

ISLP/BLA COMMERCIAL LAW EDUCATION PROJECT

Hypothetical Case Study For Sale Or Joint Venture Of Business

The following hypothetical involves two privately held companies incorporated in the RSA: Technology Vista Company (TVT) and Acqua Acquisitions Company (Acquisitions). Both companies have certified financial statements for the period ended December 31, 2005. Whatever type of transaction may be agreed, the parties contemplate a contract followed by a closing 30 days later, depending on what governmental or shareholder approvals are required.

TVT has the following factual situation:

Ownership:

Sam Share founded the company 15 years ago after immigrating from India and owns 51% of the outstanding issued shares. He's 65 years old and is the Chief Executive Officer. He prefers to sell the company for cash and then retire, but he's uncertain whether to sell shares or assets. The possibility of a joint venture with another company has also been raised, but he has yet to evaluate this possibility. His elderly and estranged mother Indira, who lives in India, owns 32% of the shares. Tom and Mary Botha, old friends of Sam, own 17%.

Business:

TVT makes software products for telecommunications companies, serving a niche market where there is very little competition. The main product is Spam Guard, a very high margin product protected by several patents and accounting for about 80% of sales, which are about 20 million Rand annually.

TVT has also developed a new product, Tele Safe, the manufacture of which is protected by highly guarded trade secrets, but it is only partially protected by patents. This product serves a market different from TVT's traditional market—it is a security device for telecommunications equipment. While this product has been accepted as being superior to all competitive items in its particular markets, no sales have yet been made by TVT. A marketing plan is being prepared for its launch.

TVT does no manufacturing of any products on its own. It subcontracts manufacturing to two offshore companies under long-term contracts which assure TVT strict quality control. Neither of these contracts is assignable by one party without the consent of the other party.

TVT owns its own office building on one hectare of land and leases a warehouse on adjacent property. It has 50 employees (who have defined benefit pension plans and medical benefits). Of the employees, 10 are Black, two of which have mid-level management positions. Besides Ken Jones, TVT has 3 other key employees who are extremely important to the business and who are willing to remain with the company or with its purchaser.

Sixty percent of TVT sales are abroad, distributed through a network of international long term Distribution Agreements. It has one distributor in the RSA for Spam Guard, but sells its other product lines domestically through two sales agents, one located in Johannesburg and the other in Cape Town. Most of these sales are to RSA governmental agencies. One of the agents is a former RSA governmental procurement official. There have been newspaper reports in which

several unnamed RSA officials responsible for the procurement of telecommunications products have been accused of “cronyism” and “kick-backs.”

Liabilities:

Apart from sales and supply obligations in the ordinary course of its business, as well as the liabilities set forth in its financial statements, TVA has the following: A European Distributor sued TVT in France in early 2005 for wrongful termination/breach of contract, and the parties are preparing for trial. This claim has been disclosed in a footnote to TVT’s December 31, 2005 financial statements which reads “management believes that TVT has valid defenses to this claim.”

Inventors Exploitation Company (IEC) wrote a letter to TVT in September 2005 alleging that several of its products, including Tele Safe, infringes several IEC patents, and IEC has offered to negotiate license agreements on a reasonable royalty basis.

Two RSA customers of TVT have notified TVT that they are returning several products purchased on the grounds that they are defective.

Unknown to TVT, another RSA customer is planning to sue, if necessary, on the basis that Spam Guard malfunctioned and caused a half-hour shutdown of its operations, resulting in the loss of revenues for that customer.

The TVT property on which its administrative office sits has been inspected by RSA environmental authorities and initial indications lead the inspectors to believe that there has been groundwater contamination from leaking underground petrol tanks. The migration of this contamination to a surrounding residential

area whose drinking water comes from privately-owned boreholes is to be the subject of an environmental study. TVT has disclosed this inspection and study in a footnote to its December 31, 2005 financial statements with the comment that “environmental authorities have inspected the property and are to study, at company expense, the possibility of groundwater contamination.”

The property which TVT owns is security for a bank loan of 5 million Rand.

TVT also has a 1 million Rand revolving line of credit for use when cash flow is insufficient to meet its payroll.

To date TVT has made no effort to meet BEE targets.

* * *

Acquisitions has the following factual situation:

Ownership:

Ralph King owns 100% of the issued shares of Acquisitions, but Acquisitions has preference shares held by a venture capital group, Venture Capital Associates (VCA). Ralph is 45 years old. Neither Ralph nor any VCA investor is Black.

Business:

Acquisitions has established itself as a key supplier of products to telecommunications companies which are complementary to but not directly competitive with the products of TVT. It has annual sales of about 50 million Rand. It has a 40% market share in these products and is the leader in a business which has three other competitors. None of Acquisitions' products has patent protection, but Acquisitions is the lowest cost competitor in an industry where price and customer service rather than innovation is the key to success.

Acquisitions manufactures its own products out of two manufacturing facilities in South Africa; one of the facilities is owned, the other is leased. It sells 90% of its products domestically through its own sales and marketing staff. About one-quarter of its domestic sales are to RSA government agencies. Acquisitions has a total of 150 employees, about one third of whom are Black; of its 40 management-level personnel, 11 are Black—including its executive in charge of labour relations. International sales are made through sales agents in various countries.

Liabilities:

Apart from sales and supply obligations in the ordinary course of its business, as well as the liabilities set forth in its financial statements, Acquisitions has the following:

Both of Acquisition's manufacturing facilities have been cited by environmental authorities for air and waste discharges in excess of those permitted. No provisions taking account of these citations appear on its accounting records.

All of Acquisitions' employees are covered by a defined contribution pension plan, as well as competitive medical benefits.

Acquisition's manufacturing employees at both production facilities are represented by the same union under a union contract which expires on June 30, 2007. The Union represents about 90 employees, about one half of whom are Black. Negotiations are already underway for a new contract but the parties have reached no agreement in an atmosphere which appears to be growing more intense.

The Acquisition has a 10-year interest only mortgage on its manufacturing facility in the amount of 15 million Rand; a final balloon payment of principal is due in 2009.

Acquisitions has made some efforts to meet BEE targets as to employment, but none as to equity ownership.

Reason's for Acquisition's Interest in TVT

Ralph King and VCA feel that TVT offers the opportunity to extend Acquisition's core product line into a unique area in the same industry that both companies understand and service. The products offered by TVT, particularly the new product, Tele Safe, will not only bring new product sales to Acquisition, they will in effect open new opportunities for Acquisition's current product line and allow it to gain market share at the expense of its competitors. Further, TVT's international distribution system will allow Acquisitions to make a major thrust into new markets. King is concerned that he cannot raise sufficient cash to purchase TVT and is wondering whether a joint venture with it might be preferable.