

**IN THE COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case no.: 52/LM/Jul04

In the large merger between:

Cherry Creek Trading 14 (Pty) Ltd

and

Northwest Star (Pty) Ltd

Reasons for Decision

APPROVAL

On 1 October 2004 the Competition Tribunal conditionally approved the merger between Cherry Creek Trading 14 (Pty) Ltd and Northwest Star (Pty). The reasons appear below.

The Parties

1. The primary acquiring firm is Cherry Creek Trading ("CCT", also known as "Bojanala"), a newly formed company. Its shareholders include Unitrans, Tans Africa Holdings ("TAH") and Mvelaphanda Holdings ("Mvela").
2. The target firm, Northwest Star (Pty) Ltd ("NWS"), is a government owned public transport company. The shares of NWS are owned by Northwest Transport Investments ("NTI"). NTI's shares, in turn, are held as to 65.5% by the North West Provincial Government ("NWPG") and as to 33.5% by the Public Investment Commissioner. One of NWS' divisions, the Tlhabane business, is the division being transferred to CCT in terms of this transaction.

The Merger Transaction and Rationale

- c. In March 1999 both NWS and its holding company, NTI were placed under judicial management. The judicial managers were advised that, in order to extinguish the judicial debt, the various businesses comprising NWS should be disposed of in terms of a public tender process. This transaction arises in pursuance of this process. Commuter transport in this area is subsidized by the North West Provincial Government. The subsidy therefore constitutes guaranteed income for CCT for a seven-year period. The consumers also pay a fare (the ‘cash fare’) calculated in terms of an agreed formula and subject to regular annual increases.
4. The business being transferred to CCT comprises:
 - i.government contract to supply subsidized commuter bus services from two depots in North West Province, namely the Tlhabane depot and the Mogwase depot.
 - ii.186 buses that services these routes.
5. The transaction provides for the establishment of a share trust, all the beneficiaries of which are employees of the acquiring firm of whom 95% are historically disadvantaged persons. Originally, the share trust was to hold a 15% interest directly in CCT.
 6. The transaction structure changed during the course of negotiations. In terms of the revised structure, the parties split the rights and obligations of CCT amongst the two primary shareholders, Class A Trading (“CAT”) (on behalf of TAH) and Expectra (on behalf of Mvela and Unitrans). Accordingly, the Share Trust would no longer hold a direct interest in CCT, but would instead hold an indirect interest in CCT via their 15% respective shareholdings in CAT and Expectra. The finalised transaction structure is represented below:

Revised Transaction Structure

7. Although this change of structure has no bearing on the competition issues related to this transaction, it does impact on the public interest considerations. This is dealt with more fully below.

The relevant product and geographic markets

8. Cherry Creek is a newly formed entity. Unitrans is a diversified transport, distribution and logistics group. TAH provides a broad range of road transportation services. Mvela is a BEE firm which has no previous involvement in commuter transport services.
9. The target's business that is being disposed of comprises contracts for the supply of subsidized commuter bus services from various depots in North West Province (specifically, in the Rustenburg, Koster, Thabazimbi, Bethanie and Mafikeng areas).
10. Although some of the shareholders of CCT also provide subsidized commuter bus services, there is, as is evident from the table below, no geographic overlap with those services offered by the target firm.

Operators of Government Commuter Subsidized Services in the Various Regions

<i>Firm</i>	<i>OFS</i>	<i>Gauteng</i>	<i>Mpumalanga</i>	<i>Limpopo</i>	<i>W Cape</i>	<i>KZN</i>	<i>E. Cape</i>	<i>N Cap e</i>	<i>NW Provinc e</i>
Unitrans			√					√	
TAH		√				√			
CCT/NW S									√

COMPETITIVE ANALYSIS

11. Since there is no geographic overlap of the respective subsidized commuter bus services, there are no competition concerns which need detain us.

However, a number of public interest concerns were raised by various participants at the merger hearing.

PUBLIC INTEREST CONCERNS

12. The following parties made representations at the hearing:

- i. NWS Management Forum representing retrenched employees,
- ii. The Coalition Group Against the Unfair Process of the Privatisation of NTI, ("the Coalition Group") represented by Mr Mahlangu,
- iii. The Transport and Allied Workers' Union ("TAWU"), representing some 6.72% of the employees of the business.

13. Just before the commencement of the hearing, we were advised in writing by the Management Forum that they no longer had any concerns and that they consequently withdrew their objection to the merger. We will deal with each of the other two concerns separately.

The Coalition Group's Concerns

14. Both the Coalition Group and TAWU attended and made representations at the hearing. The Coalition Group's complaints focused on the process of privatising NTI. They also complained that the commuters had not been consulted or involved in the process. They alluded to certain allegedly irregular practices taking place and requested that the entire process be reviewed.

15. The contract with the North West government gives CCT the exclusive right to provide a bus service on the routes for the seven-year period. Given that the only alternatives to consumers on the routes in question are taxi services, which the Commission did not consider an adequate substitute because of their relatively high prices to those of buses, the parties have been granted a monopoly by the North West Government. However the parties point out that prior to the merger, NWS enjoyed the same monopoly, so that nothing has changed except the identity of the party that enjoys the exclusivity. They also make the point that consumers are protected in two respects. Firstly, because as we have noted, the service is subsidized and secondly, that the rate the parties may charge consumers is regulated in terms of the agreement.

16. What the merger does change is the incentive of the holder of the exclusive contract. Prior to the merger the contract was the responsibility of a parastatal, now it is in private hands. For this reason the protection afforded consumers in the contract needs to be made transparent to consumers so that they can, if need be, enforce their rights. For this reason, given the opaque nature of the process thus far, we believe that it is in both the

interests of competition and the public interest (See section 12(3)(a)) to impose a condition to ensure price transparency for consumers in the affected region. Hence condition 1.2 in our order that requires the merging parties to make known to consumers by way of either an advertisement in the newspapers or a notice on the buses of the contractual stipulation insofar as they relate to fares the merging parties may charge to consumers during the contract.

Employment Concerns

17. Employment concerns were raised by TAWU, which represents a minority of the employees in the target firm. Whether because of the nature of a tender process or a very poor communications strategy or both, the merging parties' treatment of employees belonging to the minority union has been unfortunate. Not surprisingly they have viewed the process with suspicion and looked to the public interest considerations in the Act to afford them some protection. ¹
18. Initially, according to their tender proposal, the merging parties were going to utilise CCT as the operating company. It would have the contract, take over the employees and operate the routes. The employees were being transferred in terms of Section 197(2) of the Labour Relations Act. In the Sale Agreement their rights to employment were further guaranteed for a minimum of one year. ²
19. Subsequently, it appears that the shareholders have decided to divide the business between them. TAH would run certain routes and Expectra the rest. CCT would remain solely to own the rights in the contract. It appears that this created some difficulties as to where to house the employees and this was the query, which in frustration, TAWU's attorney sought clarity on at the hearing. Only then did it emerge that notwithstanding the apparent division of the routes into the separate entities, all the employees would be employed by Expectra. The Commission rightly pointed out that the undertakings not to retrench had been made by CCT and since this company was no longer the employer, the Commission questioned what the undertaking was worth.
20. We sought clarity on this issue from the merging parties and a further memorandum was filed subsequent to our hearing. In this memorandum

¹ The parties informed us at the hearing that the Northwest Province Government takes a very special interest in protecting the employees and they referred us to the suspensive conditions of the Sale of Business Agreement, specifically suspensive condition 3.1.1. The condition ensures that the parties have satisfy the

Northwest Province Government that the 15% interest in Cherry Creek is beneficially held for and on behalf of the employees and that the HDI obligation is complied with.

² As per clause 14.8 of the Sale of Business Agreement.

Expectra gave an undertaking to respect the one year moratorium on retrenchments that CCT had given. Although we welcome this undertaking we nevertheless are of the view that given the history of the transaction thus far it would be appropriate to protect employees by ensuring that the undertaking 'bites' and hence we have made it a condition of the approval of the merger. Note that in this case the moratorium is an agreement between buyer and seller and therefore not something that an individual employee could enforce. The peculiar arrangements in this transaction justify making the undertaking a condition. In this respect we have followed our approach in the large merger between Telkom SA Ltd and Praysa Trade 1062 (Pty) Ltd.³

21. It remains for us to consider another issue raised by TAWU. The union is unhappy with the one-year moratorium on retrenchments and feels that this period is too short. TAWU points out that given that the company has a guaranteed contract for seven years, which includes a subsidy, there is no reason why workers should not receive a far longer period of protection since the risk to the business going forward is minimal. The merging parties argued that there was still a risk inherent in the business going forward and substitute transport modes such as taxis may well become a greater competitive risk to them than they are now.
22. They also point out that the majority union, SATTAWU, which represents approximately 90% of the workers in the target firm, has accepted the undertaking. In this respect we have received correspondence from SATTAWU confirming that this is the case. Whilst we are not unsympathetic to the argument raised by TAWU, we do as we have said in the past, have to respect the outcomes of collective bargaining. To alter an arrangement agreed to would undermine that process and lead to uncertainty for both employees and employers. Accordingly we decline to extend the period given in the undertaking. Although we decided to refrain from extending the period given in the undertaking in this instance, every case will be assessed on its own merits. If circumstances are compelling, we would vary arrangements that are made for employees.
23. We further urge the North West Provincial Government, if their concern really is for employee rights, to ensure that these are adequately protected.

Conclusion

³ See Telkom SA Ltd, TPI Investments and Praysa Trade 1062 (Pty) Ltd - 81/LM/Aug00. In that case the history of collective bargaining suggested that employees would be better protected by a condition to the merger, as a condition in the sale agreement was a term of contract between the merging parties, Telkom and TFMC and, as such, was not readily enforceable by the individual employees if not honoured.

We conclude that the merger will not lead to a substantial lessening of competition. The Tribunal however approves the transaction conditionally, in deference to the public interest issues that arise in this case. The conditions are contained in the Order attached hereto.

D. H. Lewis

20 October 2004
Date

Concurring: N. Manoim, M. Mokuena

For the merging parties:	A. Gotz, instructed by Tabacks Attorneys
For the Commission:	M. van Hoven, Competition Commission