

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 2260

8 July 2022

COMPETITION COMMISSION

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

IZIMBIWA HANDLING SYSTEMS PROPRIETARY LIMITED

AND

IZIMBIWA COAL PROPRIETARY LIMITED

CASE NO: 2021SEP0057

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission', that it has approved the transaction involving the abovementioned firms subject to conditions set out below:

1. On 29 September 2021, the Competition Commission ("Commission") received a notice of an intermediate merger whereby Izimbiwa Handling Systems Proprietary Limited ("IHS") intends to acquire 100% of the issued shares in Izimbiwa Coal Proprietary Limited ("Izimbiwa Coal") from Izimbiwa Coal Holdings Proprietary Limited ("IC Holdco"), as well as all the loan claims against IC Holdco held by IC Holdco and Glencore Holdings South Africa Proprietary Limited. Post-merger, Izimbiwa Coal will become a wholly owned subsidiary of IHS.
2. The acquiring firm is IHS. IHS is controlled by Into Africa Mining and Exploration Proprietary Limited ("Into Africa"). Into Africa is 100% controlled by Historically Disadvantaged Persons ("HDP"). IHS controls Amahle Trucking Proprietary Limited. Into Africa and all its subsidiaries including IHS will collectively be referred to as the "Into Africa Group." Into Africa Group is a mining services investment company with interests in coal mining, processing, logistics and

handling services. Into Africa Group owns collieries that are suppliers to Eskom. Into Africa's collieries also produce, or can produce, coal suitable for the export market.

3. The primary target firm is Izimbiwa Coal. Izimbiwa Coal is controlled by IC Holdco. IC Holdco is in turn ultimately jointly controlled by Phembani Group Proprietary Limited ("Phembani Group") and Glencore plc ("Glencore"). Phembani Group is a firm owned by Historically Disadvantaged Persons ("HDPs"). Izimbiwa Coal owns and operates a coal mining complex near Middelburg, Mpumalanga. Izimbiwa Coal owns and operates what it calls the Middelburg Operations. Izimbiwa Coal historically supplied coal to Eskom, the residual domestic market and the international seaborne (export) market.
4. The Commission considered the activities of the merging parties and found that they overlap with regard to the mining and supply of thermal coal. Into Africa Group primarily supplies coal to Eskom and to the export market. In contrast, Izimbiwa Coal has historically supplied coal to the tied market (Eskom), the residual domestic market and the international seaborne (export) market. For the purpose of the proposed transaction, the Commission considered the following markets:
 - 4.1. The national tied domestic market; and
 - 4.2. The export markets.

Market share assessment relating to the national tied domestic market (supply to Eskom)

5. The Commission notes that whilst the merging parties both supplied thermal coal to the tied market, there is no overlap in the power stations supplied by the merging parties. At the national level relating to the supply of coal to Eskom, the Commission found the merged entity will have post-merger market share of less than 10%. Eskom did not raise any concerns relating to the proposed merger.
6. The Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in the national market for the tied domestic market.

Market share assessment relating to the supply of thermal coal to the export market

7. In the export market, the Commission found that the merged entity will have post-merger market share of less than 10%. The Commission is of the view that the merged entity is a relatively small player in the export market and the proposed transaction is unlikely to change the structure of the market substantially.
8. The Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in the export market for the supply of coal.

Effect on employment

9. The merging parties submit that the proposed transaction will not have any adverse effect on employment. Particularly, no retrenchments or job losses will occur as a result of the proposed transaction. Into Africa Group intends to operate Izimbiwa Coal to its full capacity and therefore does not intend to retrench any employees. Further, given that the transaction entails an acquisition of shares, employees' terms and conditions will remain the same.
10. However, the merging parties indicate that there have been retrenchments at both the Into Africa Group and the Izimbiwa Coal pre-merger. The parties submitted that these retrenchments were unrelated to the proposed transaction. The parties submit that these retrenchment processes are unrelated to the proposed transaction and are as a result of low energy demand and the effect of the Covid-19 pandemic.

Submissions by the Department of Trade Industry and Competition (dtic)

11. The dtic was concerned about the significant pre-merger retrenchments at Into Africa Group and at Izimbiwa Coal. As such, the dtic requested the Commission to engage the merging parties with a view to institute, as a commitment/ condition of the merger, that suitable

employment opportunities (when these become available) be offered to retrenched employees in both the Into Africa Group and Izimbiwa post-merger.

Commission's assessment of whether or not the pre-merger retrenchments are merger specific

12. In order to assess whether or not these retrenchments are linked to the merger, the Commission evaluated the merging parties' strategic documents including board minutes and presentations, internal memorandums, correspondence with trade unions as well as correspondence between the merging parties from when discussions regarding the proposed transaction commenced. The Commission could not find any evidence suggesting that the retrenchments were in any way linked to the proposed transaction. Therefore, the Commission is of the view that the pre-merger retrenchments are unlikely to be merger specific.

13. However, in light of the current economic climate and the unemployment rate in South Africa, the Commission engaged the merging parties about imposing a condition to give preference to the retrenched employees when vacancies become available, provided that the employees have the requisite qualifications, skills, know-how or experience for the vacancy. This commitment will apply for a period of 12 (twelve) months after the implementation of the proposed transaction. The merging parties agreed to these conditions. The conditions are attached as **Annexure A**.

The effect on the promotion of a greater spread of ownership

14. The merging parties submitted that the proposed transaction will have a positive effect on the promotion a greater spread of ownership, in particular the proposed transaction will increase HDP ownership from 50.1% to 100% post-merger. Into Africa Group is a 100% black owned entity. The Commission found that Izimbiwa Coal has 50.1% black ownership.

15. The proposed transaction does not raise any public interest concerns.

16. The Commission therefore approves the proposed transaction subject to the conditions set out in **Annexure A** hereto.

ANNEXURE A
IZIMBIWA HANDLING SYSTEMS PROPRIETARY LIMITED
AND
IZIMBIWA COAL PROPRIETARY LIMITED
CASE NO: 2021SEP0057

DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1 **"Acquiring Firm"** means Izimbiwa Handling Systems Proprietary Limited;
- 1.2 **"Affected Employees"** means Affected IC Employees, Acquiring Firm's affected mining operations employees, or any of the aforementioned as the context requires;
- 1.3 **"Affected IC Employees"** means the former employees of the Target Firm who were retrenched following the section 189 LRA consultation process which was complete and who have not been re-employed as at the Implementation Date;
- 1.4 **"Approval Date"** means the date on which the Merger is approved by the Commission as set out in the Commission's merger clearance certificate;
- 1.5 **"Commission"** means the Competition Commission of South Africa;
- 1.6 **"Competition Act"** means the Competition Act, No. 89 of 1998, as amended;
- 1.7 **"Days"** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa. A public holiday shall also include such days as may be declared by the President of the Republic of South in terms of the Public Holidays Act, No. 36 of 1994, as amended;
- 1.8 **"DTIC"** means the Department of Trade, Industry and Competition;

- 1.9 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.10 **"IC Holdco"** means Izimbiwa Coal Holdings Proprietary Limited;
- 1.11 **"LRA"** means the Labour Relations Act, No. 66 of 1995, as amended;
- 1.12 **"Merger"** means the acquisition of control by the Acquiring Firm over the Target Firm;
- 1.13 **"Merging Parties"** means the Acquiring Firm and the Target Firm;
- 1.14 **"Target Firm"** means Izimbiwa Coal Proprietary Limited; and
- 1.15 **"Tribunal"** means the Competition Tribunal of South Africa.

2 RECORDAL

- 2.1 On 29 September 2021, the Commission was notified of the Merger. Both the Acquiring Firm and the Target Firm are involved in the mining and supply of thermal coal.
- 2.2 The Commission found that the Merger will not lead to a substantial lessening or prevention of competition in any relevant market.
- 2.3 Given the pre-merger retrenchments at the Acquiring Firm and the Target Firm, the Commission engaged the Merging Parties on the possibility of the Merger being approved subject to a condition obligating the Merging Parties to give preference to the Retrenched Employees when vacancies become available set out in clause **Error! Reference source not found.** below.
- 2.4 The Merging Parties agreed to these Conditions.

3 CONDITIONS ON EMPLOYMENT

- 3.1 With respect to the Affected Employees, the Acquiring Firm and the Target Firm undertakes that they will, within 25 (twenty-five) Days of the Implementation Date –
- 3.1.1 establish separate databases of the Affected Employees with such employees' contact details (to the extent that any one or more of the Target Firm, Acquiring Firm's affected mining operations do not already have some form of database in place); and
- 3.1.2 procure that communication is dispatched to all Affected IC Employees and Acquiring Firms affected mining operations employees forming part of the databases –
- 3.1.2.1 informing them of the commitments in terms of paragraph 3.2 below;
- 3.1.2.2 requesting them to update their contact details; and
- 3.1.2.3 offering them to opt-out of receiving vacancy communications for the duration of these undertakings.
- 3.2 Subject to paragraphs 3.3 and 3.6 below, for a period of 12 (twelve) months from the Implementation Date, if any employment opportunity arises at the Target Firm, Acquiring Firm's affected mining operations–
- 3.2.1 in respect of employment opportunities arising at the Target Firm, the Target Firm will, simultaneously with internal notification of such opportunity to existing employees (where relevant), send a batch notification to all Affected IC Employees informing them of the position as well as any eligibility criteria and application requirements;
- 3.2.2 in respect of employment opportunities arising at Acquiring Firm's affected mining operation, the Acquiring Firm shall procure that the affected firm will, simultaneously with internal notification of such opportunity to existing employees (where relevant), send a batch notification to all Affected mining operations

employees informing them of the position as well as any eligibility criteria and application requirements; and

- 3.2.3** in respect of employment opportunities arising at the second Acquiring Firm's affected mining operation, the Acquiring Firm shall procure that the affected mining operation will, simultaneously with internal notification of such opportunity to existing employees (where relevant), send a batch notification to all Affected mining operation employees informing them of the position as well as any eligibility criteria and application requirements.
- 3.3 The provisions of 3.2 will not apply in circumstances where the vacant position is of such a nature that it is evident that no Affected IC Employee and mining operations affected employee has the requisite skills, experience and/or qualifications for the position.
- 3.4 Under all circumstances, the onus will rest on the Affected Employees notified in accordance with the provisions of 3.2 to apply for the vacant position. Applicants will only be considered if their applications are received within the specified time period and comply with all specified requirements and criteria, subject to operational requirements at the time, it being recorded that there may be circumstances in which vacant positions need to be filled urgently which may require shortened time periods.
- 3.5 The Target Firm's and the Acquiring Firm's affected mining operations' assessment of any such application will be subject to applicable employment and related laws, the company's recruitment practices and policies at the time and its operational requirements.
- 3.6 For the avoidance of doubt, the undertakings in this Annexure "A", exclude any Affected Employees who have elected to opt out of receiving any vacancy communications as contemplated in 3.1.2.3 above.

4 MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1 The Acquiring Firm shall inform the Commission in writing of the Implementation Date of the Merger within 10 (ten) Days of it becoming effective.
- 4.2 The Acquiring Firm shall circulate a copy of the Conditions to the relevant trade unions of the Merging Parties within 10 (ten) Days of the Approval Date. As proof of compliance herewith, the Acquiring Firm shall within 10 (ten) Days of so circulating the Conditions, notify the Commission of compliance herewith and provide evidence of such circulation.
- 4.3 Within 10 (ten) Days of the first anniversary of the Implementation Date, the Acquiring Firm shall provide the Commission with a report which shall set out the number of vacancies, if any, that became available during the 12 (twelve) month period following the Implementation Date, the number of applications received from Affected Employees and the number of Affected Employees who have been re-employed.
- 4.4 Any person/s who believe that the Acquiring Firm has not complied with or have acted in breach of the Conditions may approach the Commission with a complaint.
- 4.5 The Commission may request such additional information from the Merging Parties which the Commission from time to time regards as necessary for the monitoring of compliance with these Conditions.
- 4.6 The Merging Parties shall submit to the Commission a list of Retrenched Employees within 10 (ten) Days of the Approval Date.

5 VARIATION

- 5.1 The Merging Parties may at any time, on good cause shown, apply to the Commission for these undertakings to be lifted, revised or amended. Should a dispute arise in relation to the variation of the Conditions, the Merging Parties shall apply to the Tribunal for the Conditions or any part thereof to be lifted, revised or amended.

6 GENERAL

- 6.1. All correspondence in relation to these Conditions shall be sent to mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

Enquiries in this regard may be addressed to the Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298