

SOUTH AFRICA / JUDGMENT

Sandvik Aktiebolag plc v DSI Underground Holdings S.a.r.l (LM003Apr21) [2021] ZACT 44 (7 June 2021)

[2021] ZACT 44

COURT

Competition Tribunal

BEFORE

Y Carrim, AW Wessels, I Valodia

CASE / FILE NUMBER

LM003Apr21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case

No.: LM003Apr21

In the matter between:

Sandvik Aktiebolag
plc Primary
Acquiring Firm
And
DSI Underground Holdings
S.à.r.l. Primary
Target Firms
Panel
Y
Carrim (Presiding Member)
AW
Wessels (Tribunal Panel Member)
I
Valodia (Tribunal Panel Member)
Heard
on
: 07 June 2021
Decided
on
: 07 June 2021
ORDER
Further to the recommendations of the Competition
Commission in terms of section 14A(1)(b) of the Competition Act, 1998
("the
Act") the Competition Tribunal orders that –

1.
the merger between the abovementioned parties be approved in terms of
section 16(2)(b) of the Act
subject to the conditions attached
hereto; and
2. a Merger Clearance
Certificate be issued in terms of Competition Tribunal rule 35(5)(a).
Presiding Member

Date: 07 June 2021
Ms Yasmin Carrim
Concurring: Mr Andreas
Wessels and Prof. Imraan Valodia

Case no: LM003Apr21
Sandvik
Aktiebolag plc
(Primary
Acquiring Firm)
and
DSI Underground Holdings S.à.r.l.
(Primary
Target Firm)

REASONS FOR DECISION

- [1] On 7 June 2021, the Competition Tribunal conditionally approved a large merger between Sandvik Aktiebolag plc (“Sandvik”) and DSI Underground Holdings S.à.r.l. (“DSI”).
- [2] The transaction involves Sandvik, a global engineering group, acquiring 100% of the shareholding in DSI, a mining and tunnelling products provider. Sandvik will also acquire 100% of the shares in a South African joint venture between DSI and Frank Calandra Inc (“Jennmar JV”). Post-merger, Sandvik will solely control DSI as well as the Jennmar JV.
- [3] Sandvik is a publicly listed Swedish company and is not controlled by any shareholder. Sandvik controls several firms in South Africa.[1] DSI is a company incorporated in Luxembourg. In South Africa, Sandvik is predominantly active in the provision of mining and rock

solutions, as well as manufacturing and machining solutions. In South Africa, DSI, through its subsidiaries,² manufactures and supplies specialised ground control products to the South African underground mining and geotechnical industries.

- [4] The Competition Commission considered the activities of the merging parties and found a horizontal overlap in the market for the provision of hard rock bolts in South Africa. However, the merged entity’s accretion would be below 2%, and therefore raised no competition concerns.

- [5] The Department of Trade, Industry and Competition (“DTIC”) raised employment concerns regarding the fact that the merging parties had not made an absolute commitment to protect jobs. The DTIC requested the implementation of a condition for approval, that no merger related retrenchments should be implemented in South Africa after the merger’s approval for a period of 24 months. The merging parties agreed to the condition.
- [6] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market, or to have a negative impact on any other aspect of the public interest contemplated in section 12A(3). The transaction was accordingly

approved on the basis of the conditions attached hereto as Annexure A.

Signed by: Yasmin Tayob Carrim Signed at: 2021-06-07 13:00:48 +02:00

Reason: I approve this document

Ms Yasmin Carrim

Date: 7 June 2021

Mr Andreas Wessels and Prof Imraan Valodia concurring

Tribunal Case Manager: P Kumbirai

For the Merging Parties: M Wagener of Norton Rose Fulbright

For the Commission: R

Maphwanya and B Makgabo

ANNEXURE A

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meaning assigned to them below and cognate expressions bear corresponding meaning: –

1.1. “Acquiring Firm” means Sandvik Aktiebolag Plc;

1.2. “Acquiring Group” means the Sandvik Group;

1.3. “Affected Employees” means any employees of the Merging Parties in South Africa that may be retrenched as a result of the Merger after the Moratorium period;

1.4. “Approval Date” means the date referred to on the Competition Tribunal’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. “Conditions” means the conditions set out herein;
- 1.8. “Days” means any calendar day which is not a Saturday, a Sunday, or an official public holiday in South Africa;
- 1.9. “Employees” means all employees of the Merging Parties in South Africa;
- 1.10. “Implementation Date” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.11. “LRA” means the Labour Relations Act 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. “Moratorium Period” means the period between the Approval Date and the Implementation Date, and thereafter, a period of 2 years from the Implementation Date;
- 1.15. “Sandvik Group” means Sandvik Aktiebolag Plc and all firms which it directly and indirectly controls;
- 1.16. “Target Firm” means DSI Underground Holdings S.à.r.l.; and
- 1.17. “Tribunal” means the Competition Tribunal of South Africa.

2. EMPLOYMENT CONDITIONS

2.1. The Merging Parties shall not retrench any Employees in South Africa as a result of the Merger for the Moratorium Period.

2.2. For the sake of clarity, retrenchments for purposes of clause 2.1 above will not include

(i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA;

(iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; and/or

(vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

2.3. Should the need to retrench Employees arise after the Moratorium Period, the Merging Parties shall for a further period of 24 (twenty-four) months give preference to any Affected Employees in relation to any available vacancies that may arise within any wholly owned subsidiaries and/or divisions that are operationally under the control of the Merging Parties provided they have the requisite qualifications, skills, know-how and experience.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1. The Acquiring Firm shall inform the Commission in writing of the Implementation Date of the Merger within 5 (five) Days of it becoming effective.

3.2. The Merging Parties shall each circulate a copy of the Conditions to their Employees in South Africa, the relevant trade unions, if applicable, and employee representatives within 5 (five) Days of the Approval Date.

3.3. As proof of compliance thereof, a Senior Official of the Acquiring Firm, on behalf of the merged entity, shall within 10 (ten) Days of circulating the Conditions, submit an affidavit to the Commission attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees, the relevant trade unions,

if applicable and employee representatives.

3.4. Any Employee, relevant trade union or employee representative of either of the Merging Parties who believes that the Merging Parties have not complied with or have acted in breach of these Conditions may approach the Commission.

3.5. The Merging Parties shall, on each anniversary of the Implementation Date, during the Moratorium Period submit an affidavit to the Commission confirming compliance with the conditions for the duration of the Moratorium Period.

3.6. The Merging Parties shall, on each anniversary of the Implementation Date, during the 24-month period following the Moratorium Period submit an affidavit to the Commission confirming compliance with clause 2.3 of the Conditions.

4. BREACH

4.1. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of any of the above Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.

5. VARIATION

5.1. The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised, or amended.

6. GENERAL

6.1.

All correspondence in relation to the Conditions must be submitted to the following e- mail addresses: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

- [1] Sandvik Holdings Southern Africa (Pty) Ltd, Sandvik (Pty) Ltd, Seco Tools South Africa, Sandvik Financial Services (Pty) Ltd, South Africa Newtrax (Pty) Ltd and Sandvik Mining and Construction Delmas (Pty) Ltd. 2 Rocbolt Technologies Holdings (Pty) Ltd, Rocbolt Technologies Africa (Pty) Ltd and RB Technology Holdings Pty. These firms are controlled by the Jennmar JV.
- [1] Sandvik Holdings Southern Africa (Pty) Ltd, Sandvik (Pty) Ltd, Seco Tools South Africa, Sandvik Financial Services (Pty) Ltd, South Africa Newtrax (Pty) Ltd and Sandvik Mining and Construction Delmas (Pty) Ltd.

2 Rocbolt Technologies Holdings (Pty) Ltd, Rocbolt Technologies Africa (Pty) Ltd and RB Technology Holdings Pty. These firms are controlled by the Jennmar JV.

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