

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 73/LM/Aug06

In the matter between:

MAINSTREET 432 (PTY) LTD

Acquiring Firm

and

KOORNFONTEIN MINE

Target Firm

Panel : D Lewis (Presiding Member), M Moerane (Tribunal
Member), and M Mokuena (Tribunal Member)

Heard on : 04 December 2006

Delivered on : 04 December 2006

REASONS FOR APPROVAL

Approval

[1] On 04 December 2006, the Competition Tribunal unconditionally approved the proposed merger between Main Street 432 (Pty) Ltd (“Main Street 432”) and Koornfontein Mine (“Koornfontein Mine”).

The parties and the merger transaction

[2] Main Street 432 is a newly formed black owned shelf company. Main Street 431 (Pty) Ltd (“Main Street 431”)¹ and Investec Private Bank (“Investec”) and Coronation (“Coronation”) are the pre-and post-acquisition shareholders in Main Street 432.² Post-merger Main Street 431 will exercise control over Main Street 432 whilst both Investec and Coronation (notwithstanding their 48,998% shareholding in Main Street 432) will not be entitled to exercise any form of control whatsoever.³

[3] Koornfontein Mine is a business division of Ingwe Collieries Ltd (“Ingwe Collieries”), which in turn is controlled by BHP Billiton (“BHPB”).⁴

[4] The proposed transaction entails the acquisition of Koornfontein Mine by Main Street 432 (from Ingwe Collieries) as a going concern.⁵ The business

1 Main Street 431 (also referred to by the merging parties as “BEE Co”) is jointly controlled by AKA Resources (Pty) Ltd (“AKA Resources”) and Siyanda Resources (Pty) Ltd (“Siyanda Resources”) each holding a 30% shareholding in Main Street 431. The other Main Street 431 shareholders are: Ilitha Resources (Pty) Ltd (5%); Indyabo Investments (Pty) Ltd (7%); Inkwali Engineering Services (Pty) Ltd (10%); Koornfontein Mine Employees (8%); and Ngwane (10%). Siyanda Resources is controlled by its management (as to 55% and comprises Lindani Bennet Mthwa, Mzwandile Nombewu, Xolile Mazabane and Siyanda Trust); Investec SA (as to 25%); Siyanda Employees (10%); and Women’s Group (10%) (*See page 735-736 of the merger record*). AKA Capital (Pty) Ltd holds 80% of the shares in AKA Resources whilst Wilrich Schroeder and Anton Botha hold 10% each of the remaining 20% shares in AKA Resources.

2 Main Street 431 holds 50.002% of the entire issued share capital in Main Street 432 whilst Investec and Coronation equally hold the remaining shareholding of 49.998% in Main Street 432.

3 See page 2, paragraph 1.1, of the Commission Recommendation.

4 In other words, BHP Billiton (“BHP Billiton”), through its Ingwe Collieries Ltd subsidiary in South Africa, holds a 100% interest in the Koornfontein coal mine (*see page 493 of the merger record*).

5 See in this regard, the Notarial Sale of Business Agreement entered into between Ingwe Collieries and Main Street 432, in particular *clauses 1.2.9 and 4* (i.e., *pages 44 and 72 of the merger record*).

being acquired comprises the coal exploration, development, mining, beneficiation and transportation business carried on by Ingwe Collieries under the name and style of Koornfontein Mine.⁶

[5] Post-acquisition, Koornfontein Mine will be owned and operated by Main Street 432.⁷

Rationale for the transaction

[6] According to Main Street 432, the proposed transaction gives all of the primary acquiring firms the ideal opportunity to diversify their investment portfolios.⁸ According to BHP Billiton, the target firm (i.e., Koornfontein Mine) no longer constitutes a core asset within the BHP Billiton Energy Coal portfolio and as a result of this Ingwe Collieries wishes to dispose of Koornfontein.⁹ The key factors supporting the exit of BHP Billiton Energy Coal from Koornfontein Mine are amongst others that the BHP Billiton Energy Coal's strategy is to concentrate on the international sea-borne market and it has no desire to develop a small, Eskom only mine. BHP Billiton is also of the view that the proposed deal will count towards BHP Billiton's BEE scorecard credits that BHP Billiton must obtain as required by the Socio-Economic Empowerment Charter for the South African Mining Industry.¹⁰

6 Koornfontein Mine is situated in the Mpumalanga Province approximately 45 kilometres south east of Witbank.

7 See page 31, paragraph 11.6, of the merger record.

8 See page 331 of the merger record, i.e., paragraph 3.2.3 of the merging parties' competitiveness report.

9 See page 29, paragraph 11.1, of the merger record.

10 See a document entitled "*Memorandum – Proposed Divestment of Koornfontein coal mine*",

The relevant market

[7] Main Street 432 is a newly formed shelf entity for the purposes of this transaction, and has never traded.

[8] Siyanda Business Management is an investment holding company whose main purpose is to pursue investment opportunities in various sectors.¹¹ The merging parties advised us that Siyanda Business Management does not provide any products or services, and has no controlling interests in any other thermal coal producer in South Africa.¹²

[9] AKA Capital, which holds the majority of the shares in AKA Resources which will hold 30% in Main Street 432 post-acquisition, is an investment holding whose main purpose is substantially similar to that of Siyanda Business Management. AKA Capital does not have a controlling interest in any firm which is involved in the thermal coal business in this country. AKA Capital has interests in Corobrik (a brick manufacturer); Datacentrix (a JSE listed IT company focusing on supply, integration, support and maintenance of IT infrastructure, the provision of IT services and solutions); Murray & Roberts Cementation (whose main business is mine development, contract mining and mining services); Nampak (a packaging company); Nedbank (a financial services institution); Protea Hotels Group; and SAVCIO (a provider of maintenance and repair services for rotating electrical equipment and transformers).¹³

[10] Old Mutual Group, which holds 60% and 20% interests in Nedbank and Old Mutual respectively, is an international financial services group which focuses on assets gathering and management and provides a wide range of activities in South Africa and abroad. Old Mutual Life Assurance Company South Africa Ltd ("OMLACSA"), a subsidiary of Old Mutual Ltd, has 0.263% interest in Kumba Resources Ltd ("Kumba Resources"). Kumba Resources is

pages 493-495 of the merger record.

11 Siyanda Resources, one of the entities which will hold 30% in Koornfontein Mine, has a number of stakes in a number of companies, viz., a controlling stake in Dense Media Separation Powders; 2% in the Two Rivers Platinum Mine; 51% in Lephaka Mining (Pty) Ltd (a mine engineering company that provides, on contract, support and underground excavation protection); 60% in Concrete Lining Products (Pty) Ltd (a supplier of ready mix material that is packaged for underground civil works); 26% in Siyanda Chrome (a joint venture with Anglo Platinum); a Memorandum of Understanding for a joint venture arrangement with Rustenburg Platinum Mines (Pty) Ltd to produce chrome fines from tailings); and a 50% interest in a joint venture known as "Imigodi", which relates to the provision of consulting engineering services. Read Swatman & Voigt (Pty) Ltd is the other 50% shareholder in Imigodi. See an e-mail from Ms. Natalie Browne of Cliffe Dekker Inc. to the Commission, *page 878 of the merger record.*

12 See page 33, paragraph 14.2, of the merger record.

13 See pages 878-879 of the merger record.

active in the coal producing sector. As a result, the Commission concluded that it is unnecessary to consider the impact that may arise due to OMLACSA's interest in Kumba Resources because such an interest is a minor one which does not give rise to any form of control in Kumba Resources.¹⁴

[11] Koorfontein Mine is a coal mine which produces steam/thermal coal, a type of bituminous (or hard) coal used to generate electricity or produce synthetic fuels.

[12] According to the Commission, no overlap exists in the activities of the merging firms because the acquiring firm (a newly formed entity with no operations at the moment) together with its associated companies are not involved in the production of thermal coal for the use in the generation of electricity or to produce synthetic fuels.

Competition analysis

[13] Given the detailed information above and our finding on the product overlap, we need not analyse the competitive effect of the proposed transaction any further. We simply observe that no change in the current structure (thermal coal market) is envisaged post-acquisition.

Public Interest

[14] The merging parties initially indicated that there would be a negative impact on employment post-merger given that a maximum of 152 (132 mining

¹⁴ See page 4, paragraph 6.1, of the Commission Recommendation.

employees and 20 engineering employees) would be retrenched as a direct result of the proposed merger. It was also anticipated that a maximum of 240 contract workers (being predominantly drivers for the transportation of coal) would also be affected by the proposed merger. However, the merging parties also indicated that these 240 contract employees were likely to be relocated to provide transport services at other mines and that 14 new positions were likely to be opened in the services side of the Koornfontein Mine. This would have resulted in a worst-case scenario of a maximum of 378 employees being negatively affected by the proposed transaction.¹⁵

[15] Following this, the National Union of Mineworkers (“NUM”) engaged the Commission and objected to the approval of the proposed merger pending their employment concerns being addressed by the merging parties. In brief, NUM objected to the proposed transaction on the basis that there was no guarantee of the future of the Koornfontein Mine in the short term and secondly, that no workers had been provided with guarantees regarding the new employer’s (Main Street 432’s) ability to pay what was due to the workers as provided for by section 197 of the labour relations Act 66 of 1995, as amended (“the LRA”).¹⁶

[16] Further to various correspondences between NUM and the merging parties, in particular the meeting between NUM and Main Street 432 on

¹⁵ See pages 13-15 of the merger record.

¹⁶ With regard to this specific issue, please see NUM’s letter addressed to the Commission dated 28 September 2006 (that is, pages 847-851 of the merger record).

Saturday 4 November 2006, both NUM and Main Street 432 reached an agreement on the following principles. Firstly, compulsory retrenchments are being frozen; secondly Main Street 432 acknowledges the current agreements between NUM and Ingwe Collieries by countersigning them;¹⁷ and thirdly, Main Street 432 will further extend the agreement for a further two (2) years in terms of section 197(8) of the LRA thereby resulting in four (4) years post-transfer liability. The parties also committed themselves to signing an Ingwe Collieries, Main Street 432 and Union tripartite agreement capturing the agreed principles. NUM further agreed to withdraw its objection to the proposed transaction and now supports the proposed transaction pending the signing of the aforesaid agreements.¹⁸

[17] Main Street 432 has since then met with the Commission on Monday 6 November 2006 and confirms in writing to the Commission its firm commitment to the above agreed principles between itself and NUM.¹⁹

Conclusion

[18] We accordingly endorse the Commission's view that the proposed transaction is unlikely to result in the substantial prevention or lessening of competition in the relevant markets, and that the public interest issues which

17 These are the agreements entered into between NUM and Ingwe Collieries dated 24 June 2003, as amended by an agreement dated 17 July 2006, in relation to the Koornfontein Mine.

18 See a letter from NUM to the Commission dated 6 November 2006, i.e., pages 880-881 of the merger record.

19 See Main Street 432 letter to the Commission dated 13 November 2006, i.e., page 882 of the merger record.

were at stake have been fully and amicably addressed. We accordingly approve the proposed transaction unconditionally.

D Lewis
Presiding Member

M Moerane and M Mokuena concurring.

Tribunal Researcher: T Masithulela

For the merging parties : N Browne (*Cliffe Dekker Inc.*)
For the Commission : E Ramohlola assisted by M Mohlala
(Mergers & Acquisitions)