



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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WINDHOEK - 14 September 2023

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MINISTRY OF INDUSTRIALISATION AND TRADE

No. 295

2023

NOTICE OF APPLICATION FOR REVIEW OF DECISION OF COMMISSION IN RELATION TO PROPOSED MERGER: AFRI-TRACK RAILWAY CONSTRUCTIONS (PTY) LTD AND AFRI-TRACK GROUP HOLDINGS (PTY) LTD: COMPETITION ACT, 2003

In terms of section 49(2) of the Competition Act, 2003 (Act No. 2 of 2003) read with Rule 32(1) of the Rules published under General Notice No. 41 of 3 March 2008, I –

- (a) give notice that I have received an application for review in relation to the proposed merger between Afri-Track Railway Constructions (Pty) Ltd and Afri-Track Group Holdings (Pty) Ltd with particulars of the application and grounds for review set out in the Schedule; and
- (b) invite interested parties to make written submission, to me with regards to the matter to be reviewed within 30 days after the date of publication of this notice, by delivering the written submissions to the Office of the Minister at the Ministry of Industrialisation and Trade, Brendan Simbwaye Square, Block B, Room 235, Corner of Dr. Kenneth Kaunda and Goethe Street, Windhoek.

L. IIPUMBU
MINISTER OF INDUSTRIALISATION AND TRADE

Windhoek, 31 August 2023

SCHEDULE**PROPOSED MERGER NOTICE: AFRI-TRACK RAILWAY CONSTRUCTIONS (PTY) LTD
AND AFRI-TRACK GROUP HOLDINGS (PTY) LTD
CASE NO. 2022NOV0040MER**

1. Please take notice that the Competition Commission (“the Commission”) has on 30 May 2023 prohibited the proposed merger between Afri-Track Railway Constructions (Pty) Ltd and Afri-Track Group Holdings (Pty) Ltd as published under General Notice No. 246 of 30 May 2023.
 2. Notice is hereby given that I have on 27 June 2023, in terms of section 49(1) of the Competition Act, 2003 (Act No. 2 of 2003), received an application from Nambahu Associates on behalf of the parties to the proposed merger requesting for the review of the decision of the Commission in relation to the merger concerned.
 3. The Commission’s decision is based on the grounds that:
 - 3.1 Although the proposed merger is not likely to prevent or lessen competition in Namibia as envisaged by section 47(2) of the Competition Act, 2003 (Act No. 2 of 2003) the proposed transaction does raise broader public interest concerns on the basis that the primary target undertaking is subject to a provisional restraint order in terms of section 25 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) ordered by the High Court of Namibia and approval of the merger by the Commission may aid the circumvention of the said order. The provisional restraint order prevents the disposal of the properties and the handling of shareholding in the properties, companies or close corporation of the respondents in any manner other than that prescribed in the order.
 - 3.2 Furthermore, the court order referred to in paragraph 3.1 is binding on any person or institution that is privy to the contents of the court order and the Commission is an institution that is bound by the said court order.
 - 3.3 The Commission is legally permitted to prohibit the merger on the above-mentioned grounds as section 47(2) of the Competition Act, 2003 (Act No. 2 of 2003) provides that in determining an appropriate determination the Commission may rely on any criteria that may be appropriate in the circumstances. Considering the broader public interest concerns emanating from the restraint order, the Commission interprets a court order prohibiting the sale of the said assets as a criterion that is appropriate to consider in prohibiting the merger.
 4. The purpose of the review application referred to in paragraph 2 is to challenge the decision of the Commission in paragraph 3 on the basis that the Commission allegedly acted *ultra vires* or exceeded its powers or acted unreasonably. Further, the Commission allegedly erred by taking into consideration that the primary target undertaking is subject to a provisional restraint order in terms of section 25 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004).
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