[redacted]

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM144Jan20/INT131Sep20

In the intervention application of:

South African Energy Forum	Applicant
And	
Thabong Coal (Pty) Ltd	First Respondent
South32 SA Coal Holdings (Pty) Ltd	Second Respondent
Competition Commission	Third Respondent

***In re* the large merger between:**

Thabong Coal (Pty) Ltd	Primary Acquiring Firm
And	
South32 SA Coal Holdings (Pty) Ltd	Primary Target Firm

Panel:	AW Wessels (Presiding Member) M Mazwai (Tribunal Member) E Daniels (Tribunal Member)
Heard on:	16 October 2020
Order Issued on:	20 October 2020
Reasons Issued on:	25 October 2021

REASONS FOR DECISION

[redacted]

Introduction

[1] On 20 October 2020 the Competition Tribunal ("Tribunal") dismissed an application brought by South African Energy Forum ("SAEF") to intervene in the merger proceedings at the Tribunal relating to the large merger involving Thabong Coal Proprietary Limited ("Thabong Coal") and South32 SA Coal Holdings Proprietary Limited ("SAEC") (hereinafter referred to as "the proposed transaction").

[2] Our reasons for dismissing SAEF's intervention application follows.

Background

[3] The proposed transaction was notified to the Competition Commission ("Commission") on 10 December 2019 and on 31 August 2020, after investigating the merger, the Commission recommended to the Tribunal that the proposed transaction should be approved subject to a set of conditions.

[4] The Tribunal convened a pre-hearing on 14 September 2020. Two individuals represented SAEF at the pre-hearing, Messrs Adil Nchabeleng and Kavi Pillay.

[5] On 15 September 2020, the Tribunal issued a directive providing *inter alia* that any third party seeking to intervene in the merger proceedings must file its intervention application by 22 September 2020. The Tribunal's directive furthermore states:

> "*Any application must include information on how the Third Party can assist the Tribunal as well as the scope of intervention sought by the Third Party in terms of the merits (competition and/or public interest issues) and procedural rights*."

[6] SAEF brought its application to intervene, by filing a Form CT 6, on 24 September 2020. The information provided in the Form CT 6 will be discussed below.

[7] The Respondents (the merger parties and the Commission) filed their answers to SAEF's intervention application on 30 September 2020.

[8] On 9 October 2020, SAEF filed its reply.

[9] The intervention application hearing was set down for 16 October 2020.

[10] The Tribunal notified SAEF of the intervention hearing date on 28 September 2020, and it confirmed its availability the next day on 29 September 2020. However, it subsequently informed the Tribunal that it was no longer available on that date but did not provide sufficient reasons for why it reneged on its initial commitment to the hearing date. It merely stated that it had an important meeting but failed to elucidate the nature of said meeting. Furthermore, SAEF did not bring any formal postponement application. The intervention hearing therefore proceeded as set down on 16 October 2020 with all Respondents in attendance. SAEF did not attend and was not represented at the hearing.

[11] The merger parties and the Commission opposed SAEF's intervention application on both procedural and substantive grounds. They submitted that SAEF failed to make out any proper basis on which it should be admitted as an intervenor in the merger proceedings and that its intervention application must accordingly be dismissed.

[12] We note that the Commission on 1 October 2020 brought a strike out application in relation to allegations by SAEF of political interference at the Commission (as contained in SAEF's Form CT 6). The strike out application was heard on 16 October 2020 i.e., on the same day as SAEF's intervention application. The Commission's strike out application was granted on 16 October 2020 and we do not deal with the strike out aspects in these reasons.[1]

Legal position

[13] Section 53(1)(c)(v) of the Competition Act No 89 of 1998, as amended ("the Act") provides that "*any other person whom the Competition Tribunal recognised as a participant*" may participate in a hearing in terms of Chapter 3 of the Act.

[1] The Tribunal on 1 April 2021 issued reasons for its decision in the strike out application.

[14] In terms of Rule 46(1) of the Rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal Rules") any person who has a "*material interest in the relevant matter"* may apply to intervene in the Tribunal proceedings. Furthermore, Tribunal Rule 46(2)(b) provides that the Tribunal must deny the intervention application if it *"concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding*."

[15] It is trite that the Tribunal has the discretion to grant a party leave to participate in merger proceedings. The Competition Appeal Court ("CAC") in *Anglo SA Capital v IDC* explained that the "*granting of leave to a party to participate is discretionary*"; that such discretion "*must be exercised judiciously or according to rules of reason and justice*"; and that "*the Tribunal has a wide discretion, albeit, to be exercised in a judicial manner*".[2] The CAC further held that the Tribunal can exercise its discretion by having regard to whether a party is in a position to show that its "*participation would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act*".[3]

[16] The CAC in *Community Healthcare v The Tribunal*[4] summarised the approach to interventions in Tribunal merger proceedings as follows:

> "*28.1 The requirement of material and substantial interest, which is manifestly the appropriate test for ordinary litigation, was too restrictive a test to be applied by the Tribunal in the exercise of its discretion in terms of section 53(1)(c)(v).*
>
> *28.2 A party who is able to ensure a material and substantial interest would fall within the class of parties who may be admitted upon the exercise of their judicial discretion by the Tribunal.*
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> *28.3 A party who is unable to show a material substantial interest in the matter may well be admitted if it is able to provide evidence of its ability*

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[2] *Anglo South Africa Capital Proprietary Limited and Others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC) ("*Anglo SA Capital v IDC*") at page 22.
[3] *Anglo SA Capital v IDC* at page 22.
[4] *Community Healthcare Holdings Proprietary Limited and Another v The Competition Tribunal and Others* (44/CAC/Feb05) [2005] ZACAC 3; [2005] 1 CPLR 38 (CAC) (26 April 2005) ("*Community Healthcare v the Tribunal*") at [28].

[redacted]

to assist the Tribunal in the latter's consideration of the application of the various purposes of the Act as contained in section 1 thereof to the relevant merger transaction."

[17] Therefore the Tribunal, in exercising its discretion, *may* permit a party to intervene in merger proceedings: (i) if it has shown a material and substantial interest in the matter, and/or (ii) if it is able to provide evidence of its ability to assist the Tribunal in the merger proceedings.[5] Assistance may be given to the Tribunal, for example, by providing additional information (dealing with matters falling within the Tribunal's jurisdiction) not otherwise available to the Tribunal. The likelihood of assistance to the Tribunal must be balanced against "*the consequences of the intervention in terms of the expedition and resolution of the proceeding*".[6]

[18] Significantly, however, the existence of either or both of these elements does not automatically entitle a third party to intervention.[7] The enquiry is subject to the Tribunal's overriding discretion to permit or refuse intervention, depending on whether this is in accordance with reason and justice.[8] In *Vodacom and Altech Autopage*[9] the Tribunal stated as follows:

"*In a large merger context the purpose of any third party participation is to assist the Tribunal, considering that the Commission has already done an investigation of the matter and has made a recommendation to the Tribunal. In deciding whether to allow a party to intervene and the scope thereof the Tribunal must therefore consider whether the party applying will assist it with additional information not otherwise available to it, to consider the merger in terms of section 12A of the Act. It then follows that the Tribunal can exercise its discretion to limit (or widen) participation rights, based on the degree of assistance that a particular*

[5] Community Healthcare v the Tribunal at [28].
[6] *Community Healthcare Holdings Proprietary Limited / Cornucopia Proprietary Limited and The Competition Commission and Others* (105/LM/Dec04) [2005] ZACT 11 (16 February 2005) ("*Community Healthcare and the Commission*") at [39].
[7] See the use of the word "*may*" by the CAC in Community Healthcare v the Tribunal at 28.2 and 28.3.
[8] Supra footnote 2.
[9] *Vodacom Proprietary Limited and Altech Autopage*, a division of Altron TMT Proprietary Limited (LM185Nov15) [2016] ZACT 43 (18 April 2016) at [32].

[redacted]

participant can offer the Tribunal. The Tribunal must further balance any potential assistance that could be offered against the consequences of the intervention in terms of expedition and resolution of the proceedings."

[19] The Tribunal has in many instances exercised its discretion not to permit, or has imposed significant constraints on, intervention by third parties in merger proceedings. For example, in *Community Healthcare and the Commission* the Tribunal dismissed the applicant's application on the grounds that: "*… the applicants have not made out a case for why they should be recognized as participants. If we were to recognize them it would not be on the basis that they would prove of assistance, but only that perchance they might discover some gem that has thus far eluded all others. This is not a sufficient basis to allow the application …*".[10]

[20] In *Community Healthcare v the Tribunal*[11] the CAC stated that the intervention applicant must set out the basis on which it seeks intervention in its application:

"*[29] Significantly in both the Anglo SA, supra case as well as the decision of the Tribunal in Healthbridge (Pty) Ltd. v Digital Health Care Solutions (Pty) Ltd: in re Digital Health Care Solutions (Pty) Ltd v Competition Commission and Another 2003 [1] CTLR 187(CT)] at 192-193, the applicants for intervention set out in their founding affidavits the matters upon which they sought to make representations. They identified their interests and specified the scope and nature of their proposed participation. In Anglo SA, supra case, the applicant for intervention provided a report by expert economists aimed at disputing certain views expressed in an economists report furnished on behalf of the merging parties. The intervening applicants sought to highlight material inadequacies in this report.*

[30] By contrast, in the present case, appellants failed to provide the Tribunal or this Court with any details as to the contribution it might make

[10] At [58].
[11] At [29] to [34].

[redacted]

to proceedings before the Tribunal, were they to have been admitted as intervenors.…

[32.3] The Tribunal found appellants' papers wanting, in that no information was provided to the Tribunal as to what contribution appellants could make to the proceedings. The Tribunal found the founding affidavit to be vague and the replying affidavit quite unsatisfactory, in that 'it did nothing to address the serious criticisms raised by the respondents in their answering affidavit' …

[34] For these reasons, the Tribunal was correct to conclude that the set of considerations presented by appellants as the basis for their application were not concerns which represented a genuine interest in terms of the objectives of the Competition Act. Assertions about the first appellants own commercial interest were insufficient to bring the application within the scope of s 53(1)(c)(v) of the Act. Nowhere in the papers did appellants provide any indication of evidence it could or would lead before the Tribunal".

[21] From a procedural perspective, in *Caxton v Naspers*[12] the CAC held that when seeking to be recognised by the Tribunal as a participant in merger proceedings, placing information before the Tribunal by way of affidavit *"… is of course a necessary preparatory ingredient to the proper exercise of the Tribunal's discretion*."[13]

SAEF's intervention application

[22] SAEF intervention application, as per its filed Form CT 6, contains the following:

"*To object to the proposed large merger between Thabong (Pty) Ltd & South Africa Coal Holdings (Pty) Ltd, by the process of intervention in terms of the Competition Tribunal Rules. South African Energy Forum objects to the merger on the following basis:*

[12] *Caxton and CTP Publishers and Printers Limited & Naspers Limited and Others* (72/CAC/Aug 2007) [2007] ZACT 72 (5 October 2007) ("*Caxton v Naspers*").
[13] Caxton v Naspers at [26].

[redacted]

The ultimate beneficial ownership of Seriti (Thabong) has not been made available, nor is there any evidence that the ultimate beneficial owners of Seriti are South African HDI's.

The financing of the transaction requires onerus Cost plus contracts to be maintained by Eskom.

Eskom has a regulated price to purchase coal at, Thabong sells coal to Eskom at far above the regulated price which is not in the public interest.

Post-acquisition Seriti and Exxaro will provide up 72% of Eskom's coal which creates a monopoly and represents a significant risk to South Africa's energy Security and Sovereignty, while excluding smaller emerging players in the coal space. Seriti itself will have a 35% market share in coal which creates a dominant player.

Given that the ultimate benefical ownership of Seriti was not disclosed, we have a reason to believe this transaction will create a concentration in the ownership of the South African coal sector ie Glencore/Shanduka etc.

Post Acquisition Seriti will have 4 Cost plus contracts while SMME's have ZERO cost plus contracts, therefore the Competition Commission was negligent in its role to create competition by creating a dominant player like Seriti with 4 onerous Cost plus Contracts. This is the opposite of what the Competition Commission is meant to do.

South African Coal Holdings is currently in breach of the mining charter and the PFMA with a supposed 8% BEE ownership and would therefore be non-compliant to sell anything to Eskom.

The purpose of the Competition Act of 1998 is to promote and maintain competition in South Africa to achieve the certain objectives, the Competition Commission has not met a single objective in recommending this merger. 1.To promote the efficiency, adaptability and development of the economy. 2. To provide consumers with competitive prices and product choices. 3. To promote employment and advance the social and economic welfare of South Africans. 4. To expand opportunities for South African participation in world markets and recognises the role of foreign competition in the Republic. 5. To ensure that small and medium-sized enterprises have an equitable opportunity

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to participate in the economy. 6. To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The Commission has been negligent in the following aspects of the Competition Act as it pertains to approving this transaction for approval by the Tribunal: How is an economy efficient when the largest supplier to the only electricity provider has 4 Cost plus coal contracts. Objective 1 not met.

South African consumers of electricity are paying exorbitant prices on these 4 Cost plus contracts through the electricity tariff. Objective 2 not met.

Ignoring the concentration risk of making Seriti the largest coal supplier to the only electricity provider at excessive cost-plus coal is not in the social or economic welfare of South Africans. Objective 3 not met.

Thermal coal is on the decline globally, South African coal is better used in the South African market. Objective 4 not applicable.

The Commission is creating the largest coal supplier to Eskom, in complete disregard of its role to create SMME's. Objective 5 is not met.

The Commission has ignored all requests to disclose the ultimate beneficial ownership of Seriti but has instead gullably accepted insignificant employee and community equity positions. Objective 6 is not met."

Material interest / locus standi

[23] The first issue for us to consider is if SAEF has been able to show a material and substantial interest in the merger proceedings.

[24] The merger parties submitted that SAEF's intervention application falls to be dismissed since there is no proper application before the Tribunal. They argued *inter alia* that SAEF has not established *locus standi*, an issue also raised by the Commission.

[25] The Commission submitted that an intervention application must set out the *locus standi* of the applicant, which the party instituting the proceedings must allege

[redacted]

and prove.[14] If a party has not done so, the application must fail.[15] It argued that *locus standi* must be established with reference to Rule 46(1) of the Tribunal Rules which requires an applicant to demonstrate "*a material interest in the relevant matter*." It contended that SAEF has not set out in its filed Form CT 6 its "*material interest*" in the merger transaction. On this basis alone the Commission argued that SAEF's application falls to be dismissed.

[26] The Commission further submitted that there is no proof of authority in this case to bring the intervention application. It argued that where an application is launched in the name of an artificial person, it is necessary that a natural person be authorised by the applicant to launch proceedings on its behalf.[16] As with *locus standi* it is for the applicant to prove that the individual who is launching the proceedings on its behalf, has the necessary authority.[17] The Commission pointed out that SAEF's Form CT 6 is not signed by a natural person "*authorised by the applicant to launch proceedings on its behalf*." On this basis *alone* the Commission argued that the application must be dismissed.

Our assessment

[27] The Tribunal referred SAEF to Tribunal Rule 46 which provides:

> "*Intervenors - (1) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must - (a) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and (b) be served on every other participant in the proceedings*."[18]

[28] We further note that at the Tribunal pre-hearing on 14 September 2020, which Messrs Adil Nchabeleng and Kavi Pillay attended on behalf of SAEF, counsel for

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[14] See *Chris Hani Baragwanath Academic Hospital Board v Soul Food Services and Others (2016/2532) [2016] ZAGPJHC 320 (23 November 2016)* ("*Chris Hani v Soul Food")* at para 20.
[15] Ibid.
[16] *Chris Hani v Soul Food* at para 34.
[17] *Chris Hani v Soul Food* at para 35.
[18] Tribunal email to SAEF dated 23 September 2020.

the merger parties expressly requested that, if SAEF wished to bring an intervention application, it should deal with the composition of SAEF and who it represents since that was not clear to the merger parties.

[29] We further note that SAEF's intervention application does not set out the order that it seeks from the Tribunal. It provided no indication of the nature and/or scope of the intervention sought (despite, as indicated above, having been provided with guidance in this regard by the Tribunal in its directive). Given the above, the merger parties argued that they were not able to discern what is being sought in order to allow them a proper opportunity to respond thereto.

[30] In addition, Form CT 6 (used by SAEF) expressly refers to Tribunal Rule 42 which provides that a supporting affidavit is required to accompany any application. No such affidavit was provided. An affidavit is a necessary preparatory step to the proper exercise of the Tribunal's discretion, as affirmed in *Caxton v Naspers*.[19]

[31] Importantly, SAEF in its application does not clearly explain who it is and who it represents. It included the name "*South African Energy Forum*" in the space designated for "*Name and Title of [a] person authorised to sign*" in its Form CT 6. It however does not provide any detail regarding *inter alia* the nature and composition of SAEF, who it claims to represent or the nature of its interest in the merger proceedings. This is critical to any intervention application as the applicant should explain why it has a material interest in the proceedings which is not possible without providing information as to who the applicant is.

[32] In an attempt to remedy the above deficiencies, SAEF subsequently sought to introduce further detail in its reply where it states that it is "*an informal organisation…a gathering of activists that advocates for equitably (sic) involvement in energy and mining technologies and a mix of investments that maximise benefits for South Africa …*";[20] SAEF "*engages in all matters relating to the energy sector with a primary view of transforming the sector and ensuring South Africa maintains energy security and the policy of Free Basic Electricity*";[21]

[19] Caxton v Naspers at [26].
[20] SAEF bundle at page S38.
[21] SAEF bundle at page S39.

and SAEF "*is an organisation of South Africans*".[22] However, it is still unclear who SAEF represents, the nature of its interest in the Tribunal's proceedings (or how it could assist the Tribunal, as dealt with below).

[33] We conclude that SAEF's intervention application does not disclose any cognisable and material interest that it may have in the merger proceedings.

[34] However, we have furthermore also considered whether or not SAEF has demonstrated an ability to assist the Tribunal in the merger proceedings, which is discussed next.

Likely assistance to the Tribunal

[35] As indicated above, the Tribunal may permit a third party to intervene in merger proceedings if it has provided evidence of its ability to assist the Tribunal in its assessment of the merger.

[36] Having regard to the broad generalised language used by SAEF in its Form CT 6, it is difficult to discern the basis upon which SAEF seeks to intervene in the merger proceedings. SAEF simply makes sweeping references to various broad purposes of the Act as a basis on which it argues that the proposed merger should not be approved. Furthermore, SAEF does not set out how and why the generalised issues that it raises are relevant to the merger control provisions of the Act, and why and how the issues relate to the proposed transaction i.e., why they are merger-specific issues. This is not remedied in SAEF's reply insofar as it continues to assert that various other pieces of legislation have application and that the transaction falls within the remit of other regulators or Government departments (such as the Department of Mineral Resources and Energy ("DMRE")) and/or reiterates its allegation that the attorneys acting for the merger parties do not understand the proposed transaction and/or the provisions of the Act.

[37] We next turn to certain of the specific broad allegations in SAEF's application.

[22] SAEF bundle at page S40.

[38] In its application SAEF alleges that "*the ultimate beneficial owners of Seriti are [not] South African HDI's*" and that "*given that the ultimate beneficial ownership of Seriti was not disclosed, we have reason to believe that the transaction will create a concentration in the ownership of the South African coal sector".* These allegations are unsubstantiated – no evidence is adduced in support of this. Its claim about non-disclosure was furthermore directly challenged by the merger parties who stated that the beneficial ownership of Thabong Coal was fully disclosed to and was assessed by the Commission during its investigation of the proposed transaction. The merger parties submitted that they have indicated to the Commission that the proposed transaction will result in SAEC being owned by a black-owned and controlled South African company and will result in an increase in SAEC's equity ownership level by historically disadvantaged persons in South Africa to approximately 90%.

[39] Indeed, the Commission's evaluation of the proposed merger includes an analysis of ownership, and it would be capable of providing any further information that may be required by the Tribunal on the issue of ownership. There appears nothing further that SAEF can add to the Tribunal's consideration of this issue, nor has SAEF suggested otherwise since it has not indicated what evidence it wishes to place before the Tribunal, or that it has any factual basis on which to challenge the merger parties' position.

[40] Regarding SAEF's references in its application to the merger parties having constructed a transaction which involves a community trust and an employee trust, it does not demonstrate any ability to provide evidence that would assist the Tribunal in considering these undertakings of the merger parties. Furthermore, the Commission in its referral deals with these public interest-related issues. Moreover, certain other third parties, namely the Phola Community, the Phola Mining Community Development Trust and the Phola Ogies Rural Mining Forum Community Cluster, who are better placed to deal with these public interest-related issues before the Tribunal, were granted leave by the Tribunal to intervene in relation to these issues.[23]

[23] See the Tribunal order of 19 October 2020 for details of the scope of the allowed intervention.

[41] SAEF in its application also has not demonstrated how it would assist the Tribunal in analysing the alleged financing structure of the transaction; Eskom's so-called cost-plus and shorter-term contracts; NERSA's regulatory role; or the effect of the proposed transaction on SMMEs. Nor has it adduced evidence that it has anything further to add that would assist the Tribunal beyond the Commission's analysis and the submissions of various third parties to the Commission, including Eskom, NERSA and the relevant Government departments. In short, SAEF has not indicated that it has personal knowledge or evidence that is not otherwise available to the Tribunal on these aspects.

[42] Eskom, as the main customer in the thermal coal market in South Africa, would be in a far better position to address any questions on aspects relating to its contracts, pricing, potential alternative suppliers and concentration levels. Eskom representatives could be summoned by the Tribunal to give evidence at the hearing, if required, and indeed were summoned by the Tribunal to do so.

[43] Regarding SAEF's allegations of SAEC being in breach of the Mining Charter and PFMA, these allegations are not substantiated, and it has not indicated how it could assist the Tribunal beyond these issues being dealt with by the Commission and the relevant Government departments' submissions to the Commission. It furthermore fails to explain why these issues are merger specific and how they fall within the scope of the public interest provisions of the Act.

[44] In conclusion, SAEF's intervention application consists of a variety of general and unsubstantiated allegations and arguments. It fails to provide the Tribunal with any detail as to the contribution it might make to the proceedings to assist the Tribunal if it was to be admitted as an intervenor. Nowhere in its papers does SAEF provide any indication of evidence it could or would lead before the Tribunal to assist it in its competitive or public interest analysis of the proposed transaction. SAEF also has not been able to show that certain issues raised in its application are within the scope of the Act and/or are merger specific.

[45] SAEF has not made out a case that it will be able to provide any value or assistance to the Tribunal in its deliberations, and therefore its application falls to be dismissed.

[redacted]

Conclusion

[46] For all the above reasons, the Tribunal has, in its discretion, dismissed SAEF's application to intervene in proceedings relating to the proposed transaction.

[47] There is no order as to costs.

Andreas Wessel Wessels

Mr Andreas Wessels | 25 October 2021 **Date**

Ms Mondo Mazwai and Mr Enver Daniels concurring

Tribunal Case Managers:	Kgothatso Kgobe and Busisiwe Masina
For the Applicants:	No appearance
For the Merger Parties:	Adv T Ngcukaitobi SC instructed by Nortons Inc. and ENSAfrica
For the Commission:	Mr B Majenge