

## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM004Apr20

In the matter between:

Gatsby Security SPV (Pty) Ltd

**Primary Acquiring Firm**

And

Cell C Ltd

**Primary Target Firm**

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Panel : E Daniels (Presiding Member)  
: F Tregenna (Tribunal Panel Member)  
: A Ndoni (Tribunal Panel Member)  
Heard on : 27 May 2020  
Decided on : 27 May 2020

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### NON-CONFIDENTIAL ORDER

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Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

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Mr Enver Daniels  
Presiding Member

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27 May 2020

Date

Concurring: Prof. Fiona Tregenna and Ms Andiswa Ndoni

**NON-CONFIDENTIAL**

**ANNEXURE A**

**IN THE LARGE MERGER INVOLVING:**

**GATSBY SECURITY SPV (PTY) LTD**

**AND**

**CELL C LIMITED**

**CC CASE NUMBER: 2020APR0025**

**CT CASE NUMBER: LM004APR20**

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**CONDITIONS**

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**1. DEFINITIONS**

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

1.1.1. “**Acquiring Firm**” means Gatsby SPV;

1.1.2. “**Acquiring Group**” means Gatsby SPV, the Trust and the ultimate controllers of the Trust;

1.1.3. “**Act**” means the Competition Act 89 of 1998, as amended;

1.1.4. “**Ancillary Agreements**” means [...]<sup>1</sup>;

1.1.5. “**Approval Date**” means the date referred to in the Tribunal’s merger clearance certificate (Form CT 10) in relation to this Merger;

1.1.6. “**Asset Sale Agreement**” means the agreement that records the terms of the sale of the Target Assets by Cell C to the Acquiring Group;

1.1.7. “**Cell C**” means Cell C Limited;

1.1.8. “**Commission**” means the Competition Commission of South Africa;

1.1.9. “**Commission Rules**” means the Rules for the Conduct of Proceedings in the Commission

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<sup>1</sup> Claimed as confidential.

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1.1.10. “**Conditions**” means the conditions referred to in this document;

1.1.11. “**Day**” means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.1.12. “**Finance Agreements**” means [...]<sup>2</sup>;

1.1.13. “**Gatsby SPV**” means Gatsby Security SPV (Pty) Ltd;

1.1.14. “**Guiding Principles**” [...]<sup>3</sup>:

1.1.14.1. [...];

1.1.14.2. [...];

1.1.14.3. [...];

1.1.14.4. [...];

1.1.14.5. [...];

1.1.14.6. [...];

1.1.15. “**Implementation Date**” means the date on which the Merger is implemented;

1.1.16. “**Merger**” means the acquisition of the Target Assets by the Acquiring Firm;

1.1.17. “**Merging Parties**” means Gatsby SPV and Cell C;

1.1.18. “**Primary Roaming Agreement**” means [...]<sup>4</sup>:

1.1.18.1. [...];

1.1.18.2. [...];

1.1.18.3. [...];

1.1.18.4. [...];

1.1.19. “**Professional Trustees**” means either [...]<sup>5</sup>, who both provide professional trust administration services;

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<sup>2</sup> Claimed as confidential.

<sup>3</sup> The entire section was claimed as confidential.

<sup>4</sup> The entire section was claimed as confidential.

<sup>5</sup> Claimed as confidential.

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1.1.20. “**Roaming Provider**” means the counterparty to the Primary Roaming Agreement or the Secondary Roaming Agreement as the case may be;

1.1.21. “**Secondary Roaming Agreement**” means [...]<sup>6</sup>:

1.1.21.1. [...];

1.1.21.2. [...]; and

1.1.21.3. [...];

1.1.22. “**Target Assets**” means certain assets of Cell C (but excluding the Cell C spectrum) which include Cell C’s network assets; [...]<sup>7</sup>; the Cell C brand, trademarks and other intellectual property; and any technology [...]<sup>8</sup>;

1.1.23. “**Target Firm**” means Cell C Limited;

1.1.24. “**Tribunal**” means the Competition Tribunal of South Africa;

1.1.25. “**Trust**” means a trust that is yet to be formed whose sole purpose will be to hold 100% of the issued shares in Gatsby SPV;

1.1.26. “**Trust Deed**” means the legal document that governs the Trust;

1.1.27. “**Trustees**” means the person or persons to be appointed by the Professional Trustees to be a trustee of the Trust.

## 2. RECORDAL

2.1. On 16 April 2020, the Merging Parties notified the Merger to the Commission.

2.2. As part of the Merger notification, the Merging Parties also informed the Commission that following the implementation of the Merger:

2.2.1. they intend entering into the [...]<sup>9</sup>;

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<sup>6</sup> The entire section was claimed as confidential.

<sup>7</sup> Claimed as confidential.

<sup>8</sup> Claimed as confidential.

<sup>9</sup> Claimed as confidential.

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- 2.2.2. Gatsby SPV intends entering into the [...]<sup>10</sup>; and
- 2.2.3. the Merging Parties and various lenders intend entering into the Finance Agreements.

2.3. The Merging Parties submit that [...]<sup>11</sup>.

2.4. The Merging Parties submit that [...]<sup>12</sup>.

2.5. [...]<sup>13</sup>.

2.6. Accordingly, and following its investigation of the Merger, the Commission concluded that, based on the information before it, the Merger is unlikely to substantially prevent or lessen competition in any relevant market.

2.7. Despite the above finding, the Commission notes the Merging Parties are currently not yet in a position to confirm which trustees will be appointed to the Trust that will control Gatsby SPV. The Commission is accordingly of the view that the Merger may raise competition concerns, such as *inter alia*, (i) anticompetitive information exchange should the trustees appointed to the Trust, include individuals from firms that compete with Cell C or (ii) present undisclosed competitive overlaps which were not considered in the assessment of the Merger. In addition, the Merging Parties submit that they are not yet in a position to indicate which Professional Trustee will be appointed to manage and control the Trust.

2.8. The Merging Parties have indicated that they will appoint either [...]<sup>14</sup> as the Professional Trustee to manage the Trust.

2.9. The Merging Parties have undertaken that the Acquiring Group will not be owned or controlled by firms that compete with Cell C or have a vertical relationship with Cell C (other than a lending relationship). In addition, the Merging Parties submit that the current shareholders of Cell C shall not be part of the Acquiring Group whether through holding an economic interest in Gatsby SPV or through being a trustee of the Trust.

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<sup>10</sup> Claimed as confidential.

<sup>11</sup> Claimed as confidential.

<sup>12</sup> Claimed as confidential.

<sup>13</sup> Claimed as confidential.

<sup>14</sup> Claimed as confidential.

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2.10. In order to ensure that the Merging Parties implement their commitments in relation to the composition of the Acquiring Group, the Commission recommends that the Merger be approved by the Tribunal subject to the below Conditions.

### **3. CONDITIONS**

3.1. The Merging Parties shall ensure that:

3.1.1. If to the extent that any of the Ancillary Agreements are negotiated and entered into, they will comply with the Guiding Principles at all times.

3.1.2. No firm or individual that competes or may compete with Cell C or firms that have a vertical relationship with Cell C (other than a lending relationship) holds or will hold an economic interest in the Acquiring Group.

3.1.3. No current shareholder of Cell C holds or will hold an economic interest in the Acquiring Group.

3.1.4. The trustees appointed to the Trust are employees of a Professional Trustee.

3.2. The conditions in clause 3.1.3 shall not apply in relation to Cell C employees, certain of whom are currently shareholders in Cell C [...]<sup>15</sup>.

### **4. APPOINTMENT OF TRUSTEES**

4.1. The Merging Parties shall propose Trustees for the Commission's written approval within 20 (twenty) Days of the expiry of the Implementation Date or such extended period that may be agreed upon between the Commission and the Merging Parties.

4.2. The proposal shall contain such information required for the Commission to determine whether the proposed Trustees comply with clauses 3.1.2 to 3.1.4 of the Conditions.

4.3. [...]<sup>16</sup>.

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<sup>15</sup> Claimed as confidential.

<sup>16</sup> Claimed as confidential.

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## **5. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 5.1. The Acquiring Firm shall inform the Commission of the Implementation Date within 5 (five) Days of it occurring.
- 5.2. The Acquiring Firm shall provide the Commission with a compliance report within 3 months of the Implementation Date indicating the extent of the Merging Parties compliance with clause 3 above. Such report shall be accompanied by an affidavit deposed to by a director or trustee of the Acquiring Firm confirming the contents of the report.
- 5.3. The Merging Parties shall submit to the Commission copies of the Trust Deed, the Asset Sale Agreement and the Finance Agreements within 15 (fifteen) Days of them being duly signed and executed.
- 5.4. The Commission may request additional information from Gatsby SPV which the Commission from time to time deems necessary for the monitoring of compliance with these Conditions.

## **6. GENERAL**

- 6.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).
- 6.2. In the event that the Commission receives a complaint regarding non-compliance by the Merging Parties with these Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of the Conditions, the matter shall be dealt with in terms of Rule 39 of the Commission Rules.

## **7. VARIATION**

- 7.1. The Merging Parties and Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted.