



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM137Oct20

### In the matter between

K2020704995 (South Africa) (Pty) Ltd

Primary Acquiring Firm

and

Comair Ltd (In Business Rescue)

Primary Target Firms

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Panel	Y Carrim (Presiding Member) E Daniels (Tribunal Panel Member) AW Wessels (Tribunal Panel Member)
Heard on	30 October 2020
Order Issued on	30 October 2020
Reasons Issued on	22 December 2020

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### REASONS FOR DECISION

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#### Introduction

[1] On 30 October 2020 the Competition Tribunal ('Tribunal') approved a transaction in terms of which K2020704995 (South Africa) (Pty) Ltd (Bidco) acquired sole control of Comair Ltd (In Business Rescue) (Comair) with conditions.

[2] The reasons for the conditional approval follow.

## **Parties to the transaction**

### *Primary Acquiring Firm*

- [3] The primary acquiring firm, Bidco, is a newly established company that was created for the purposes of the proposed transaction, it does not directly or indirectly control any firm.
- [4] Mr Martin Moritz will control Bidco, with a shareholding of 61%. All beneficial voting rights attached to these shares will be owned and held by Mr Moritz. The Commission confirms that Mr Moritz does not control any other firm.
- [5] The remaining shareholders in Bidco are:
- 5.1 the Executive management of Comair;
  - 5.2 the South African Lenders of Comair;
  - 5.3 a Broad-Based Black Economic Empowerment/and or Employee Share Ownership Program (by operation of the conditions imposed); and
  - 5.4 a firm referred to as SA Holdco.
- [6] SA Holdco primarily serves as an investment vehicle for a consortium of companies representing the interests of certain individuals. The Commission submits that none of the companies with a shareholding in SA Holdco have any interests in businesses in the airline industry which compete with Comair.

### *Primary target Firm*

- [7] Comair is a public company incorporated in accordance with the laws of the Republic of south Africa. Comair's listing on the Johannesburg Stock Exchange was suspended with effect from 5 May 2020, the date on which Comair entered voluntary business rescue as applied for by its board of directors who considered it to be prudent and in the best interests of the shareholders.

- [8] Comair is a South African aviation company which offered scheduled airline services within South Africa to the rest of sub-Saharan Africa and the Indian Ocean Islands. Comair operates under two brands, namely its low fare airline brand Kulula and the British Airways brand as part of a licence agreement with British Airways PLC. In addition, Comair controls several firms which offer services ancillary to the provision of scheduled airline services.
- [9] Comair has not been operational since 26 March 2020 when the national lockdown restrictions enacted to curb the spread of Covid-19 commenced. At the time of the transaction, Comair was under control of its Business Rescue Practitioners (BRP).

### **Background to the Proposed transaction**

- [10] As indicated above, Comair entered voluntary business rescue on 05 May 2020 in order to restructure and improve its financial position. At the time, it also suspended its trading on the JSE.
- [11] The merging parties submit that this decision was made in a context where, for months preceding the decision, Comair was operating under significant financial distress caused by several factors which included:
- 11.1 Rising levels of debt due to significant capital expenditure to renew the Comair fleet;
  - 11.2 The failure of South African Airways to pay the outstanding amount of R790 million owed to it in terms of a settlement agreement;
  - 11.3 The national lockdown imposed which had an unprecedented and prejudicial economic effect on Comair due to travel suspensions.
- [12] The merging parties submitted that these conditions resulted in the inevitability of the commencement of business rescue proceedings, with the only alternative being the liquidation or structured winding down of the company which would have significant detrimental effects on competition in its operational space, as well as direct and indirect employment levels.

[13] Although air travel has been allowed since at least 18 August 2020, on the submissions of the merging parties, it is currently impossible for Comair to resume operations and the BRP's have taken the view that flights will not be able to resume until Comair is sufficiently capitalised.

[14] The Commission noted the merging parties' submission that the proposed transaction would provide the necessary capital injection required for Comair to remain operational.

### **Proposed transaction and rationale**

[15] In terms of the proposed transaction Bidco intends to acquire 99% of the issued shares in Comair. Thereafter, Comair will be delisted from the JSE and Bidco will, accordingly, exercise sole control over Comair.

[16] In line with the requirements of the Air Service Licensing Act 115 of 1990, 99% of Comair's voting interests will post merger be held and controlled by BidCo, a South African entity, with the public holding the remaining 1%.

[17] In terms of the conditions to the merger, discussed below, a shareholding amount of up to ██████ in BidCo will be earmarked for a broad-based black economic empowerment initiative on mutually acceptable commercial terms the initiative will take place within ██████ of the proposed 'flying start date' (ie the date on which Comair resumed operations-being 1 December 2020).

[18] We note here that the proposed transaction arises from the approved business rescue plan and, to the BRP, it is viewed as the best possible way for Comair to resume operations and resolve its current financially perilous situation. Comair's BRP issued a request for proposals and offers in response to which a number of investors formed a consortium, titled the Comair Rescue Consortium (which is now ultimately Bidco), and made a binding offer to provide funding to Comair and acquire 99% of its issued share capital. The BRP included the binding offer in the business rescue plan and it was approved by

the creditors and shareholders of Comair at a duly convened meeting on 18 September 2020.

- [19] In terms of rationale, Bidco submits broadly that it is in the best position, by virtue of the quality of its shareholders and management, to achieve the recapitalisation plan required for Comair to deliver on the long-term sustainability and viability of its business. It submits that it is in the best position to ensure the long-term sustainability and viability of the business.
- [20] Comair submits that the proposed transaction best enables it to achieve the return of Comair to sustainable operational levels. The transaction will result in both new equity capital and access to debt funding of up to R 1.9 billion, a substantial amount desperately needed to preserve the key business elements during the business rescue period and to facilitate Comair's return to operations.
- [21] The Commission, in assessing the submitted rationales found that the proposed transaction will likely provide a better outcome through the capital injection than would be the case under liquidation, at the same time allowing about 1 681 jobs to be preserved.

### **Competition Assessment**

- [22] The Commission assessed the activities of the merging parties and found that there is no horizontal overlap between the business activities of the merging parties as none of the Bidco shareholders are involved in activities that can be deemed interchangeable or substitutable with those of Comair. Accordingly, the proposed transaction will not result in any market share accretion or any change in the competitive landscape in any relevant market.
- [23] In addition, the Commission found that there is no vertical overlap between the merging parties' activities as they do not participate at different levels of the same supply chain. Given the lack of horizontal or vertical overlap between the activities of the merging parties, the Commission concludes that the proposed

transaction is unlikely to substantially prevent or lessen competition in any market.

[24] We agree with the Commission's conclusions.

### **Public interest considerations**

#### Employment

[25] The merging parties submitted that the proposed transaction would result in a positive public interest outcome. In particular, the implementation of the transaction would ensure that approximately 1600 jobs would be saved. The parties submitted that the transaction would enable the return to operations of Comair, thus ensuring that employees would not face retrenchment as a result of liquidation or winding down proceedings.

[26] However, given the ailing financial position of Comair, Bidco made known its intent to reduce Comair's staff complement by no more than 200 people based upon operational requirements. The merging parties submitted that most of the employees who may need be retrenched will be in the skilled, professionally qualified or senior executive category. It was also submitted that no unskilled employees would be retrenched and only a few semi-skilled were at risk of retrenchment. The Commission noted the merging parties' submission that the proposed retrenchments represented a worst-case scenario number, which was still subject to engagement with Comair Management, and that therefore the number may be reduced

[27] In order to address the employment concerns raised by the proposed transaction, the merging parties committed to a condition which caps the number of post-transaction operational retrenchments at 200 employees and requires it to make offers of employment to all staff who have been retrenched as a result of the proposed transaction when jobs become available.

[28] The Commission ultimately concluded that the proposed transaction would ensure that over 1600 jobs were saved as, if not for the transaction, the target

business would not be in a position to remain operational and would be liquidated.

#### Spread of ownership

[29] During the course of the Commission's investigation the Minister of the Department of Trade Industry and Competition (the Minister) raised additional public interest concerns. The minister was of the view that the proposed transaction appears to be inconsistent with section 12A(3)(e) of the Competition Act, that requires an evaluation of whether a merger promotes a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. The Minister suggested the merged entity offer the employees equity (through an Employee Share Ownership Program equivalent to the value of unpaid salaries). The Minister proposed that the merged entity commit a minimum of 5% shareholding towards an employee share ownership program (ESOP) with a total Broad-Based Black Economic Empowerment (BBBEE) /ESOP participation of [REDACTED]

[30] In line with the concerns raised by the Minister, the Commission considered and engaged with the merging parties as to whether a suitable remedy could be agreed to. The merging parties ultimately agreed to a condition to earmark up to [REDACTED] of the shares in Bidco for an appropriate ownership structure which meets the requirements of the Codes of Good Practice on Broad-Based Black Economic Empowerment issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended) and aligns with the commercial objectives of Comair.

[31] The merged entity was willing, within this [REDACTED] to commit to secure (i) the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% as well as (ii) one or more Black Investor Groups who are agreeable to participating in this initiative on mutually acceptable terms and who are able to demonstrate an alignment of interests and strategic skills which shall support and advance the medium to long-term

business case of Comair. Thus, the combined BBEE/ ESOP initiative will comprise a shareholding of up to [REDACTED] in Bidco.

[32] The Commission is of the view that the proposed B-BBEE initiative is a positive public interest outcome and will promote the public interest objectives in the Competition Act.

[33] We agree with the Commission's conclusions.

### **Conclusion**

[34] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, any public interest concerns raised by the merger could be cured by the conditions agreed to by the Commission and the merging parties. Accordingly, we approved the proposed transaction subject to the conditions attached as Annexure A.

Signed by: Yasmin Tayob Carrim  
Signed at: 2020-12-22 12:50:12 +02:00  
Reason: I approve this document

*Yasmin Tayob Carrim*

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**Ms Y Carrim**

**22 December 2020**

**Date**

**Mr E Daniels and Mr AW Wessels concurring.**

Tribunal Case Manager : Alistair Dey- van Heerden.

For the Merging Parties : Paul Coetser of Werksmans Attorneys for the Business Rescue Practitioners

: Derushka Chetty and Wade Graaf of ENSAfrica for the acquiring firm

For the Commission : Zanele Hadebe and Grashum Mutizwa



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CONFIDENTIAL CONDITIONS

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1. DEFINITIONS AND INTERPRETATION

1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings —

1.1.1 **“Affected employees”** means a maximum of 200 (two hundred) Comair employees that will be retrenched following the implementation of the Merger;

1.1.2 **“Approval Date”** means the date the Tribunal issues a Clearance Certificate (Notice CT10) in terms of the Competition Act;

1.1.3 **“B-BBEE”** means broad-based black empowerment as defined in the B-BBEE Act;

1.1.4 **“B-BBEE Act”** means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended, and the Codes of Good Practice 2013, as amended;

1.1.5 **“B-BBEE initiative”** means the commitment to earmark up to [REDACTED] of the shares in SA Bidco for an appropriate ownership structure which meets the requirements of Statement 100 of the Codes and aligns with the commercial objectives of Comair;

1.1.6 **“B-BBEE Purchaser”** means any natural Black person or persons or B-BBEE controlled company or B-BBEE owned company as defined in the B-BBEE Act;

1.1.7 **“Black”** means Black People as defined in the B-BBEE Act;

1.1.8 **“Codes”** means the Codes of Good Practice on Broad Based Black Economic Empowerment in terms of the B-BBEE Act;

1.1.9 **“Comair”** means Comair Limited (in business rescue);

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- 1.1.10 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.11 "Competition Act" means the Competition Act, 89 of 1998, as amended;
- 1.1.12 "Conditions" means the conditions set out herein;
- 1.1.13 "Days" means business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.1.14 "HDI" means historically disadvantaged individuals, as defined in the section 3(2) of the Competition Act;
- 1.1.15 "ESOP" means Employee Share Ownership Program;
- 1.1.16 "Flying Start Date" means the date on which Comair's flying operations recommence, which, subject to all regulatory approvals being in place, is currently scheduled to be 1 December 2020;
- 1.1.17 "Merged Entity" means Comair, subject to the control of SA BidCo;
- 1.1.18 "Merger" means the acquisition of control over Comair by SA BidCo;
- 1.1.19 "Merging Parties" means Comair and SA BidCo;
- 1.1.20 "Proposed Transaction" means the proposed acquisition by SA BidCo of a controlling shareholding in Comair;
- 1.1.21 "SA BidCo" means K2020704995 (South Africa) (Pty) Ltd;
- 1.1.22 "South Africa" means the Republic of South Africa; and
- 1.1.23 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.

## 2. CONDITIONS TO THE APPROVAL OF THE MERGER

### B-BBEE

- 2.1 In terms of the B-BBEE Initiative, the Merged Entity shall, within [REDACTED] of the Flying Start Date, allocate up to [REDACTED] of the shares in SA Bidco for

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an appropriate B-BBEE ownership structure. In this regard, the Merged Entity commits to securing the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% as well as one or more B-BBEE Purchasers who are agreeable to participating in this initiative on mutually acceptable terms and who are able to demonstrate an alignment of interests and strategic skills which shall support and advance the medium to long-term business case of Comair.

- 2.2 In furtherance of the Merged Entity's commitments in paragraph 2.1 above, the Merging Parties shall conclude an agreement, on mutually acceptable commercial terms, with one or more B-BBEE Purchaser/s to acquire a minority shareholding of up to [REDACTED] in SA Bidco, within [REDACTED] of the Flying Start Date.
- 2.3 In furtherance of the Merged Entity's commitments in paragraph 2.1 above, the Merged Entity shall, within a period of 12 (twelve) months from the Flying Start Date, secure the participation of an ESOP (with a broad representation of Black participants) with a minimum shareholding of 5% in SA Bidco.
- 2.4 If, at the end of the [REDACTED] period mentioned above (the "First Period"), SA BidCo has not entered into an agreement with one or more B-BBEE Purchaser/s in compliance with clause 2.2 above, then SA Bidco shall engage with the Commission in order to extend such period with the written consent of the Commission, which written consent shall not unreasonably be withheld.

### EMPLOYMENT

- 2.5 The Merging Parties shall not retrench any employees as a result of the Merger for a period of three (3) years from the Flying Start Date. For the sake of clarity, the Merging Parties will be entitled to retrench the Affected Employees.
- 2.6 Comair will make offers of employment to all Affected Employees who have been retrenched when jobs become available at the new airline post-merger. This commitment will apply for a period of 36 (thirty six) months after the Flying Start Date and is subject to employees being suitably qualified.
- 2.7 For the sake of clarity, retrenchments exclude: (i) voluntary separation arrangements; or (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments

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lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, excluding but not limited to, dismissals as a result of misconduct or poor performance; (vii) any decision not to renew or extend a contract of a contract worker; and (viii) any transfer of employees to the employment of a third party as a result of any sale of business operations, including related assets and liabilities, or any joint venture or similar business arrangements.

### 3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1 SA BidCo shall communicate in writing the Flying Start Date to the Commission within 5 (five) days of its occurrence.
- 3.2 Comair shall circulate a copy of the employment related Conditions to all of its employees and/or their employee representatives and/or relevant trade unions in South Africa within 5 (five) Days of the Approval Date.
- 3.3 As proof of compliance herewith, a director of Comair shall, within 10 (ten) Days of the circulation of the Conditions, provide the Commission with an affidavit attesting to the circulation of the Conditions and attach a copy of the said notice that was sent to the employees, the relevant trade unions and/or employee representatives.
- 3.4 SA BidCo shall submit to the Commission a progress report, within 6 (six) months of the Flying Start Date, detailing amongst other the status of the implementation of the B-BBEE initiative including the negotiations with any potential B-BBEE Purchaser/s and the steps taken to comply with condition 2.1, 2.2 and 2.3 above. This report shall be accompanied by an affidavit, attested to by a director of SA BidCo, confirming the accuracy of the report.
- 3.5 SA BidCo shall submit a report on each anniversary of the Flying Start Date, setting out its compliance with clauses 2.1, 2.2, 2.3, 2.5 and 2.6 of the Conditions, for the duration of the Conditions. This report shall be accompanied by an affidavit, attested to by a director of SA BidCo, confirming the accuracy of the report.
- 3.6 SA BidCo shall inform the Commission in writing within 5 days after a legally binding written agreement with a B-BBEE Purchaser/s has been signed for the purposes of paragraph 2.2 above.

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- 3.7 The Commission may request any additional information from the Merging Parties which the Commission from time to time might deem necessary for the monitoring of compliance with these Conditions.

### 4. BREACH

- 4.1 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of any of the above Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules For the Conduct of Proceedings in the Tribunal.

### 5. VARIATION

- 5.1 The Merging Parties and the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

### 6. GENERAL

- 6.1 All correspondence in relation to the Conditions must be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).