

SOUTH AFRICA / JUDGMENT

Assore Holdings (Pty) Ltd v Assore Limited and Others (LM039Jul21) [2021] ZACT 96 (28 September 2021) [2021] ZACT 96

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Fiona Tregenna, Anton Roskam

CASE / FILE NUMBER

LM039Jul21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM039Jul21

Assore Holdings (Pty) Ltd (Acquiring Firm)

and

Assore Limited

African Mining and Trust Company (Pty) Ltd

Assore Treasury Company (RF) (Pty) Ltd

Ore & Metal Company (Pty) Ltd (Target Firms)

REASONS

FOR DECISION

- [1] On 28 September 2021, the Competition Tribunal unconditionally approved the acquisition of Assore Limited (“Assore”), African Mining and Trust Company (Pty) Ltd (“AMT”), Assore Treasury Company (RF) (Pty) Ltd (“Assore Treasury”), Ore & Metal Company (Pty) Ltd (“O&M”, collectively referred to as the “target firms”) by Assore Holdings (Pty) Ltd (“Assore Holdings”).
- [2] The transaction constitutes an internal restructuring. The ultimate controller of the target firms and their subsidiaries - namely, Oresteel Investments Proprietary Limited (“Oresteel”)

- will remain unchanged. In terms of the Implementation Agreement, it is envisaged that a special purpose vehicle (SPV) - Assore Holdings - will be interposed between Assore and Oresteel with Assore Holdings acquiring the majority of the shares in Assore.[1]
- [3] Assore is 63.4% controlled by Oresteel. The merging parties indicate that Oresteel is controlled by Sacco Family.[2] Assore Holdings is a newly established company established specifically for purposes of the proposed transaction and as such it does not provide any activities. Oresteel is an investment management company which holds shareholding in Assore and does not provide any products or services. Post-transaction Assore Holdings will be 92.7%[3] controlled by Oresteel. (Assore Holdings and Oresteel are collectively referred to as the “acquiring group”).
- [4] The balance of the shares in Assore are held as to 31.6 % by its B-BBEE shareholders Main Street 904 (Pty) Ltd (“MS 904”), Main Street 460 (Pty) Ltd (“MS 460”) and Main Street 350 (Pty) Ltd (“MS 350”); as to 3.9%, Ms Sally Dufour Berte; and as to 1.1%, the Sacco Family Trust.
- [5] Assore is a public company incorporated in accordance with the laws of the Republic of South Africa. However, Assore delisted from the Johannesburg Stock Exchange (“JSE”) in early 2020, and is to be renamed Assore SA Proprietary Limited. Pre- transaction, the shareholding in Assore is held as follows: as to 63.4%; Oresteel; as to [...] 31.6 % it B-BBEE shareholders Main Street 904 (Pty) Ltd (“MS 904”),[4] Main Street 460 (Pty) Ltd (“MS 460”)[5] and Main Street 350 (Pty) Ltd (“MS 350”);[6] as to 3.9%, Ms Sally Dufour Berte (nee Sacco); and as to 1.1%, the Sacco Family Trust. Assore, pre- transaction controls AMT, O&M and Assore Treasury, as well as, Wonderstone (Pty) Ltd (“Wonderstone”),[7] Assmang (Pty) Ltd (“Assmang”)[8] and Dwarsrivier Chrome Mine (Pty) Ltd (“Dwarsrivier”).[9]
- [6] Pre-transaction, AMT, Assore Treasury and O&M, are wholly owned by Assore and are South African registered companies.[10] AMT houses legacy assets such as properties. Assore Treasury is a domestic treasury management company.[11] O&M is the sales and marketing agent in respect of the ore and metal products of Assmang, Cato Ridge Alloys (Pty) Ltd,[12] Dwarsrivier and Wonderstone. It also houses the corporate and head office functions and services of Assore.
- [7] The Commission considered the activities of the merging parties and found that the proposed transaction does not result in a horizontal overlap as the acquiring group does not have any other interests in the mining sector outside of its controlling shareholding in the target firms. As such, the Commission was of the view that the proposed transaction is unlikely to change the structure of the market and it will not result in any market share accretion in the acquiring group’s market share. The Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition.

Public interest

- [8] Regarding the public interest, in particular employment, the employees of the target firms are represented by an employee representative, whom the Commission engaged and they confirmed that the employees had been notified of the proposed transaction, and stated that the employees did not raised any concerns. Given that the proposed transaction does not result in any duplications and will not affect any employees within South Africa, the Commission concluded that the transaction is unlikely to raise any employment concerns.

Greater spread of ownership

- [9] In assessing the effect of the proposed transaction on the greater spread of ownership, the Commission considered (i) the reduction of B-BBEE shareholding in Assore in respect of the pre-delisting, post delisting; (ii) the Assore board participation of B-BBEE

shareholders; and the effect of the call option and the purchase price of the B-BBEE shareholdings in Assore; and (ii) the dilution of the B-BBEE Shareholdings in AMT, O&M and Assore Treasury.

- [10] The Commission found that the B-BBEE Shareholdings in Assore will be reduced by approximately 5.5% as a direct result of the proposed transaction. This is because the B-BBEE Shareholders will now hold 26.1% B-BBEE shareholdings in Assore as opposed to 31.6% pre-transaction.

- [11] The Commission assessed the reduction of the B-BBEE by looking at the qualitative and quantitative value pre- and post-transaction by pointing out the historic evolution of the B-BBEE shareholding in the proposed transaction and in particular Assore.

11.1. In June 2019 (pre 2020 delisting on the JSE), the B-BBEE shareholders collectively held 26.1% (which includes Assore which formed part of the B-BBEE shareholding). The remaining shareholding was held as follows Oresteel (52.4%) and the public shareholders (21.5%). The merging parties stated that as a result of Assore forming part of the B-BBEE shareholders by virtue of their 49% in MS 350 that they jointly control with the Boleng Trust the B-BBEE shareholders (excluding Assore) had an effective 19.1% B-BBEE shareholding in Assore.

11.2. Following the 2020 de-listing on the JSE, and the situation pre-transaction, the B-BBEE shareholding collectively increased from 26.1% to 31.6% as a result of a share repurchase by Assore from public shareholders. As a consequence of the repurchase agreement remaining shareholders will hold shareholding as follows Oresteel (63.4%) and other shareholders (5%).

11.3. The post-transaction structure, provides that the B-BBEE shareholders will collectively hold 26.1% with the exclusion of Assore.

- [12] Based on the above the Commission concluded that the increase to 31.6% was a temporary increase as the 2020 de-listing was done in contemplation of the proposed transaction. It appears that the appropriate pre-transaction B-BBEE shareholding level at Assore is likely to be 26.1% when the historical context is considered.

- [13] The Commission noted that the value attributable to the B-BBEE shareholders will remain relatively the same pre- and post-transaction as the net equity value of the B- BBEE shareholders will be valued at R [...] post-transaction as compared to R [...] The merging parties indicated that the value of the B-BBEE shareholders will remain the same even though the number of shares will be reduced. In this regard, the Commission notes the gross equity value of the 23.1% interest held in Assore by the B-BBEE shareholders pre-transaction is approximately R [...] However, the gross equity value of the 26.1% held by the B-BBEE shareholders in Assore post-transaction, is approximately R [...] a reduction of approximately R [...] gross equity value. However, the Commission found that pre-transaction, the 23.1% interest held by the B-BBEE shareholders attracted a debt burden of approximately R [...] whilst post-transaction, the 26.1% interest attracts a debt burden of approximately [...] Thus, the B-BBEE shareholders' debt burden will [...] by approximately R [...] because of the transaction. Therefore, the net equity value of the shares held by the B-BBEE shareholders in Assore remains unchanged at approximately R [...]
- [14] Given that the B-BBEE shareholders only begin to reap the full financial rewards of any dividends earned in Assore once debt has been repaid, the post-transaction scenario appears to be more favourable. This has been confirmed by the Trustee of the B-BBEE shareholders who has stated that that the post-transaction structure provides the Assore Employee Trust (which forms part of the broader B-BBEE shareholders) an opportunity to repay their debt within more than approximately [...] whilst in the pre-transaction structure it would have taken them up to a period of less than approximately [...] to repay their debt.
- [15] The Commission noted that the B-BBEE shareholders will continue holding ordinary shares post-transaction, in Assore, as is the case pre-transaction. However, the B- BBEE shareholders will now have the ability to appoint three directors on Assore's board post-transaction which they did not enjoy pre-transaction. Hence, the B-BBEE shareholders will have better and more meaningful participation within Assore post- transaction because they will have the ability to sit on the board of directors and provide input on the direction of the entity, a scenario which does not exist

pre-transaction. The Trustee of the B-BBEE shareholders also informed the Commission that the board representation will place them in a position to actively engage in discussions insofar as it relates to Assore and for the benefit of the B-BBEE shareholders in respect of more money directly benefiting and developing the communities (which form part of the broader B-BBEE shareholders) and also benefit workers who also form part of the broader B-BBEE shareholders. The transaction would thus have a positive effect as it relates to the greater participation of the B-BBEE shareholders within Assore post- transaction.

- [16] As part of its merger investigation, the Commission reviewed a number of resolutions of the B-BBEE shareholders and legal documents prepared and reviewed on behalf of the B-BBEE shareholders i.e., legal analysis report; and found that the B-BBEE shareholders have extensively dealt with substantive impacts of the proposed transaction on their B-BBEE shareholding via the legal transaction analysis report ("B- BBEE Legal Analysis Report"). The

B-BBEE Legal Analysis Report raised a concern regarding a call option in the Assore Shareholders' and Relationship Agreement to be entered into by the B-BBEE Shareholders, Assore and Assore Holdings ("B-BBEE Relationship Agreement"). In terms of which " [...]

". The Commission raised the issue of the with the merging parties and sought to better understand the implications of the [...] on the B-BBEE Shareholders [...].

[17] The merging parties indicated that the [...] can only be exercised in respect of all the B-BBEE shareholders interests and the implementation of the [...] is subject to approval by the Commission (to the extent required). Additionally, the merging parties stated that (i) Assore Holdings will already exercise control over Assore and therefore [...] and (ii) Assore would likely only resort to [...].

[18]

Assore Holding does not have any B-BBEE ownership. Thus, the transaction will result in a reduction of 31.6% indirect B-BBEE shareholdings in the AMT, O&M and Assore Treasury to 0%. The Commission found that these firms collectively account for approximately less than [...] % of revenue generated by Assore group firms. In addition to the above, the Commission confirmed from the Trustee of the B-BBEE shareholders that collectively Assmang and Dwarsrivier contribute over [...] % of the dividend flow to the Assore Group. The Commission noted the Trustee indicated that AMT, O&M and Assore Treasury do not regularly pay dividends and the B-BBEE Shareholders are in a better financial position from a dividend perspective as they will now effectively sit closer in the group structure to the key dividend-paying group operating company (Assmang), and will be sitting at this level alongside Assore Holdings [...].

In light of the above, the Commission found that post-transaction, the impact in respect of the dividend flow to the B-BBEE shareholders is unlikely to have a substantial negative effect as the B-BBEE shareholders are likely to continue receiving dividends from Assmang and Dwarsrivier (which both contribute over [...] % of the dividend flow to the Assore Group pre-transaction).

[19] We ultimately agreed with the Commission and concluded that the proposed transaction is unlikely to substantially prevent or lessen

competition in any relevant market, nor have a negative impact on the public interest.

Date: 28 September 2021

Ms Yasmin Carrim

Prof Fiona Tregenna and Mr Anton Roskam concurring

Tribunal Case Manager: Mpumelelo Tshabalala

For the Merging Parties: Daryl Dingley

For the Commission: Tumiso

Loate, Amanda Mfuphi

and Themba Mahlangu

- [1] According to the merging parties, the proposed transaction comprises the following interrelated and inter-conditional steps. Step one, Assore Holdings will acquire all the issued ordinary Assore shares from Oresteel Investments (63.4%), BEE shareholders (31.6%) and other shareholders (5.3%) in exchange for the issue of Assore Holdings shares; and step two, Assore unbundles or disposes its shares in AMT, O&M and Assore Treasury Company to Assore Holdings.
- [2] Oresteel has the following shareholders: as to 44.31%, the Sacco Trust; as to 49%, Sumitomo Corporation Tokyo; and as to 6.69%, Ms. Sally Dufour Berte. The Trustees of the Sacco Trust are Patrick Sacco and Desmond Sacco. Sumitomo Corporation Tokyo controls in excess of 30 firms world- wide; in South Africa it controls Somitomo Corporation (Pty) Ltd.
- [3] The balance of the shareholdings in Assore Holdings will be held by the Desmond Sacco Family Trust (1.7%) and Sally Dufour Berte (5.6%).
- [4] As to 14.3%
- [5] As to 13.3%
- [6] As to 4%.
- [7] As to 100%
- [8] As to 50%, this is a 50/50 joint venture between Assore and African Rainbow Minerals (Pty) Ltd.
- [9] As to 100%.
- [10] Except Assore Treasury is a domestic treasury management company.
- [11] As defined in schedule 1 of the Income Tax Act, No 58 of 1962.
- [12] Cato Ridge Alloys (Pty) Ltd through a joint venture with Assmang, Mizushima Ferroalloys Company Ltd and Sumitomo Corporation, produces refined manganese alloys in KwaZulu-Natal.

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