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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM198Jan17

In the matter between

Firefly Investments 319 Proprietary Limited	Primary Acquiring Firm
And	
Murray and Roberts Infrastructure and Building Platform of Murray and Roberts Limited	Primary Target Firm

Panel	: Mr Norman Manoim (Presiding Member) : Mr Enver Daniels (Tribunal Member) : Mr Andreas Wessels (Tribunal Member)
Heard on	: 8 March 2017
Order Issued on	: 8 March 2017
Reasons Issued on	:24 March 2017

REASONS FOR DECISION

Approval

[1] On 8 March 2017, the Competition Tribunal ("the Tribunal") unconditionally approved the large merger between Firefly Investments 319 Proprietary Limited ("Firefly") and Murray and Roberts Infrastructure and Building Platform ("I&B Platform") of Murray and Roberts Limited ("Murray and Roberts"), hereinafter referred to as the merging parties.

[2] The reasons for the approval are as follows.

Parties to the transaction

Primary Acquiring Firm

[3] Firefly is a newly established black-owned company. Its shareholders are the Southern Palace Group ("Southern Palace") which holds 75% of the equity with the remaining 25% held by the Government Employees Pension Fund ("the GEPF"). We are advised that the GEPF despite this shareholding will exercise no control over Firefly. Southern Palace will thus be the sole controller of Firefly.

[4] Southern Palace has diverse interests in real estate, industrial companies, information technology, steel products manufacturing and recycling, automotive trading and manufacturing industry metals. Importantly it has no investments in any firm that could be considered to be a competitor of the target firm. Until this transaction, Southern Palace did not have previous experience as a controlling shareholder.

Primary Target Firm

[5] The I&B Platform is a business division of Murray and Roberts that conducts its business operations through two entities: Concor Proprietary Limited ("Concor") and Forum SA Trading 284 Proprietary Limited ("Forum SA"), collectively referred to as the I&B Platform entities.

[6] The I&B Platform entities are engaged in the business of civil engineering, general building, road and earthworks, open cast mining, main civil works for power stations, construction plant and equipment and property development.

Proposed transaction and rational

[7] In terms of the sale agreement, Firefly shall acquire the entire I&B Platform. Post-merger, Firefly shall control the I&B Platform entities.[1]

[1] The proposed transaction shall be notified in Namibia and Botswana.

[8] Southern Palace submitted that the proposed transaction presents an attractive investment opportunity that offers great potential for growth. Murray and Roberts submitted that the disposal of the I&B Platform will allow it to focus on its various projects in selected natural resource market sectors.

Relevant market and impact on competition

[9] The Commission considered the activities of the merging parties and found that there are no overlaps in any of the products or services offered by the merging parties.

[10] Murray and Roberts is considered to be a top tier construction firm that possesses a level 9 status in the Civil Engineering (CE) and General Building (GB) sectors as classified by the industry regulator, the Construction Industry Development Board. The merging parties indicated that the I&B Platform will remain competitive post-merger despite the fact that the Southern Palace has no previous experience in this sector. The I&B Platform is a business that has been operating independently from Murray and Roberts for many years. Southern Palace indicated that it has a large order book of the projects it will continue to execute post-merger. It also does not anticipate losing the level 9 CE and level 9 GP status post-merger.

[11] In light of the above we find that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

History of collusion

[12] It is worth noting that on 1 September 2009, the Commission launched a complaint against various construction companies for engaging in horizontal restrictive practices in violation of section 4(1)(*b*) of the Competition Act 89 of 1998 ("the Act"), which are price fixing, market allocation and collusive tendering. Murray and Roberts was one of the firms implicated in several contraventions although most of these have apparently been settled.

[13] At the merger hearing, we enquired as to whether any further steps will be taken to ensure that the target firm will not fall foul of section 4(1)(*b*) of the Act. Southern Palace submitted that they have undergone extensive due diligence and requisite training around the issues of prohibited practices. Furthermore, it submitted that it will ensure that appropriate governance and leadership will foster training around its philosophies and best practices, thus ensuring it does not find itself engaging in horizontal restrictive practices.

Restraint of trade

[14] Clause 24 of the Merger Agreement contains a restraint clause inserted in favour of Firefly which restrains Murray and Roberts from engaging in any business activities conducted by the I&B Platform (excluding its marine business) for a period of 5 years, throughout Southern Africa.

[15] The Commission was initially of the view that the restraint was disproportionate in relation to the interest sought to be protected by the buyer. Typically in sales of business of this nature, the restrain period is between two to three years. The merging parties however persuaded the Commission that the restraint could be justified given various unique circumstances in this case.

[16] This justification was repeated by Mr Lukas Tseki, the Chief Executive Officer of Southern Palace. Mr Tseki summed up the reasons saliently as follows:

[16.1] The need to protect the investment. He indicated that Firefly was paying a full price for the target firm. As such, it was necessary to protect the investment while the new owners established themselves.

[16.2] The nature of construction projects is that they are long term. Mr Tseki mentioned that construction projects, for a group of this size, can last anything between three and eight years. It is important to protect the goodwill whilst projects are still works in progress.

[16.3] The issue of branding. Firefly will only be entitled to use the Murray and Roberts name (one of the most established in the industry) for a period of one year. If Murray and Roberts (as the selling entity) were to re-enter the market in a short period of time then, until Firefly had established its new identity, it would be at great risk of losing business again to the very firm that had sold to it.

[16.4] Although not mentioned by Mr Tseki, the Commission also took the following factors into account: that there was no market power achieved as a result of the transaction, that there was an exchange of goodwill and know-how; and that the acquiring firm was a new entrant into the market and importantly one with BEE status.

[17] In light of the above, we are of the view that the nature and scope of the restraint clause does not raise any competition concerns. The purpose of the restraint clause adequately informs the reasonable justification for a 5 year restraint period. We are accordingly satisfied with the rationale provided by the merging parties and have no doubt as to the Commission's conclusion regarding the restraint of trade clause.

Public interest

[18] The merging parties submitted that the proposed transaction shall not have an effect on employment. It shall have a positive impact on Firefly as employment opportunities will be created therein. Furthermore, the proposed transaction results in the creation of the first industrialist black-owned construction entity from the Acquiring group's point of view.

[19] Based on the above, the Commission is of the view that the proposed transaction is unlikely to have a negative effect on employment and does not raise any other public interest concerns.

Conclusion

[20] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no adverse public interest issues arise whilst a positive one arises because the transaction leads to the introduction into this sector of a BEE company. Accordingly, we approve the proposed transaction unconditionally.

Mr Norman Manoim

24 March 2017
Date

Mr Enver Daniels and Mr Andreas Wessels concurring

Tribunal Researcher:	Ndumiso Ndlovu
For the merging parties:	Ahmore Burger-Smidt for Werksmans Attorneys and Rudolph Labuschagne for Bowman Gilfillan
For the Commission	Zintle Siyo and Xolela Nokele