

SOUTH AFRICA / JUDGMENT

Scaw South Africa (Pty) Ltd v Ozz Industries (Pty) Ltd (13/LM/JAN08) [2008] ZACT 68; [2008] 2 CPLR 289 (CT) (4 June 2008) [2008] ZACT 68

COURT
Competition Tribunal

BEFORE
D Lewis, Y Carrim, U Bhoola

CASE / FILE NUMBER
13/LM/JAN08

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: 13/LM/Jan08

In the matter between:

SCAW SA (PTY) LTD PRIMARY ACQUIRING FIRM

and

OZZ INDUSTRIES (PTY) LTD PRIMARY TARGET FIRM

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and U Bhoola (Tribunal Member)

Heard on : 30 May 2008

Order issued on : 4 June 2008

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A (1) (b), the merger between Scaw SA (Pty) Ltd and Ozz Industries (Pty) Ltd is approved in terms of section 16 (2) (b) on the following conditions:

1.The merged entity undertakes, subject to the provisions of paragraph 2 below, to continue to produce high chrome or standard grinding cylpebs or eclipsoids products to meet the requirements of its customers and potential customers for a period of five years after the merger is approved.

2.The merged entity's obligations, as provided for in paragraph one, are subject to the following:

2.1that its ability to produce the requisite volumes of cylpebs and/or eclipsoids is not negatively affected by factors outside of its control such as vis major or force majeure, or by reason of any exceptionally inclement weather, interruption or shortages of supply of power¹, or by reason of civil commotion, political riot, strike or lock-out or delay or any other causes beyond its control or if significant maintenance has to be performed which reduces the capacity of the East Iron Foundry plant (in which the eclipsoids and cylpebs are produced) for the period during which maintenance is performed); and/or

2.2it is not required to produce a particular quantity and/or size of cylpeb or eclipsoid which would adversely impact its ability to maximise the volume of cylpebs or eclipsoids which it is able to produce; and/or

2.3in the event that it is commercially feasible to do so, the merged entity may produce in excess of the current capacity of the East Iron Plant which is estimated to be an average rate of 65 tonnes per day²; and/or

2.4in the event that customer demand for cylpebs and eclipsoids decreases to the extent that there is not sufficient demand to justify the continued production of cylpebs and eclipsoids, the merged entity is not obliged to continue producing cylpebs and eclipsoids. For the purposes of this provision, insufficient demand means either:

2.4.1if orders received by the merged entity for cylpebs and eclipsoids from customers in any six month period result in an average daily production of eclipsoids and cylpebs combined of below 50 tonnes per day; or

2.4.2the merged entity provides a certificate from its external auditors to the effect that levels of production of cylpebs and/or eclipsoids over any six month period are sub-economic in that they have resulted in a negative EBIT (revenue less fixed and variable manufacturing costs, less depreciation, less SGA (Sales General and Administration costs) as reflected in the merged entity's accounts); and/or

2.5in the event that significant capital expenditure is required to maintain the current capacity of the East Iron Foundry (in which the eclipsoids and cylpebs are produced) and this would result in a negative NPV (net present value at a 10.5% real discount rate), the merged entity is not required to continue producing cylpebs and/or eclipsoids.

3.The merged entity furthermore undertakes that the maximum ex works price which the merged entity will charge current and potential customers from the date on which the merger is implemented

for 11% high chrome or standard (no chrome) cylpebs or eclipsoids in South Africa during the five year period (referred to in paragraph

one) will be based on a reference (or base) price as set out below which will be adjusted from time to time according to a price

adjustment formula in the manner described below.

3.1 The reference (or base) price for high chrome cylpebs or eclipsoids will be the Ozz ex-works price applicable to Impala as at 30 June 2007 and, the reference price for standard cylpebs or eclipsoids will be the Ozz ex-works prices applicable to Mogale Gold as at 30 June 2007. For the sake of clarity, the ex works price applicable to Impala Platinum was R5,450 per tonne and the ex-works price applicable to Mogale Gold was R4,575 per tonne. In addition, for the sake of clarity, the reference price will, on implementation of the merger, be adjusted to take into account any changes in the cost elements set out in clause 4 between the date of the reference price and the date on which the merger is implemented and the percentages in Tables A and B will be adjusted accordingly.

3.2 Subsequent adjustments to the reference price for the purposes of calculating the maximum price referred to in clause 2, whether quarterly or interim, will be determined on the basis set out below.

3.3 Quarterly adjustments, which shall be effective on 1 January, 1 April, 1 July and 1 October of each year shall be based on actual steel scrap price adjustments received by Scaw from its steel scrap supplier/s, actual ferrochrome price adjustments received by Scaw from its ferrochrome supplier/s, actual ferromanganese price adjustments received by Scaw from its ferromanganese supplier/s, actual ferrosilicon price adjustments received by Scaw from its ferrosilicon suppliers/s and published indices for power, for labour and consumables reflected in Table A and Table B in respect of high chrome and standard grinding media, respectively.

4. Interim adjustments from time to time on the basis of –

4.1 actual steel scrap price adjustments received by Scaw from its Steel scrap supplier/s (as regards steel scrap) from time to time; and/or

4.2 actual ferrochrome price adjustments received by Scaw from its ferrochrome supplier/s from time to time; and/or

4.3 actual ferromanganese price adjustments received by Scaw from its ferromanganese supplier/s; and/or

4.4 actual ferrosilicon price adjustments received by Scaw from its ferrosilicon supplier/s; and/or

4.5 the actual increase in the cost of power, labour and/or consumables.

Table A

Cost Element % in the case of high chrome Relevant Index or letter of supply Description of adjustment mechanism Steel Scrap 32.6% Letter of supply Steel scrap price adjustment will based on the actual adjustment received by Scaw from its Steel scrap supplier/s. Ferrochrome 31.9% Letter of supply Ferrochrome price adjustment will based on the actual adjustment received by Scaw from its Ferrochrome supplier/s. Ferromanganese 2.3% Letter of supply Ferromanganese price adjustment will based on the actual adjustment received by Scaw from its Ferromanganese

supplier/s. Ferrosilicon 1.4% Letter of supply Ferrosilicon price adjustment will based on the actual adjustment received by Scaw from its Ferrosilicon supplier/s Power 6.4% SEIFSA table K The latest available index (not the average) compared with the index from the preceding quarter. Labour 11.8% SEIFSA table C3 – all hourly paid. The latest available index (not the average) compared with the index from the preceding quarter Consumables 13.6% SEIFSA table U-Locally

Table B

Cost Element % in the case of standard Relevant Index or letter of supply Description of adjustment mechanism Steel Scrap 48% Letter of supply Steel scrap price adjustment will based on the actual adjustment received by Scaw from its Steel scrap supplier/s. Ferrochrome 1.6% Letter of supply Ferrochrome price adjustment will based on the actual adjustment received by Scaw from its Ferrochrome supplier/s. Ferromanganese 1.1% Letter of supply Ferromanganese price adjustment will based on the actual adjustment received by Scaw from its Ferromanganese supplier/s. Ferrosilicon 2.6% Letter of supply Ferrosilicon price adjustment will based on the actual adjustment received by Scaw from its Ferrosilicon supplier/s Power 6.4% SEIFSA table K The latest available index (not the average) compared with the index from the preceding quarter Labour 17.4% SEIFSA table C3 – all hourly paid. The latest available index (not the average) compared with the index from the preceding quarter Consumables 22.9% SEIFSA table U-Locally

5.As set out above, the maximum price for the standard and high chrome eclipsoids or cylpebs may be adjusted (on the basis of the cost elements set out in Table A in respect of high chrome grinding media and in Table B in respect of standard grinding media, as amended in terms of clause 6 below) during the course of any year in the event that there is a variation in:

5.1the price at which Scaw obtains scrap steel; and/or

5.2the price at which Scaw obtains ferrochrome; and/or

5.3the price at which Scaw obtains ferromanganese; and/or

5.4the price at which Scaw obtains ferrosilicon; and/or

5.5the cost of procuring power, labour and/or consumables.

6.In addition, any price adjustment to any customer to which this condition applies after the date on which this merger is approved shall be:

6.1made in writing and submitted to the relevant customer;

6.2supported by the following:

6.3a price list, detailing the revised prices;

6.4details of the percentage variations in the revised prices; and

6.5letters from suppliers in relation to steel scrap and the relevant alloys.

7. Following an interim or quarterly price adjustment, the percentage which the various cost elements make up of the price will be adjusted accordingly and all current customers to whom this condition applies will be provided with a table setting out the new percentages.

8. For the duration of these conditions, Scaw will provide the Commission with an audit certificate issued by an independent auditor, sanctioned by the Commission, on an annual basis, verifying compliance with these conditions. Scaw's financial year ends on 31 December and the audit certificate will be provided to the Commission within 8 weeks of Scaw's financial year end. For the duration of this condition, the Executive Chairman of, or a person holding the equivalent status at, Scaw will provide the Commission with an affidavit at six monthly intervals from the date of the approval of the merger confirming substantial compliance with these conditions.

9. The reporting obligations are applicable for the duration of these conditions. The final audit report and affidavit will be furnished to the Commission once the period for these conditions has lapsed.

10. The Commission may, where appropriate, in response to a request from Scaw showing good cause, grant an extension of the time periods foreseen for the provision of the audit certificate referred to in clause 8. Where Scaw seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall Scaw be entitled to request an extension within the last month of any period.

11. The Tribunal may, on good cause shown, and on notice given to the other party, lift, revise or amend these conditions upon being approached either by the Commission or the merging parties, provided that any such revision or amendment shall not extend beyond the parameters of these conditions.

D Lewis

Presiding Member

Concurring: Y Carrim and U Bhoola

1 If, owing to power shortages, the merging parties are required to reduce power usage, power usage by the East Iron Foundry (in which the eclipsoids and cylpebs are produced) will be reduced proportionately.

2 Operating at Ozz current shift system.

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