



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM269Mar19

In the matter between

WBHO Construction (Pty) Ltd

Primary Acquiring Firm

and

Trencon Construction (Pty) Ltd

Primary Target Firm

Panel : Yasmin Carrim (Presiding Member)
: Andreas Wessels (Tribunal Member)
: Fiona Tregenna (Tribunal Member)
Heard on : 17 July 2019
Order Issued on : 19 July 2019
Reasons Issued on : 19 August 2019

REASONS FOR DECISION

Approval

- [1] On 19 July 2019, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between WBHO Construction (Pty) Ltd and Trencon Construction (Pty) Ltd.
- [2] The reasons for the approval follow.

Parties to the transaction

Primary Acquiring Firm

- [3] The primary acquiring firm is WBHO Construction (Pty) Ltd (“WBHO”), a company duly incorporated in accordance with the laws of the Republic of South Africa. WBHO is a wholly owned subsidiary of Wilson Bayly Holmes-Ovcon Limited (“WBHO Group”), which is a public company listed on the Johannesburg Stock Exchange. Its shares are widely held, and it is not directly or indirectly controlled by any single entity.
- [4] WBHO is a large construction company with a broad spectrum of expertise in respect of all sectors of the construction industry. WBHO controls a number of companies in South Africa and around Africa. WBHO mainly operates through the following divisions:
- a. Building and Construction – WBHO is involved in the building of inter alia office and commercial buildings, hospitals, shopping centres, residential developments and golf estates, hotels and resorts, casinos and stadiums.
 - b. Roads and Earthworks – WBHO provides large-scale public and private projects across various infrastructural applications such as inter alia road construction and rehabilitation, bridges and structures, freeways and airports, harbours and railways.
 - c. Civil Engineering – WBHO provides civil engineering services in a number of sectors including mining, energy, water, and effluent treatment and silos and towers.

Primary Target Firm

- [5] The primary target firm is Trencon Construction (Pty) Ltd (“Trencon”). Trencon is wholly owned by Mr. Amarnath Singh and does not directly or indirectly control any firm. The majority of Trencon’s directors are Indian individuals.
- [6] Trencon is a diversified construction company with experience in traditional building and civils contracts, as well as concession projects. Trencon concentrates on building construction (residential and non-residential) and conducts civil engineering works, sans road works.

Proposed transaction and rationale

- [7] The current transaction stems from a previous large merger wherein WBHO formed an economic alliance with Fikile Construction (Pty) Ltd (“Fikile”), Motheo Construction Group (Pty) Ltd (“Motheo”), and Edwin Construction (Pty) Ltd (“Edwin”) – collectively referred to as the Emerging Contractors.¹ The Emerging Contractors are all smaller construction companies that are more than 51% owned and controlled by historically disadvantaged persons (“HDPs”).
- [8] The Alliance is the result of a settlement agreement concluded between a number of Construction Companies² and the Government of the Republic of South Africa (as represented by the Ministers of Rural Development and Land Reform, Economic Development, Public Works and Transport) on 11 October 2016 (“the Settlement Agreement”).
- [9] The current transaction entails the replacement of Fikile Construction Pty Ltd (“Fikile”) with Trencon as an Emerging Contractor within the WBHO Alliance. The merging parties submitted that it was intended that post-merger, the

¹ WBHO Construction and Fikile Construction and 2 Others LM024Apr17

² Aveng (Africa) (Pty) Ltd (“Aveng”), Basil Read Holdings (Pty) Ltd (“Basil Read”), Group Five Construction Limited (“Group Five”), Murray and Roberts Limited (“Murray and Roberts”), Raubex (Pty) Ltd, Stefanutti Stocks (Pty) Ltd (“Stefanutti”) and WBHO Construction (“WBHO”).

merging parties will operate as a single economic entity (i.e. the WBHO Alliance).

- [10] Regarding rationale, WBHO submitted that the merger is intended to fulfil its obligations in terms of the Settlement Agreement as a result of Fikile's exit from the WBHO Alliance.
- [11] WBHO submitted that its views, and that of the Fikile's management regarding Fikile's business requirements were no longer aligned. The parties mutually agreed to terminate Fikile's participation as an Emerging Contractor under the Settlement Agreement and consequently as a member of the WBHO Alliance.
- [12] The Commission engaged Fikile's management to obtain a full account of the events which led to the decision by WBHO and Fikile to terminate their agreement. In this regard, Fikile duly corroborated WBHO's submission.³

Relevant market and impact on competition

- [13] The Commission identified horizontal overlaps in the following markets:
- a. The provision of services for civil engineering: other;
 - b. The provision of services for general building: residential; and
 - c. The provision of services for general building: non-residential.
- [14] In the initial assessment of the WBHO Alliance, the Commission had relied on data from Statistics South Africa as well as from the merging parties' competitors for the market share information. In the current transaction, the Commission relies on the merging parties' estimates which were based on data from Statistics South Africa, the Construction Industry Development Board ("CIBD"), the South African Reserve Bank, as well as the South African Forum of Civil Engineering Contractors ("SAFCEC").

³ Please see page 487-489 of the merger record.

- [15] The Commission considered the merging parties estimates and found no reason to question the merging parties estimates as the proposed transaction arises less than two years since the Commissions initial investigation.
- [16] The average combined market share of the merged entity will be low, falling below 10% in each relevant market. Furthermore, the market share accretion resulting from the proposed transaction is insignificant. The Commission also identified a number of prominent rivals in the relevant markets such as Aveng, and Murray & Roberts. The Commission concludes that the merged entity is unlikely to exercise market power given the presence of several viable alternatives who will be able to discipline the merged entity.
- [17] Further, the Commission identified a vertical overlap, in so far as WBHO manufactures/produces mesh and rebar (“upstream products”) which are purchased by Trencon and its competitors in the downstream market for the provision of general building (non-residential) and general building (residential) services.
- [18] However, Trencon’s procurement of mesh and rebar from all suppliers equates to 5.6% of WBHO’s total sales of mesh and rebar and WBHO is just one of many manufacturers of these products in the market.⁴ Therefore the Commission found there is no likelihood of foreclosure as a result of the proposed transaction.

Public interest

- [19] The merging parties submitted that no retrenchments will occur as a result of the proposed transaction. The Commission is of the view that the proposed transaction is unlikely to negatively affect employment as the businesses of the merging parties will not be integrated post-transaction. There will be no employee rationalisations or duplications as a result of the proposed transaction.

⁴ These include companies such as Allied Mesh and Fitters, Biflex wire products, GKD Group South Africa, IPM Steel and Merco Industries, amongst others.

- [20] In addition, the merging parties submitted that in line with section 12A(3)(c) the proposed transactions result in public interest benefits as it enables the Emerging Contractors (in their capacity as BEE and Historically Disadvantaged firms) to become competitive. The merging parties outline the following benefits:
- a. It will improve the development of skills among HDPs in critical areas in the industry;
 - b. It encourages participation and ownership of SMEs and enterprises managed and owned by HDPs; and
 - c. It provides for demonstrable and measurable expansion opportunities in the construction industry which promotes competition, innovation and growth in the market.
- [21] The Commission agreed and found that the proposed transaction raises strong public interest benefits in terms of the Act. The WBHO Alliance ensures that small black-owned construction companies are able to scale their businesses and hopefully, one day, be able to compete directly with firms such as WBHO.
- [22] The Commission was of the view that it is necessary to monitor the performance of the WBHO Alliance in their attainment of these public interest benefits. The Commission therefore required the merging parties to provide a report to the Commission on all the projects the merging parties would have participated in as part of the WBHO Alliance. The merging parties must submit reports annually detailing the projects they have worked on during the joint venture. Further, they must provide a report upon termination of the alliance.
- [23] The WBHO Alliance therefore presents a tangible opportunity for Trencon to be developed into a large, competitive firm in line with the objectives of section 12A(3)(c) of the Act.

Conclusion

[24] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Accordingly, we approved the proposed transaction subject to conditions. For convenience the set of conditions are attached, marked as “Annexure A”.



Ms. Yasmin Carrim

19 August 2019

Date

Mr. Andreas Wessels and Prof. Fiona Tregenna concurring.

Tribunal Case Manager : Andiswa Nyathi & Alistair Dey-Van Heerden

For the Merging Parties : Paul Coetser and Paul Cleland from Werksmans Attorneys

For the Commission : Thabelo Masithulela & Busisiwe Ntshingila

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WBHO CONSTRUCTION PROPRIETARY LIMITED

AND

TRENCON CONSTRUCTION PROPRIETARY LIMITED

CC CASE: 2019Mar0008

CT CASE: LM269Mar19

CONDITIONS

1. Definitions
 - 1.1 **"2018 Merger Decision"** means the Tribunal's conditional approval of the merger involving the economic alliance between WBHO, Fikile, Edwin and Motheo, approved in terms of the Tribunal order issued on 21 February 2018 under case number LM024Apr17;
 - 1.2 **"2018 Merger Conditions"** means the merger conditions set out in Annexure A to 2018 Merger Decision;
 - 1.3 **"Act"** means the Competition Act, No. 89 of 1998, as amended;
 - 1.4 **"Approval Date"** means the date referred to on the Tribunal's Merger Clearance Certificate (Form CT 10);
 - 1.5 **"Commission"** means the Competition Commission of South Africa;
 - 1.6 **"Conditions"** means the conditions contained in this document - Annexure A;
 - 1.7 **"Competitively Sensitive Information"** includes but is not limited to, any and all such information relating to -
 - 1.7.1 pricing (including but not limited to pricing of specific products, discount and pricing strategies and/or terms),
 - 1.7.2 production rates, profit and/or risk allowances, capacity forecasts, (including marketing and/or investment strategies and/or growth plans),
 - 1.7.3 current and future divestments,
 - 1.7.4 budgets and business plans,
 - 1.7.5 margin information by product or client;

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- 1.7.6 cost information for particular products;
- 1.7.7 details of commercial relationships with customers, suppliers and/or competitors, and
- 1.7.8 other confidential customer and/or competitor data of a price-sensitive nature;
- 1.8 **"Competition Compliance Policy"** means a document to be developed by WBHO and the Emerging Contractors which provides the framework for their respective companies to ensure compliance with the Act. The document should seek to ensure that all business units and relevant employees of WBHO and the Emerging Contractors are familiar with, and comply with the provisions of the Act and should include mechanisms for the monitoring and detection of any contravention of the Act;
- 1.9 **"Construction Companies"** means the construction company signatories to the Settlement Agreement, namely: WBHO; Aveng (Africa) Proprietary Limited; Basil Read Holdings Proprietary Limited; Group Five Construction Limited; Murray & Roberts Limited; Raubex Proprietary Limited and Stefanutti Stocks Proprietary Limited;
- 1.10 **"CIDB"** means Construction Industry Development Board;
- 1.11 **"Days"** means business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.12 **"Emerging Contractors"** means collectively, Trencon, Motheo and Edwin, who are each entities owned, managed and controlled by Historically Disadvantaged Persons;
- 1.13 **"Edwin"** means Edwin Construction Proprietary Limited, a private company incorporated in accordance with the laws in the Republic of South Africa, with registration number 1997/013204/07;
- 1.14 **"Fund"** means the Tirisano Construction Fund established as a trust, in accordance with the provisions of the Settlement Agreement";
- 1.15 **"Historically Disadvantaged Persons"** where used in these conditions –
- 1.15.1 in reference to the Construction Companies' obligations in terms of the Settlement Agreement, has the meaning contemplated by the term "previously disadvantaged persons" in the Construction Industry Development Board Act No, 38 of 2000 in relation to "emerging enterprises"; or

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- 1.15.2 in reference to the Commission or the Act (if applicable), has the meaning ascribed thereto in section 3(2) of the Act;
- 1.16 "**Implementation Date**" means the date, occurring after the Approval Date, on which the WBHO Alliance will be implemented vis-a-vis Trencon;
- 1.17 "**Merger**" means the merger notified to the Commission in terms of the Act under case number 2017Mar0147;
- 1.18 "**Motheo**" means Motheo Construction Group Proprietary Limited, a private company incorporated in accordance with the laws in the Republic of South Africa, with registration number 2004/029693/07;
- 1.19 "**PICC**" means Presidential Infrastructure Coordinating Commission;
- 1.20 "**Settlement Agreement**" means the settlement agreement reached between the Construction Companies and the Government of the Republic of South Africa on 11 October 2016, which became effective on 8 November 2016;
- 1.21 "**Termination Date**" means the date on which the WBHO Alliance will terminate in respect of a particular Emerging Contractor or all Emerging Contractors, as the case may be, as contemplated in the Settlement Agreement, being –
- 1.21.1 in the event that the collective Turnover Target is achieved in the seventh year of the WBHO alliance, WBHO's 2024 financial year end, as provided for in clause 6.4.2 of the Settlement Agreement; or
- 1.21.2 in the event that the emerging Contractors have not attained the collective Turnover Target at the end of WBHO's 2024 financial year end, such longer period as may be applicable in terms of clause 6.4.5 of the Settlement Agreement; or
- 1.21.3 such earlier date as the WBHO Alliance terminates in its entirety or vis-à-vis any particular Emerging Contractor, should that occur;
- 1.22 "**Trencon**" means Trencon Construction (Proprietary) limited a company duly incorporated and registered in accordance with the laws of the Republic of South Africa, with registration number 1995/001822/07;
- 1.23 "**Tribunal**" means the Competition Tribunal South Africa;
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- 1.24 "Trustees" means the Trustees of the Fund from time to time;
- 1.25 "Turnover Target" means the collective turnover targets specified in clause 6.4.2 of the Settlement Agreement, being a collective turnover target of 25% of WBHO's qualifying turnover on the Termination Date, and the annual targets as are specified in clause 6.4.2 of the Settlement Agreement, with a view to monitoring compliance, on an ongoing basis, with such collective target;
- 1.26 "WBHO" means WBHO Construction Proprietary Limited, a private company incorporated in accordance with the laws in the Republic of South Africa, with registration number 1983/011902/07;
- 1.27 "WBHO Alliance" means the proposed economic alliance between WBHO, Trencon, Motheo and Edwin, except where the context indicates that WBHO Alliance is a reference to the existing economic alliance between WBHO, Motheo and Edwin; and
- 1.28 "WBHO Alliance Members" means WBHO, Edwin, Motheo and Trencon.

2. Recordal

- 2.1 On 04 March 2019, the Competition Commission ("Commission") received notice of a large merger whereby WBHO intends to form an economic alliance with Trencon. Trencon is 100% owned, managed and controlled by Historically Disadvantaged Persons.
- 2.2 Emerging Contractors are smaller construction companies that are owned and controlled by Historically Disadvantaged Persons. WBHO had initially selected 3 (three) Emerging Contractors with whom it intended to form the WBHO Alliance, being Edwin, Motheo and Fikile. This was approved by the Tribunal in the 2018 Merger Decision. WBHO and Fikile subsequently agreed to terminate their agreement such that, at the date of this merger notification, WBHO had only 2 (two) Emerging Contractors. In terms of the proposed transaction, Trencon will be introduced to the WBHO Alliance as a third Emerging Contractor with Motheo and Edwin.
- 2.3 In light of the fact that the 2018 Merger Decision was approved subject to the 2018 Merger Conditions, the Commission recommends that the proposed transaction be approved subject to the same conditions, *mutatis mutandis*.

2.4 Recognising that the Conditions specified below are substantially the same as those contained in the 2018 Merger Conditions, it is noted that compliance by the WBHO Alliance with any obligation in the 2018 Merger Conditions shall constitute compliance with that same obligation as contained in these Conditions, and vice versa, save for any difference in compliance necessitate by these Conditions, for example as regards Trencon.

2.5 The Commission recommends that the Merger be approved subject to the Conditions set out below.

3. CONDITIONS

3.1 Conditions relating to the Fund

3.1.1 WBHO shall ensure that any person who is directly and operationally involved in the mentorship and development of the Emerging Contractors is not the same person(s) whom WBHO will appoint as a Trustee to represent WBHO's interests in the Fund;

3.1.2 The WBHO Alliance Members shall continue to ensure that all information submitted to the Fund for reporting purposes is aggregated such that it does not reveal Competitively Sensitive Information;

3.1.3 WBHO must ensure that any person it appoints as a Trustee representing WBHO's interests in the Fund shall sign the necessary Non-Disclosure Agreements to prevent the exchange of Competitively Sensitive Information between the WBHO Alliance and other Construction Companies; and

3.1.4 Each of the Alliance Members shall put in place other precautionary measures to ensure that Competitively Sensitive Information does not flow from the WBHO Alliance to the other Construction Companies through the Fund or through any other medium.

3.2 Reporting on the progress of the WBHO Alliance and the demerger process

3.2.1 On the first anniversary of the Termination Date, WBHO on behalf of the WBHO Alliance shall submit a report to the Commission which should include details of the following:

3.2.1.1 Written correspondence confirming that the WBHO Alliance has terminated;

3.2.1.2 The written notification by WBHO to the WBHO Alliance Members ("Termination Notification"), which notification would include the following information:

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- 3.2.1.2.1 The official date of the termination of the WBHO Alliance;
 - 3.2.1.2.2 An acknowledgement by all WBHO Alliance Members that they have received and understood the Termination Notification; and
 - 3.2.1.2.3 Confirmation that the Termination Notification advises the WBHO Alliance Members that all mentorship and development relationships, activities and interactions pursuant to the Merger have ceased and cannot be engaged in after the Termination Date, save for any ongoing joint ventures or project-specific sub-contracts between WBHO Alliance Members which had commenced before the Termination Date, or in respect of which tenders had been submitted before the Termination Date, which need to be completed after the Termination Date.
- 3.2.1.3 A written summary of the status of WBHO's compliance with the various obligations of the Settlement Agreement at the Termination Date; and
 - 3.2.1.4 A list of any and all ancillary agreements concluded between the WBHO Alliance Members during the subsistence of the WBHO Alliance, including those that will terminate at the Termination Date and those that will continue after the Termination Date.
- 3.2.2 WBHO on behalf of the WBHO Alliance Members shall submit annual reports to the Commission, the first report to be submitted on 6 May 2020 and all subsequent reports to be submitted on each anniversary thereof until the Termination Date providing the Commission with the following details:
 - 3.2.2.1 A list detailing material development, mentoring and training activities that has been provided to the Emerging Contractors during the previous year, which will include: the date; topic; and parties present at such training;
 - 3.2.2.2 A list of all projects and joint ventures that the WBHO Alliance has participated in (being a joint venture or project in which two or more of the Alliance Members have participated in together) during the preceding year, which list will include the:
 - 3.2.2.2.1 name of the project;
 - 3.2.2.2.2 details of the project;

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- 3.2.2.2.3 details of the customer;
 - 3.2.2.2.4 duration of the project;
 - 3.2.2.2.5 parties to the joint venture; and
 - 3.2.2.2.6 the rand value of the project.

3.3 Condition relating to fair treatment

- 3.3.1 Having regard to the Emerging Contractors' capacity, skills and areas of development, WBHO shall ensure that, in the identification of potential work/projects, it treats each Emerging Contractor in a fair and non-prejudicial manner.
- 3.3.2 Should an Emerging Contractor reasonably observe that it is being treated unfairly, or WBHO is identifying potential work/projects in an unfair or prejudicial manner, that Emerging Contractor should take the necessary steps to notify the Commission. The Commission will then deal with the Emerging Contractors' concerns in terms of paragraph 5.4 to these conditions.

3.4 Development of a Competition Compliance Policy

Trencon shall develop and implement a Competition Compliance Policy within 6 (six) months of the Approval Date, provided that the Merger has, by that date, been implemented, failing which the Competition Compliance Policy will be developed and implemented within 2 (two) months after the Implementation Date. Trencon shall take all reasonable steps to ensure that all its relevant employees are properly trained and well versed on the contents of the Competition Compliance Policy as well as its implications.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1 WBHO shall, within 10 (ten) business days of the Approval Date, submit to the Commission, the details of the person/s it has appointed as the Trustee representing the interests of WBHO in the Fund, or confirm in writing that these details have already been provided to the Commission;
- 4.2 WBHO shall, within 10 (ten) business days of the Approval Date, submit to the Commission, signed copies of the relevant Non-Disclosure Agreements referred to in clause 3.1.3 above;

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- 4.3 By the respective dates contemplated in paragraphs 3.2.1 and 3.2.2, submit to the Commission the annual reports referred to in paragraphs 3.2.1 and 3.2.2 above, respectively;
- 4.4 Trencon shall, within 6 (six) months after the Approval Date, provide the Commission with copies of its Competition Compliance Policy, provided that the merger has, by that date, been implemented, failing which the Competition Compliance Policy will be provided within 2 (two) months after the Implementation Date ; and
- 4.5 The Commission may request any additional information from the WBHO Alliance Members which the Commission from time to time deems necessary for the monitoring of compliance with these conditions.

5. GENERAL

- 5.1 Notwithstanding anything to the contrary indicated in these Conditions no provision of these Conditions will be operative vis-à-vis WBHO and/or Trencon unless WBHO and Trencon have implemented the proposed transaction.
- 5.2 Compliance by the WBHO Alliance with any obligation in the 2018 Merger Conditions shall constitute compliance with that same obligation as contained in these Conditions, and vice versa, save for any difference in compliance necessitated by these Conditions, for example as regards Trencon.
- 5.3 All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.
- 5.4 An apparent breach by the WBHO Alliance Members of these Conditions, shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Competition Tribunal read together with Rule 39 of the Rules for the Conduct of Proceedings in the Competition Commission.
- 5.5 The WBHO Alliance Members may at any time, on good cause shown, apply to the Tribunal for an order waiving, relaxing, modifying or substituting of anyone or more of the conditions. The Commission shall be entitled to oppose such application.
- 5.6 The Commission may at any time, on good cause shown, apply to the Tribunal, for the Conditions to be waived, relaxed, modified and/or substituted.

