

SOUTH AFRICA / JUDGMENT

Sibanye Gold Ltd v Newshelf 1114 (Pty) Ltd

(017855) [2014] ZACT 46 (3 March 2014)

[2014] ZACT 46

COURT

Competition Tribunal

BEFORE

Norman Manoim, Takalani Madima, Imraan Valodia

CASE / FILE NUMBER

017855

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017855

In the matter between:

SIBANYE GOLD LIMITED

Primary Acquiring Firm

And

NEWSHELF 1114 (PROPRIETARY) LIMITED

Primary Target Firm

Panel : Norman Manoim (Presiding Member)

: DrTakalani Madima (Tribunal Member)

: Prof Imraan Valodia (Tribunal Member)

Heard on : 5 February 2014

Order Issued on : 5 February 2014

Reasons

Issued on : 3 March 2014

Reasons for Decision

Approval

- [1] On 5 February 2014, the Competition Tribunal (“Tribunal”) conditionally approved the acquisition by Sibanye Gold Limited of 76% of the shares held in Newshelf 1114 (Pty) Ltd from Gold One international Limited.
- [2] The reasons for conditionally approving the proposed transaction follow.

Parties to transaction

Acquiring firm

- [3] The primary acquiring firm is Sibanye Gold Limited (“Sibanye”). Sibanye is a public company listed on the JSE with a secondary listing of its American Depositary Receipts on the New York Stock Exchange. Sibanye controls a number of firms inter alia Living Gold (Pty) Ltd, Sibanye Gold Nursing College (Pty) Ltd, Sibanye Gold Shared Service (Pty) Ltd, St Helena Hospital (Pty) Ltd and Sibanye Gold Protection Services Ltd.

Target firm

- [4] The primary target firm is Newshejf 1114 (Pty) Ltd (“Newshelf”). Newshelf is solely controlled by Gold One International Ltd (Gold One”) which holds 76% of its shares with the remaining 24% being held by Rand Uranium Empowerment Partnership (“RU Partnerships”). Newshelf wholly controls Rand Uranium (Pty) Ltd (“Rand Uranium”) which in turn wholly controls the Cooke Rehabilitation Trust. Gold One is a public company listed on the ASX Limited in Australia with a secondary dual listing on the JSE that is controlled by a consortium of investors from the People's Republic of China through BCX Gold Investment Holdings Ltd (BVI) (“BCX”).

- [5] BCX is controlled by;

- The Baiyin Group;
- The Chinese African Development Bank; and
- The Changxin Element Group.
- Gold One controls:
- Gold One Europe Ltd;
- Gold One Africa Ltd;
- Twin Hills Operations (Pty) Ltd;
- Australian Silicon Operations (Pty) Ltd;
- Gold One Asia Ltd (BVI).
- Gold One Europe in turn controls:

- Ezuiwini Mining Company (Pty) Ltd;
- Gold One Africa in turn controls:
- Etendeka Prospecting and Mining Company (Pty) Ltd;
- Gold One Mozambique Limitada;
- New Kieinfontein Mining Company Ltd;
- Goliath Gold Mining Ltd.

[6] It must be noted that in order to undertake the proposed transaction, a restructuring and consolidation of the Cooke Mining Operations currently housed within Rand Uranium ("Cooke Shafts 1 through 3") and Ezuiwini {"Cooke Shaft 4") will take place. Post the aforementioned restructuring and consolidation, Ezuiwini will be controlled by Newshelf 1114. As such, Newshelf 1114 comprises of the Cooke shafts 1 through 4 underground operations and the Randfontein Surface Operations in the Western Witwatersrand Basin region, collectively referred to as (the "Cooke Mining Operations").

Proposed Transaction

- [7] Sibanye Gold intends to acquire control over Gold One's Cooke Mining Operations
- e. the underground operations of Gold One's Cooke Shafts 1 through 4 and the Randfontein Surface Operations, by acquiring 76% of the shares in Newshelf 1114. Upon implementation Sibanye Gold will acquire sole control over the business of Newshelf 1114 and the RU Partnership will retain its 24% non-controlling interest in Newshelf 1114.[1]

Rationale

- [8] This transaction presents Sibanye with an opportunity to consolidate the West Rand and West Witwatersrand surface gold production opportunities in a joint venture with Gold one and will allow Sibanye exclusively to develop and exploit the potential of the West Rand and Western Witwatersrand Basin Region, resulting in material infrastructure and operational synergies. The transaction also allows for the introduction of an anchor Sibanye Gold Shareholder with long term investment potential. The Cooke operation will serve to support Sibanye Gold's organic growth profile.
- [9] Gold one submits that it will acquire a healthy dividend stream by obtaining a stake in the equity of Sibanye Gold through a relative valuation merger of the Rand Uranium and Ezulwini.

Relevant Market and Impact on Competition

- [10] The relevant market is the market for the international production and supply of gold and silver. The merging parties' activities overlap in the international markets for the production and supply gold and silver.

- [11] In the international market for the production of gold the merged entity will have a market share of approximately 1.41% with a market share accretion of 0.08%. The market for the supply of gold is highly fragmented with the likelihood of significant competition being faced by the merging party from other players.[2]
- [12] In the international market for the production of silver Sibanye Gold's production of silver is so negligible that reliable data cannot be found to determine its market share. The merged entity would continue to face significant competition from other viable competitors.[3]
- [13] The Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition given the merged entities

minimal market share of less than 2% in respect of gold and 1% in respect of silver.

Public Interest

Analysis

- [14] The merging parties submitted that no retrenchments were envisaged as a result of the proposed transaction. The Commission's

investigation however revealed that all the relevant unions were given notice prior to the merger filing of possible retrenchments

within all divisions of Sibanye Gold, The merging parties stated that this retrenchment process was not merger specific and was based solely on their operational requirements,

- [15] The Commission conducted an extensive investigation to assess the possible link between the retrenchments and the proposed transaction.

During this investigation Gold One issued a Section 189 Notice in respect of a possible retrenchment of 82 employees from the Cooke Mining Operations. This process was subsequently withdrawn as there was a concern from Gold One that the retrenchment exercise impact on the proposed transaction.[4] This raised concerns that Gold One would embark on a retrenchment process post-merger.

- [16] The Commission, after reviewing all the information submitted, found that it was not able conclusively to determine whether the retrenchments were merger specific or not. However, taking into account all the information they had gathered, including the withdrawn retrenchments by Gold One, the Commission recommended that the transaction be approved subject to the condition which would prevent the merged entity from retrenching any employee(s) as a result of the merger for a period of two years following the merger implementation date.[5] The merging parties chose not to contest this condition. We agree with this condition as set out in Annexure A to these, reasons.

Conclusion

[17] In Sight of the above we agree with the Commission's conclusion that the proposed transactions are unlikely to substantially prevent or lessen competition in the market for the international production and supply of gold and silver. In addition, no public interest issues arise if the condition proposed is imposed to prevent the retrenchment of employees of the merged entity as a result of the merger. Accordingly we approve the proposed transaction subject to the condition contained in Annexure A.

03 March 2014

DATE

Imraan Volodia

Norman Manoim and Takalani Madima concurring

Tribunal Researcher: Derrick Bowles

For the merging parties: ENS Africa (on behalf of the acquiring and target firms)

For the Commission: Portia Bele assisted by Themba Mahlangu and Jatheen Bhima

Case No.: 017855

SIBANYE GOLD LIMITED

and

NEWSHELF 1114 (PTY) LTD

Panel: N Manoim (Presiding Member), T Madima (Tribunal Member) and I Valodia (Tribunal Member)

Heard on : 5 February 2014

Decided on : 5 February 2014

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b), the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between Sibanye Gold Limited and Newshelf 1114 Proprietary Limited be approved in terms of section 16(2)(b) of the Act subject to the conditions in Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

5 February 2014

Date

PresidingMember

N Manoim

Concurring: T Madima and I Valodia

Competition tribunal

South Africa

Merger Clearance Certificate

Date: 5 February 2014

To: Edward Nathan Sonnenbergs Inc

Case Number: 017855

Sibanye Gold Ltd and Newshelf 1114 (Pty) Ltd

You applied to the Competition Commission on 12 September 2013 for merger approval in accordance with Chapter 3 of the Competition Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to: no conditions.

X the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

CONDITIONS

1 DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings;

1.1 "Approval Date" means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT 10);

1.2 "Commission" means the Competition Commission of South Africa;

1.3 "Competition Act" means the Competition Act, 89 of 1998, as amended;

1.4 "Conditions" means these conditions;

1.5 "Merger Implementation Date" means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties. This date is subject to compulsory notification to the Commission;

1.6 "Merger" means the transaction in terms of which Sibanye Gold will acquire control over Newshelf 1114 notified to the Commission under the above case number;

1.7 "Merging Parties" means Sibanye Gold and Newshelf 1114;

1.8 "Newshelf 1114" means Newshelf 1114 (Pty) Ltd, a. company incorporated in accordance with the laws of the Republic of

South Africa; and

2013Sep0446 Sibanye Gold and Newshelf 1114.

1.9 "Sibanye Gold" means Sibanye Gold Limited, a firm incorporated in accordance with the laws of the Republic of South Africa. Sibanye Gold is a public company listed on the Johannesburg Stock Exchange Limited (the "JSE") and the secondary listing of its American Depositary Receipts listed on the New York Stock Exchange.

2 CONDITIONS

2.1 The Merging Parties shall not retrench any employee, as a result of the Merger for a period of two years following the Merger Implementation Date. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages.

3 MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Merging Parties must notify the Commission of Merger Implementation Date by way of affidavit within 10 days of Merger Implementation Date;

3.2 The Merging Parties shall circulate a copy of the conditions to their respective employees within 7 days of the Tribunal order*

3.3 As proof of compliance hereof, the Merging Parties shall within 5 days of circulating, the conditions, provide an affidavit by a senior official attesting to the circulation of the conditions and provide a copy of the notice that was sent to the employees.

3.4 The Merging Parties must submit a report to the Commission annually on the anniversary of the Merger Implementation Date. This report must confirm that no employees were retrenched as a result of the Merger. The annual report must be accompanied by affidavit, signed by a senior official of. the. Merging Parties, confirming accuracy thereof. , • ,

3.5 Any breach of these conditions shall be dealt with in accordance with Rule 39 of the Competition Commission Rules.

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3.6 All reports and correspondences in relation to these conditions must be submitted to the following email address: mergerconditions@compcom.co.za

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[1] It must be noted that the Commission also considered the effects of a related transaction on the proposed transaction. In terms of this related transaction the RU Partnership which currently holds a 24% non-controlling interest in Newshelf 1114, intends to acquire negative control over Newshelf 1114 in terms of section 12(2)(g) of the Act. Upon implementation of the proposed related transaction, Newshelf 1114 will be jointly controlled by Gold One (76%) and the RU Partnership (23.4%). The RU Partnership/Newshelf 1114 transaction contemplates the RU Partnership's acquisition of joint control over Newshelf 1114, while the proposed transaction contemplates Sibanye Gold's parallel acquisition of Gold One's 76% shareholding in Newshelf 1114 (i.e. sole control over same) such that Sibanye Gold essentially 'steps into the shoes' of Gold One as Newshelf 1114's majority shareholder. Upon the successful implementation of both transactions, the cumulative effect of the proposed transaction and the RU Partnership/Newshelf 1114 transaction which currently run parallel with one another is such that Newshelf 1114 will be jointly controlled by Sibanye Gold (76%) and by the RU Partnership (24%). The cumulative effect of both these transactions constitutes a move from sole control by Gold One to joint control by Sibanye Gold and the RU Partnership of Newshelf

1114. This transaction is hereinafter referred to as the "RU Partnership/Newshelf 1114 Transaction".

[2] See Table 2 on page 30 of the Commission's Report.

[3] See Table 3 on page 31-32 of the Commission's Report

[4] See page 37 of the Commission's Report

[5] This sentiment was echoed by the representatives from the USASA and Solidarity trade unions.

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