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COMPETITION

Once empowered, always empowered?

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There has been a recent shift in emphasis by the Competition Commission of South Africa (**the Commission**) from simply protecting competition and market conditions to actively promoting, amongst others, a greater spread of ownership and participation by historically disadvantaged persons (**HDPs**) and workers in firms in the market.

This has made the mandate of the Commission dual in nature; namely pursuing competition and public interest goals. The dual mandate is based on the amendments to the Competition Act 89 of 1998 (**the Act**), which were promulgated in 2019. Section 12A(3)(e) of the Act forms a particularly important focus of the amendments.

Historically disadvantaged persons (HDP)

Accordingly, should a target firm be HDP and/or worker owned and such ownership be significantly affected/diluted by a transaction the Commission may prohibit the transaction or approve it with conditions due to that factor alone.

In the matter between *Minerals Council of South Africa v Minister of Mineral Resources and Energy and thirteen others* [Case No. 20341/19], the High Court adjudicated a challenge to the Broad Based Socio Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (**Mining Charter III**). The principal dispute concerned whether or not the 26% BEE ownership target had to be continually met following the grant of a mining right under the Minerals and Petroleum Resources Development Act, 2002.

The effect of the judgment was that mining right holders will be able to retain their empowerment status even if their empowerment partners dispose of their stake in the firm holding the mining right after the mining right has been granted (i.e. "once empowered, always empowered").

Similar issues arise in competition matters. However, the question remains what the Commission's approach or attitude will be in transactions that do not affect HDP ownership levels or where a target firm was previously empowered but had its empowerment shareholding diluted or disposed of pre merger.

The Commission approved, with conditions (relating to employment), a transaction involving Bright Minerals Proprietary Limited (**Bright Minerals**) and Afarak Mogale Proprietary Limited (**Afarak**)[1] (**the transaction**). Although the Commission found that the transaction was unlikely to result in a substantial lessening or prevention of competition in any relevant market, there were certain public interest concerns which are interesting to note.

The target firm's pre transaction shareholders included a workers' trust whereas the acquiring group was not owned or controlled by a member of a historically disadvantaged group and had no BEE shareholding.

As such, the Commission and the Department of Trade Industry and Competition raised concerns about the effect of the transaction on the promotion of a greater spread of ownership, in particular to increase the levels of ownership of HDPs and workers in firms in the market (section 12A(3)(e) of the Act).

The workers' trust

The workers' trust had, pre merger, disposed of its 6.83% shareholding in the target firm. However, the Commission formed the view that because the disposal had occurred pre merger, the transaction was unlikely to have a significant negative effect on the promotion of a

greater spread of ownership as contemplated in section 12A(3)(e) of the Act.

Consequently, the merging parties had no obligation to "top up" the reduction in the 6.83% workers' trust ownership that had existed pre merger since the disposal had occurred prior to the transaction that was being considered. This begs the question as to whether compliance with section 12A(3)(e) of the Act is a once off affair.

Section 12A(3)(e) of the Act

Given the Commission's robust approach to section 12A(3)(e) of the Act, it is important to consider the once empowered, always empowered principle in merger transactions. Although the Bright Minerals transaction may appear to open the door slightly, one could question whether the general approach is what have merger parties done and what more can they still do in terms of section 12A(3)(e).

What is without a doubt is that HDP and worker ownership growth is an important factor for all parties to consider when contemplating a merger or acquisition.

This is part 2 of a 3-part series looking at the evolving role of public interest considerations in merger investigations following the amendments to the Competition Act.

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[1] *Bright Minerals Proprietary Limited and Afarak Mogale Proprietary Limited* Case No: 2021MAY0021.



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