

SOUTH AFRICA / JUDGMENT

Sinosteel Group Corporation Limited v Deen Holdings Corporation Limited (LM123Nov21) [2021] ZACT 81 (18 March 2021)

[2021] ZACT 81

COURT

Competition Tribunal

BEFORE

I Valodia, E Daniels, L Mncube

CASE / FILE NUMBER

LM123Nov21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM123Nov21

Sinosteel Group Corporation Limited (Primary Acquiring Firm)

And

Deen Holdings Corporation Limited (Primary Target Firm)

Panel:

I Valodia (Presiding Member)

E Daniels (Tribunal Panel Member)

L Mncube (Tribunal Panel Member)

Heard on:

16 March 2021

Order Issued on:

17 March 2021

Reasons

Issued on:

18 March 2021

REASONS

FOR DECISION

[1] On 16 March 2022, the Competition Tribunal conditionally approved a large merger in terms of which Sinosteel Group Corporation Limited

(“Sinosteel”) intends to acquire 50% shareholding in Deen Holdings Corporation Limited (“Deen Holdings”)[1] from [....][2] Post-merger, Sinosteel will solely control Deen Holding.[3]

[2]

Sinosteel is a company incorporated in accordance with the laws of the Peoples’ Republic of China (“PRC”) and is wholly owned by the Government of the PRC.[4] In South Africa, Sinosteel controls four firms; including Sinosteel South Africa Proprietary Limited (“Sinosteel South Africa”)[5] Together with Samancor Chrome Holdings Proprietary Limited (“Samancor”) an entity in which Deen Holdings has a controllin

g interest, Sinosteel holds a 50% interest in three South African joint ventures: Tubatse Alloy Proprietary Limited, Tubatse Chrome Proprietary Limited, and Tubatse Chrome Minerals Proprietary Limited (collectively referred to as the JV Entities Sinosteel and its subsidiaries are collectively referred to as the Sinosteel Group.

[3] Sinosteel has operations in iron ore, chrome ore and nickel ore base in, inter alia, South Africa.[6] In South Africa through the JV Entities, the Sinosteel Group conducts activities in the respect of mining, beneficiation and supply of chrome ore and ferrochrome. Through Sinosteel South Africa, the Sinosteel Group trades chrome from South Africa. In South Africa, Sinosteel is also active in the renting of office space and the provision of business development and consulting services.

[4] Deen Holdings is a Mauritian company controlled by a Hong Kong incorporated company. Deen Holdings operates in South Africa through

several firms with activities in the mining industry.[7] However, relevant to the proposed transaction, Deen Holdings operates in South Africa through Samancor and its affiliates, in which

Samancor is active in chrome ore mining, smelting and the production of electrode paste (an essential input into the production of ferrochrome).

Competition Assessment

[5] The Competition Commission (Commission) considered the activities of the merging parties and found that the proposed transaction give rise to a horizontal overlap, which arises in the merging parties’ activities in the trading of chrome ore. The Commission noted also, that Sinosteel and Samancor (controlled by Deen Holdings) jointly control the joint venture responsible for mining of metallurgical minerals resources and the supply of ferrochrome. The Commission did not consider this to be an overlap and did not assess the matter further.

- [6] The merging parties submitted that potential vertical relationship could arise between the merging parties in the trading of chrome ore in South Africa given that Sinosteel, through Sinosteel South Africa engages in the trading of chrome ore whereas Deen Holdings, through its Samancor affiliate, produces and supplies chrome ore.
- [7] There are also limited vertical relationships between the parties in South Africa insofar as Sinosteel supplied coke nuts and equipment spare parts to an affiliate of Deen Holdings in 2020. With regard to coke nuts, Samancor in Sinosteel's sole customer an arrangement unlikely to raise any significant foreclosure concerns in the market. Regarding equipment spare parts, the Commission noted that Sinosteel supplies [...] of its spare parts to Samancor; and in this regard Sinosteel is a small player in the market with less than 1% market share. The Commission concluded that neither of these relationships needed to be investigated further.
- [8] Thus for the competition assessment the Commission considered as relevant the national market for the mining and supply of chrome, and the global market trading of chrome ore.
- [9] Regarding the horizontal overlap identified in the global market for the trading of chrome ore, the Commission found that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for trading of chrome ore as the merging parties combined post-merger share remains low at 0-4%, with an accretion of 0-2%.

[10]

Regarding the vertical overlap identified, the Commission found that upstream in the national market for chrome mining and supply, the merged entity will have approximately [...] market share with no accretion. Other competitors, in the production and supply of chrome ore in South Africa have [...] of the market share. The Commission assessed the ability of the merging parties to foreclose local traders of chrome and it found that the merging parties are unlikely to have the ability to significantly foreclose local chrome ore traders as Samancor is not a dominant supplier of chrome ore with [...] market share. Furthermore, Samancor only has one customer of chrome ore in South Africa, which is [...] The Commission considered whether the proposed transaction raises any customer foreclosure concerns; and it noted the merging parties 2% market share in the downstream for the market for chrome ore trade and based on that, it concluded that the proposed transaction does not raise any customer foreclosure concerns.

[11] The Commission also engaged [...] – Samancor's only ferrochrome customer in South Africa. [...] is a ferrochrome trader that procures from producers and on-sells to its customers that use the input in the production of steel. [...]

was confident that there is enough competition in the local market between Samancor, Glencore and Mogale Alloys and this will remain

post-merger. As such it submitted that it does not oppose the proposed transaction.

[12] Based on the above, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market. We concur with this finding.

Public Interest

Effect on Employment

[13] The merging parties submitted that the proposed transaction will not lead to any retrenchments at either of the merging parties or Samancor. The merging parties disclosed historic and contemplated retrenchments at Samancor that the merging parties claimed were based on operational requirements. The Commission investigated these allegations.

[14] During its analysis the Commission noted the following factors about the market for the trade of chrome. This market is strongly impacted upon by global economic conditions, exchange rates, demand for stainless steel and chromite supply. China and India have historically been the leading consumer markets for chrome ore and ferrochrome due to their large markets for stainless steel. South African concerns raised regarding growing exportation of unrefined chrome ore at the expense of domestic ferrochrome manufacturing has precipitated increased export taxes and quotas on South African chrome ore. Locally the lower prices and higher electricity costs have led to a number of firms entering business rescue; and the market has experienced subsequent consolidation.[8]

[15] Samancor commenced retrenchments on the basis of operational requirements in January 2020, which process was completed by December 2020.[9] The Commission's review of internal documentation revealed, firstly that discussions about the proposed transaction commenced

approximately a year after retrenchments were implemented. Secondly, the need to restructure the Samancor business was necessitated by market conditions at the end of Q2 2019 relating to the oversupply of chrome ore and the drop in global prices of chrome ore and ferrochrome. Furthermore, prices continued to deteriorate in the early part of 2020 due to the Covid-19 pandemic.

[16] Samancor Chrome, pursuant to its budgeting processes, has revealed that retrenchments due to operational requirements are foreseen as part of Samancor's ongoing efforts to streamline and make its operations more efficient. The Commission sought information on this and noted that the business is still facing market challenges of worldwide commodity prices being under pressure, with the drastic decline of ferrochrome prices and continuous increase in the cost of production due to, inter alia, Eskom's electricity prices.

- [17] The Commission found neither the historic nor contemplated retrenchments to be merger related. However, in light of the current economic climate and South African unemployment rates it engaged the merging parties on two employment related conditions. The merging parties agreed to the proposal of a two year moratorium on merger-specific retrenchments and a 24-month “vacancies clause” which gives preference to the retrenched employees when vacancies are available.
- [18] During the investigation two of the notified unions raised concerns with the proposed transaction.
- a. The National Union of Mineworkers (“NUM”) raised its members concerns about the Samancor pre-merger retrenchments and an alleged unwillingness of Samancor to implement the recall clause.[10] NUM further requested the Commission to impose a moratorium on retrenchments.
 - b. The National Union of Metalworkers South Africa (“NUMSA”) said its members were concerned about employment security and possible variation of conditions of employment related to a Samancor merger in 2018. It also raised concerns that its members, through Samancor Ndizani Workers’ ESOP Trust (“Ndizani Trust”) are shareholders of Samancor and because of a current unresolved dispute between Ndizani Trust and Samancor, NUMSA did not support the proposed transaction. NUMSA also sought information regarding the Ndizani Trust structure and the control structure of the merging parties.
- [19] Through engagement with the merging parties, the Commission found that the periods applicable to the implementation of the recall clause, and the retrenchment moratorium related to the 2018 Samancor merger had both lapsed.[11] It was accepted that NUMSA’s other issues were not merger-specific.
- [20] NUM elected to participate in the Tribunal proceedings, through which the condition relating to the variation clause was strengthened.
- [21] Following further submissions by the trades unions and the merging parties, the Tribunal was satisfied that the revised condition addressed any employment concerns that are merger-specific.

Effect on the greater spread of ownership

- [22] Neither of the merging parties have Broad-Based Black Economic Empowerment (B- BBEE) shareholding or an employee share ownership program (“ESOP”) pre-merger. The Commission invited the merging parties to make submissions on how the proposed transaction will promote a greater spread of ownership.
- [23] The merging parties disputed this interpretation of the Act and provided that (at worst) the proposed transaction was public interest

neutral.[12] Nevertheless the merging parties submitted that Samancor has applied for a mining right[13] and if the application to the Department of Mineral Resources and Energy (“DMRE”) is successful, the DMRE will require Samancor to increase its existing levels of ownership by historically disadvantaged persons (“HDP”) in respect of the Mineral Right Holding Entity (“MRHE”).

[24] As a condition to the approval of the proposed transaction, the merging parties tendered that Samancor will allocate [...] of the shareholding in the MRHE to an ESOP; a further[...] shareholding in the MRHE to the relevant community; and allocate a further minimum [...] shareholding in the MRHE to an HDP shareholder/s. This condition will only be effected if Samancor is successful in its DMRE mining right application.

[25] The Commission and the merging parties were still in dispute about the timing for the implementation of the tendered spread of ownership condition before the Tribunal. The Panel saw it fit to align the timing to the application approval.

Conclusion

[26] For the above reasons, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market; and the public interest conditions imposed for the approval of the merger have a positive effect on the public interest.

Signed by Imraan Valodia

Signed at: 2022-04-11 17:26:15 +02:00

Reason: Witnessing Imraan Valodia

18 March 2022

Professor Imraan I. Valodia

Concurring: Mr Enver Daniels and Dr Liberty Mncube

Tribunal Case Managers: Sinethemba Mbeki and Mpumelelo Tshabalala

For the Merging Parties: Xolani Nyali, Sivuyise Lutshiti and Kayla Abrahams
of Bowmans Attorneys

For the Competition: Zintle

Siyo and Themba Mahlangu

IN THE LARGE MERGER BETWEEN:

SINOSTEEL GROUP CORPORATION LIMITED AND

DEEN HOLDINGS CORPORATION LIMITED

CASE NUMBER: LM123NOV21

ANNEXURE A: CONDITIONS

1 DEFINITIONS

1.1 The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings, namely:

1.1.1 "Acquiring Firm" means Sinosteel Group Corporation Limited;

1.1.2 "Affected Employees" means those employees dismissed for operational reasons in terms of section 189 of the LRA by Samancor (i) before the Merger, in the period ranging from 1 January 2020 to 31 December 2020; and (ii) any that may take place after the Merger limited to those contemplated at the notification and investigation of the Merger, including dismissals for operational reasons regarding the restructuring of the Western Chrome Mines Business Unit as provided to the Commission.

1.1.3 "Approval Date" means the date referred to on the Tribunal's Merger Clearance Certificate (Notice CT10) in terms of the Competition Act;

1.1.4 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

1.1.5 "Commission Rules" means the Rules for the Conduct of Proceedings in the Commission;

1.1.6 "Competition Act" means the Competition Act, No. 89 of 1998, as amended;

1.1.7 "Conditions" means these conditions contained in this Annexure A;

1.1.8 Conversion means Samancor's successful application to the Department of Mineral Resources and Energy for the conversion of the Old Order Mineral Right into the Mineral Right;

1.1.9 "Days" mean business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;

1.1.10 "HDPs" means historically disadvantaged persons as defined in section 3(2) of the Competition Act;

[1] Deen Holdings is a company incorporated in Mauritius and it is controlled by [...]

[2] is a company incorporated in Hong Kong, China

[3] This is the case despite [...] retention of 50% of the issued share capital (Letter from Bowmans to the Tribunal dated 11 March 2022)

[4] Sinosteel's ownership by the Government of the PRC is through the Central State-owned Asset Supervision and Administration Commission, an agency of the Central Chinese Government. The Central SASAC owns various firms in China but of the purposed of the current transaction, only Sinosteel is relevant

[5] In addition to Sinosteel South Africa: ASA Metals Proprietary Limited; Dilikong Chrome Mine Proprietary Limited; and Sinosteel

International South Africa Proprietary Limited

[6] The Sinosteel Group also has set up and operates iron ore, chrome ore and nickel ore base in Australia, Cameroon, China, Indonesia,

Philippines, and Zimbabwe

[7] Batlhako Ferrochrome Proprietary Limited; Crometals Proprietary Limited; Dikwena Chrome Proprietary Limited; Henry Gold Proprietary

Limited; Middelburg Technochrome Proprietary Limited; Middelburg Steel & Alloys Proprietary Limited; NST Ferrochrome Proprietary

Limited; Poschrome Proprietary Limited; Samancor Chrome Holdings Proprietary Limited; Samancor Chrome Limited; TC Smelters

Proprietary Limited; Tubatse Alloys Proprietary Limited; Tubatse Chrome Proprietary Limited; Tubatse Chrome Minerals Proprietary

Limited; and Waterkloof Mines Proprietary Limited

[8] This involved the following firms: Samancor Chrome and NST Ferrochrome (Pty) Ltd; Samancor Chrome and International Ferro Metals (SA) (Pty) and Sky Chrome Mining (Pty) Ltd; K2015356066 (South Africa) (Pty) Ltd and the Business of Hernic Ferrochrome (Pty) Ltd

[9] This process impacted [...] employees. No retrenchments were undertaken in 2021.

[10] Which seeks to give employment preference to its retrenched employees, should any vacancy become available within the company.

[11] Letter from the merging parties to the Commission dated 15 December 2021 (Merger Record, p451-459).

[12] The merging parties provided that despite difficult market conditions, Samancor has managed to save [...] direct jobs, through a combination of reduction in retrenchments and re-hiring previously retrenched employees. Furthermore, Samancor has [...]

of its shareholdings held by HDPs and an ESOP which shareholdings will remain unaffected post-merger.

[13] Samancor holds a prospecting right relating the mining of chrome ore in the Farm Mareesburg 8 JT, situated in Mpumalanga.

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