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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM004Apr16

In the matter between:

Samancor Chrome Limited	Acquiring Firm
and	
The chrome mining and ferrochrome production assets of International Ferro Metals (SA) (Pty) Ltd (in business rescue)	Target Firms
Sky Chrome Mining (Pty) Ltd	

Panel	:	AW Wessels (Presiding Member) Mondo Mazwai (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	25 May 2016
Order issued on	:	25 May 2016
Reasons issued on	:	15 July 2016

Reasons for Decision

Approval

1. On 25 May 2016, the Competition Tribunal (the "Tribunal") unconditionally approved an acquisition by Samancor Chrome Limited ("Samancor") of the chrome mining and ferrochrome production assets of International Ferro Metals (SA) (Pty) Ltd ("IFMSA") (in business rescue) and Sky Chrome Mining (Pty) Ltd ("Sky Chrome").

2. The reasons for the approval of the proposed transaction follow.

Parties and their activities

Acquiring firms

3. The primary acquiring firm is Samancor, a company incorporated in accordance with the laws of the Republic of South Africa. Samancor is controlled by Samancor Chrome Holdings (Pty) Ltd ("Samancor Holdings"), which is in turn controlled by Terris Chrome Limited ("Terris Chrome"), a company incorporated in accordance with the laws of the Republic of Mauritius. Terris Chrome is controlled by Terris Stainless Limited ("Terris Stainless"), which is in turn controlled by Terris Mining Limited ("Terris Mining"). Terris Mining is controlled by [...][1], which is in turn controlled by [...].

4. Samancor is a vertically integrated producer of ferrochrome. It is involved in the (upstream) mining and beneficiation of chrome ore and the (downstream) smelting of chrome ore to produce ferrochrome.

5. Samancor's chrome ore mining activities are undertaken at mines located in the Mpumalanga, Limpopo and North West provinces and its smelting operations are carried out through three separate plants which are situated in the Mpumalanga and Limpopo provinces.

6. Samancor is further involved in a 50/50 joint venture with Elkem Carbon AS of Norway ("Ferroveld Partnership"). This joint venture produces electrode paste which is used in ferrochrome production.

Target firms

7. The primary target firms are the chrome mining and ferrochrome production assets of IFMSA as well as Sky Chrome.

8. IFMSA is controlled by International Ferro Metals Limited (AUS) ("IFML"), a company incorporated in accordance with the laws of Australia.

[1] Certain information claimed as confidential by the merging parties has been removed from the public version of our Reasons for Decision.

9. IFMSA has been in business rescue proceedings since 26 August 2015. Its primary assets (i.e. its chrome mining and ferrochrome production assets) are currently non-operational.

10. Sky Chrome is controlled (80%) by Purity Metals Holdings Limited (BVI) ("Purity"), a company incorporated in accordance with the laws of Switzerland. Purity is wholly controlled by IFML.

11. Prior to IFMSA being placed under care and maintenance, it was a vertically integrated producer of ferrochrome, i.e. it was involved in the mining and beneficiation of chrome ore and the smelting of chrome ore to produce ferrochrome.

12. IFMSA owns the Lesedi chrome mine in the North West province, which is adjacent to one of Samancor's chrome mines. Sky Chrome owns an opencast chrome ore mine which ceased operating in June 2014.

Proposed transaction and rationale

13. In terms of the proposed transaction, Samancor intends to acquire the chrome mining and ferrochrome production assets of IFMSA, as well as 80% of the share capital of Sky Chrome.

14. Samancor submitted that the acquisition of the IFMSA assets, if returned to operation, represents an attractive investment opportunity.

15. IFMSA submitted that the only reasonable prospect for rescuing its business and assets was through a disposal to a third party. According to IFMSA a sale also represents the most favourable prospects for creditors and employees.

Competition analysis

16. The Competition Commission ("Commission") found that there is a horizontal overlap between the activities of the merging parties in the following two markets: (i) in the (upstream) market for the mining and

production of chrome ore; and (ii) in the (downstream) market for the production and supply of ferrochrome.

17. The Commission also found that the proposed transaction gives rise to two vertical relationships: (i) in relation to the (upstream) production of chrome ore that is used in the (downstream) manufacture of ferrochrome; and (ii) in relation to the production and distribution of electrode paste by Samancor (through the Ferroveld Partnership), which is an essential input in the production of ferrochrome.

Mining and production of chrome ore

18. The Commission considered market shares based on the total production of chrome ore in 2013-2014 in South Africa.[2] On this approach the merged entity would have a market share of less than 30%, with a market share accretion of less than 1% as a result of the proposed transaction. The Commission further found that the merging parties' competitors in this market include Glencore, Assmang, Hernic Ferrochrome, Rustenburg Minerals Development Company and others.

19. If one considers only sales to third parties or open market sales (i.e. excluding all in-house sales), the merging parties estimated that the merged entity's market share would be significantly lower than that stated above.[3]

Production and supply of ferrochrome

20. The Commission found that the merged entity will have a post-merger market share of less than 15% in the international market for the production and supply of ferrochrome.[4] Competitors in this market include Glencore, Assmang, Hernic Ferrochrome and others.

[2] This includes chrome consumed internally by the vertically integrated firms (for purposes of ferrochrome production).
[3] Also see Transcript, pages 11 to 15.
[4] Production figures for 2013-2014 were used.

Vertical relationships

21. The Commission found that Samancor's competitors in the production of chrome ore have alternative customers other than IFMSA, including export opportunities.

22. In relation to electrode paste, the Commission found that the merging parties are unlikely to engage in a successful input foreclosure strategy since Samancor cannot consume all the electrode paste produced by the Ferroveld Partnership. The Commission further noted that IFMSA pre-merger already sourced all of its electrode paste requirements from the Ferroveld Partnership.

23. Based on the above the Commission concluded that the proposed transaction is unlikely to substantially lessen or prevent competition in any relevant market. We concur with the Commission's conclusion.

Public interest

24. We next discuss the employment effects associated with the proposed transaction.

Employment

25. As stated above, IFMSA has been in business rescue proceedings since 26 August 2015.

26. The merging parties submitted that as a result of the business rescue proceedings at IFMSA, the Business Rescue Practitioner had to retrench all of IFMSA's employees. A total of 723 employees were affected by this process, which was recorded in a collective agreement with the labour constituents. This retrenchment process commenced on 07 September 2015 and was concluded on 05 November 2015.

27. The merging parties also indicated that limited duration contracts were concluded with certain of the previous employees of IFMSA involved in

care and maintenance and metal recovery activities, as well as a small staff of office and admin personnel.

28. The merging parties further submitted that the proposed transaction will not have a material adverse effect on employment at IFMSA because IFMSA has already been through a full retrenchment process as a result of the business rescue proceedings and not as a result of the proposed merger. The merging parties furthermore indicated that the proposed transaction will give rise to overall positive employment effects given that the merged entity will require employees once it recommences operations at IFMSA.

29. The Commission received notices to formally participate from three trade unions, namely Solidarity, the United Association of South Africa ("UASA") and the National Union of Metalworkers of South Africa ("NUMSA").

30. Solidarity initially requested the Commission to impose a two-year moratorium on job losses as a result of the proposed transaction. It however subsequently withdrew its request and submitted that the proposed merger will have positive effects on employment.

31. UASA informed the Commission that Samancor is currently engaged in a section 189 of the Labour Relations Act process ("section 189 process"), where certain retrenchments are contemplated. According to the Commission, UASA however accepted during a meeting with it that the retrenchments currently contemplated within Samancor are not occasioned by the current merger transaction. The Commission further noted that the representatives of UASA informed it that they are not opposed to the proposed transaction since they are of the opinion that the proposed transaction will save or create more jobs in Samancor.

32. UASA submitted to the Commission that Samancor informed it that should this proposed merger be approved, the contemplated retrenchments of Samancor employees as a result of operational requirements may be mitigated in that only 70 employees may be retrenched since the proposed

acquisition of IFMSA's assets will create new job opportunities. UASA therefore requested the Commission to recommend the imposition of a condition that will ensure that the employees of Samancor who survive the current section 189 process be protected for a period of at least two years after the implementation of the proposed transaction.

33. NUMSA alleged that Samancor has the intent to move its furnace / smelting operations to Brits in the North West province and close down its Mpumalanga plant. NUMSA therefore requested an undertaking from the merging parties in relation to there being no retrenchments at Samancor and that the Samancor furnace operations will not be moved to the IFMSA site.

34. NUMSA further raised a concern around the Business Rescue Practitioner's decision to carry out retrenchments at IFMSA instead of selling the company as a going concern to avoid retrenchments. NUMSA submitted that the IFMSA employees who were retrenched on 05 November 2015 (when the retrenchment process was concluded) should be re-employed by Samancor once it commences production at IFMSA's furnace operations.

35. Samancor in response to the allegations and concerns raised, submitted that its current section 189 process is not related to the proposed transaction but is occasioned by market conditions led primarily by the declining Chinese demand for chrome and ferrochrome, i.e. there is no nexus between the proposed transaction and the current section 189 process at Samancor since these retrenchments are the result of operational requirements.

36. Samancor at the time of the investigation submitted that it was not in the position to provide the Commission with exact figures on potential retrenchments at Samancor since the consultation process was still underway and would be completed in May 2016. Samancor stated that at the initial stages of the section 189 process, the company had identified 1700 employees at its mining operations and 289 employees at its

smelting operations for possible retrenchments, i.e. a total of 1989 employees.

37. The merging parties also submitted that the proposed transaction may in the long run yield positive employment outcomes once the IFMSA assets are operational; however, this is an assessment that had not been carried out.

38. In relation to NUMSA's contention regarding the future use of furnaces, Samancor submitted that it has not shut down any of its furnaces in Mpumalanga and did not have any long-term plans to shut down any of its furnaces as it requires these in its downstream activities for ferrochrome production.

39. The Business Rescue Practitioner submitted that the basis for carrying out retrenchments at IFMSA was an attempt to preserve the company and ensure that it returns to production and create jobs in the future. He provided details regarding the running costs of the business at the relevant time and the portion of that dedicated to employee salaries. The Business Rescue Practitioner furthermore submitted that the Commission for Conciliation, Mediation and Arbitration ("CCMA") found that retrenchments were the only viable option in the circumstances, in order to preserve the company and ensure that employees receive their severance pay.

40. The merging parties ultimately submitted that the proposed transaction does not result in any negative public interest concerns and that no conditions are therefore warranted as part of the approval.

41. The Commission noted that Samancor is acquiring the assets of IFMSA and not any IFMSA employees and after investigation concluded that the IFMSA retrenchments were carried out as a result of the target firm being under business rescue proceedings. The Commission further found that it is unlikely that Samancor had influenced the Business Rescue Practitioner's decision to retrench the IFMSA employees since Samancor was only chosen as a preferred bidder during November 2015, two months

after the section 189 process at IFMSA had commenced. In light of this the Commission concluded that the retrenchments at IFMSA are unlikely to be linked to the proposed transaction.

42. In relation to the retrenchments occurring within Samancor the Commission found that these retrenchments were occasioned by market conditions and not by the proposed transaction.

43. The Commission also found, based on the merging parties' strategic documents, that it is unlikely that Samancor will close down its furnace operations post-merger (as suggested by NUMSA), since this would be at odds with the merging parties' commercial rationale / strategy.

44. In relation to potential jobs to be created by the proposed transaction, the Commission noted that there will be jobs created in the short term from the IFMSA smelting operations side because there are no licence requirements that Samancor has to satisfy. The Commission further noted that if Samancor is granted a licence to mine at IFMSA's mine it will need more employees to work in those mines and that too will have a positive employment effect in relation to the merged entity's mining operations.

45. The Tribunal informed the abovementioned unions of the hearing in case they wished to make further written and/or oral submissions. The Tribunal received responses from Solidarity and UASA indicating that they did not wish to make any further submissions in this matter. We also note that a non-unionised employee representative at IFMSA, namely Tommy Parker, was however present at the hearing to observe the proceedings.

46. The Tribunal questioned the merging parties at the hearing regarding *inter alia* the retrenchments that took place at IFMSA, the current retrenchments at Samancor and the likely number of jobs to be created as a result of the proposed transaction.

47. The representatives of the merging parties confirmed that a total of 723 employees were retrenched at IFMSA, of which roughly 320 employees

worked at the mining operations and roughly 405 employees worked at the smelting operations.[5]

48. They also indicated that in contemplation of the proposed merger it was possible to scale back the initial retrenchments at Samancor[6] to an extent but that the majority of the savings in jobs at Samancor was the result of certain restructurings that took place at Samancor. As a result of these implemented measures, the total number of forced retrenchments at Samancor will reduce to approximately 320 employees (approximately 60 people at the smelting operations and head office and approximately 260 employees at the mining operations).[7]

49. With regards to potential jobs being created at the IFMSA smelting operations, the merging parties indicated that it will take some time to ramp those operations up until they are at their full operation. They said that it is only expected that that will be in the course of September 2016. They gave a rough estimate that approximately 300 employees could be required at the IFMSA smelting operations post-merger.[8]

50. They however indicated that it was more difficult to quantify potential job opportunities in relation to the mining operations, since it depended on certain synergies that could be assessed only once the necessary DMR approvals are obtained.[9] They nevertheless confirmed that there "*will be opportunities on the smelter as well as on the mine side on the one hand for our [Samancor] people that we retrenched, on the other end for ex IFM employees.*"[10]

51. We were satisfied with the responses provided by the merging parties to the employment issues and concur with the Commission's finding that the proposed merger would not give rise to any significant public interest concerns.

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[5] Transcript, page 28.
[6] The initial anticipated number of retrenchments at Samancor was in excess of 1900.
[7] Transcript, pages 29 and 30.
[8] Transcript, pages 28 and 29.
[9] Transcript, page 29.
[10] Transcript, page 33.

Conclusion

52. In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Further, we agree with the Commission's assessment that proposed transaction is unlikely to result in significant public interest concerns. We therefore approve the proposed transaction unconditionally.

Mr AW Wessels

15 July 2016
Date

Ms Mondo Mazwai and Professor Imraan Valodia concurring

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For the merging parties	:	Paul Cleland of Werksmans Attorneys
For the Commission	:	Amanda Mfuphi