities of coal by rail. It also states that Eskom increasingly has to source coal from further afield (i.e. not from adjacent tied collieries) and pay significantly higher transport costs. The merging parties, on the other hand, indicated that because of their geographic locations in the Middelburg/Witbank region it would not be viable for Siyanda Coal and the majority of Optimum's operations to supply Eskom's planned developments in the Waterberg, Limpopo province[5] since the merging parties do not have coal reserves in this geographic area.[6] When questioned at the hearing about the above-mentioned statement and in general in regard to the geographic scope of the domestic market the merging parties commented as follows:

" ... *coal mining is as much a business of logistics as it is a business of mining. ... it* (coal) *is exceptionally heavy and quite difficult to move around. When the Commission correctly says that* (the) *Optimum mine is tied to Eskom that is true because the coal produced goes on a conveyer belt to* (the) *Hendrina power station. So in simple economics to compare that ease of delivery with trying to truck this stuff to* (the) *Waterberg is just not feasible*. ... *And it also happens that a lot of the Eskom power stations* ... *are not heavily supplied by the rail network. They either are supplied by the most adjacent tied colliery or the coal is generally trucked to them if they need to buy over and above their tied colliery*."

" ... *from a costing point of view you can easily add 50 to 100% to your costs by just trying to move coal around. Taking cognisance of how Optimum supplies to* (the) *Hendrina power station for example via conveyer belt, and we run extensive networks of conveyers belts on Optimum Colliery, we talk in the order of 8 to 10 cents a ton per kilometre*" in comparison to "*80 cents and 1 rand*" a ton per kilometre were you to transport coal for example to the Waterberg/North, a distance of approximately 600 kilometres. The Waterberg/North "*in actual fact ... does not become a market*" since the coal would be "*totally priced out of the market should you in any way try and participate in that business*".

[5] Situated in the North West of the country.

[6] See merging parties' Competitiveness Report, page 252 of the record.

Competition analysis

Export Market

[17] **Table 1** below summarises the national market share estimates of the major South African producers of bituminous thermal coal who supply the export market. The coal is sold "free on board" which implies that the buyers arrange the shipping themselves.

Table 1: Estimated national market shares in the export market for bituminous thermal coal

RBCT Shareholders	Estimated market share (%)
Anglo Coal	[20-30]
BHP Billiton	[20-30]
Xstrata	[20-30]
Optimum	**9**
Total Coal	[0-10]
Sasol Mining	[0-10]
Exxaro	[0-10]
Koornfontein	**2**
Kangra Coal	[0-10]
Other South African firms	<1

Source: Merging parties' estimates based upon the RBCT Company throughput quotas, given that the vast majority of coal is exported via the RBCT.

[18] As shown in the **Table 1** above, the post-merger market share of the merged entity will be approximately 11% in the export market for bituminous thermal coal. This relatively small market share does not raise competition concerns; the merged entity will face competition from larger market players such as Anglo Coal, BHP Billiton and Xstrata, as well as some smaller competitors.

Domestic Market

[19] **Table 2** below summarises the estimated national market shares of the South African suppliers of bituminous thermal coal to the domestic market, i.e. to primarily Eskom and Sasol.

Table 2: Estimated national market shares for the supply of bituminous thermal coal to the domestic market (i.e. Eskom and Sasol)

Competitor	Estimated market share (%)
Exxaro	27
Anglo Coal	23
BHP Billiton	23
Kumba	12
Optimum	**4**
Xstrata	2
Koornfontein	**2**
Graspan Colliery	1
Kangra Coal	<1
Total Coal	<1
Other South African firms	4
Total	**100**

Source: Merging parties' estimates

[20] **Table 2** above shows that the merged entity will have a post-merger national market share of approximately 6% in the domestic market for bituminous thermal coal. This relatively small market share does not raise competition concerns at a national level; the merged entity will face competition from larger market players such as Exxaro, Anglo Coal, BHP Billiton and Kumba.

[21] From a regional perspective, the Koornfontein Mine, along with the Optimum Colliery, is situated in the Middelburg/Witbank region, within close proximity of a number of Eskom power stations. Eight of Eskom's eleven operational power stations are situated in this region. Eskom is also in the process of recommissioning three other power stations in the area, namely Komati, Grootvlei and Camden. The merging parties at the hearing explained that there is a radius of approximately 70 km between the centre of the Optimum and Koornfontein coal mines in the Middelburg/Witbank area "*where 99% of the current operating collieries of substance are located and within that area as well there is four or five power stations operating*". The merging parties stated that the coal mining industry is focused in this geographic area and that *inter alia* BHP Billiton and Anglo American are present as competitors to the merged entity. Furthermore, the Commission indicated that Eskom raised no concerns in regard to the proposed merger. We therefore conclude that the proposed

merger is also unlikely to raise competition concerns in a potential regional domestic market.

Residual Domestic Market

[22] **Table 3** below summarises the national market share estimates of the South African suppliers of bituminous thermal coal to the residual domestic market.

Table 3: Estimated national market shares for the supply of bituminous thermal coal to the residual domestic market

Competitor	Estimated market share (%)
Wakefield	13
Xstrata	12
Graspan	9
Koornfontein	**2**
Optimum	**2**
Other South African firms	62
Total	**100**

Source: Merging parties' estimates

[23] **Table 3** above shows that the merged entity will have a post-merger national market share of approximately 4% in the supply of bituminous thermal coal to the residual domestic market. This relatively low market share does not raise competition concerns; the merged entity will face competition from market players such as Xstrata, Wakefield and Graspan, as well as numerous other smaller firms that participate in this market. There is no reason for us to believe that competition concerns arise at a regional level.

[24] The Commission noted that it has identified certain pricing and production anomalies in the residual domestic market for bituminous thermal coal, but indicated that these were not merger specific issues and therefore do not raise concerns in the context of the instant merger. We shall therefore not elaborate on these issues in these reasons.

Public Interest

[25] The merging parties confirmed that the proposed merger will have no impact on employment. The proposed transaction also raises no other public interest concerns.

Conclusion

[26] The merger is approved unconditionally since it is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the proposed transaction raises no public interest concerns.

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Andreas Wessels	**DATE**
Tribunal Member	

Norman Manoim and Yasmin Carrim concurring.

Tribunal Researcher	:	Romeo Kariga
For the acquiring firms	:	Adv Michele Le Roux instructed by Glyn Marais Inc
For the target firms	:	Webber Wentzel Attorneys
For the Commission	:	Fergus Reid (Mergers and Acquisitions division)