

SOUTH AFRICA / JUDGMENT

Zimco Metals Proprietary Limited and Another v Competition Commission; In re: Zimco Metals Proprietary Limited v Atlantis Metals Proprietary Limited (AME160Oct15) [2016] ZACT 7; [2016] 1 CPLR 114 (CT) (11 February 2016) [2016] ZACT 7

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Imraan Valodia, Andiswa Ndoni

CASE / FILE NUMBER

AME160Oct15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: AME160Oct15

In the matter between:

ZIMCO METALS PROPRIETARY LIMITED First Applicant

ATLANTIS METALS PROPRIETARY LIMITED Second

Applicant

and

THE COMPETITION COMMISSION

Respondent

In respect of the conditionally approved merger between:

ZIMCO METALS PROPRIETARY LIMITED

Primary Acquiring Firm

ATLANTIS METALS PROPRIETARY LIMITED

Primary Target Firm

Panel

: Yasmin Carrim (Presiding Member)

: Imraan Valodia (Tribunal Member)

: Andiswa Ndoni (Tribunal Member)

Heard on

: 20 January 2016

Reasons

Issued on : 11 February 2016

Reasons

for Decision

Approval

- [1] On 2 September 2014 the Competition Commission ("Commission") conditionally approved the intermediate merger between Zimco Metals Proprietary Limited ("Zimco") and Atlantis Metals Proprietary Limited ("Atlantis") in case number 2014Jul0338.
- [2] On 20 October 2015 the Applicants applied to the Competition Tribunal for an amendment of the merger conditions imposed by the Commission ("the conditions") The application was brought in terms of section 27(1)(d) of the Competition Act (No. 89 of 1998) ("the Act"), as read with Tribunal Rule 42, together with clause 4 of the merger conditions which provided that "the merging parties may at any time, on good cause shown, including changes in economic conditions, approach the Tribunal for the conditions to be lifted, revised or amended' .
- [3] On 20 January 2016 the Competition Tribunal ("Tribunal") approved the application for an amendment of the conditions with respect to Condition 3.2.
- [4] The reasons for approving the application for amendment follow.

Background

- [5] On 2 July 2014, the merging parties notified the Commission of their proposed intermediate merger in which Zimco would acquire the business and assets of Atlantis and a property on which the anode operations of Atlantis were conducted, as a going concern. The offer for the anode business also included the anode plants owned by Lead Processing Industries and Wattled Crane in the DRC. It should be noted that at the time, the holding company of Atlantis, Thuthuka Group Limited ("Thuthuka"), had been placed in business rescue. The sale of Atlantis was an attempt by the Business Rescue Practitioner to raise cash and prevent the liquidation of Thuthuka.

- [6] Zimco is a wholly-owned subsidiary of the Zimco Group (Pty) Ltd ("Zimco Group") and is a producer of industrial and base materials, zinc, lead, aluminum metal and alloys, related chemicals and engineering plastics in South Africa. Atlantis is a manufacturer of lead products and specifically lead anodes for the electrowinning and electrofining of copper, zinc, nickel, cobalt and manganese. The manufacturing plants of Atlantis are located in Brakpan in South Africa and in Kolwezi in the DRC. Atlantis operates under a patented anode process licence granted in 2008 by the Electro Winning Products (Pty) Ltd ("EWP").
- [7] During its investigation, the Commission found that the merging parties both produced lead anodes and as such their activities overlapped in the market for the provision of lead anodes in South Africa. Given that the merging parties were the only two producers of lead anodes in South Africa there was a concern that a monopoly would be created despite Atlantis' dire financial position. In addition the merging parties were also net exporters of lead anodes and hence there was a concern surrounding local supply and employment.
- [8] In light of the above, on 2 September 2014, the Competition Commission approved the transaction subject to conditions. The conditions that were imposed can be grouped into three broad categories namely an obligation relating to supply to customers; the prevention of the relocation of the Atlantis plant; and employment.
- [9] However on 20 October 2015, the Applicants applied to the Competition Tribunal for an amendment of the conditions citing a change in market circumstances as detailed below.

The relevant conditions for the application for amendment are:

"3.2 Relocation of the Atlantis Plant

From the Approval Date and for as long as Zimco has control over Atlantis, the manufacturing plant/facilities of Atlantis shall not be relocated from the current location in Brakpan to premises that are outside of South Africa.

3.3. Employment

3.3.1 For a period of two (2) years commencing on the Approval date, Zimco undertakes that no employees of Atlantis will be retrenched by the merging parties in South Africa as a result of the merger.

3.3.2 For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements and (ii) voluntary early retirement offers by Atlantis."

Change in market circumstances

- [10] Since the approval of the transaction, the merging parties have made significant improvements to the facilities at the Atlantis plant. However, they have also encountered a number of difficulties due to changes in market conditions.

- [11] One notable change has been the decline in commodity prices and the subsequent decrease in demand for commodities (including copper). Given that lead anodes are used primarily in the electro winning of copper, the merging parties submitted that this has resulted in a decline in the demand for lead anodes. While they have attempted to acquire new customers and expand into other countries the length of time needed to secure a new business relationship is too long.
- [12] Furthermore the largest customer of Atlantis has decided to suspend operations at some of its mines in the Democratic Republic of Congo and Zambia. This has had grave consequences for Atlantis whose viability has been dependent on this customer and on exports to other copper mines. The parties further submitted that there are few opportunities for selling lead anodes in South Africa due in part to the lack of local copper producers as well as the life span of the lead anode which has resulted in a saturated market. As a consequence of the aforementioned, the parties have concluded that the Atlantis plant is no longer economically viable.
- [13] In order to sustain the economic viability of their business, the parties have decided to move the Atlantis plant from Brakpan to Krugersdorp. However in doing so they anticipate that there will be job losses of 13 employees due to the distance between Brakpan and Krugersdorp and the inability of employees to travel. The parties submit that the proposed retrenchments are not merger specific but arise mainly due to an attempt to remain economically viable. Accordingly the proposed retrenchments are operational in nature. Furthermore they submitted that while the relocation of the plant would reduce costs, being unable to relocate outside of South Africa has placed them at a significant disadvantage to their rivals. Transport costs have escalated and in a declining commodity cycle and further weakening of the currency, they would need to locate the production capacity closer to their export markets. For this reason they would like to relocate the machinery related to the seamless production of anodes under the patented process to locations outside South Africa.
- [14] The Applicants therefore sought an order declaring the lifting or removing of the condition relating to the relocation of the Atlantis plant to a location outside of South Africa and/or that the anticipated retrenchments are not merger specific. These amendments refer to Conditions 3.2 and 3.3 respectively of the conditions.
- [15] The Commission submitted that it had conducted a two month long investigation into this matter. It had engaged extensively with the merging parties and met with its largest customer to confirm their views on the commodity sector and whether they were indeed suspending operations at some of their mines which were identified. From these discussions as well as strategic documents reviewed, the Commission had satisfied itself that Atlantis was in dire financial circumstances. On this basis the Commission submitted that it would not oppose the relocation of the plant to outside South Africa or the relocation of the Brakpan operations to Krugersdorp. It was in favour of deleting condition 3.2. The Commission further confirmed that it had satisfied itself that the anticipated retrenchments were not merger specific but were due to operational reasons. At first the Commission

required an amendment to condition 3.3 to the effect that retrenchments ought to be capped at 13. However after engagement with the Applicants and members of the Tribunal the Commission accepted that given its own view that the retrenchments fall in line with voluntary retrenchment and/or voluntary separation there was no need to amend condition 3.3.

Order

[16] In light of the above the Tribunal ordered that condition 3.2 of the merger conditions be deleted.

[17] The conditions to the merger between Zimco Metals (Pty) Ltd and Atlantis (Pty) Ltd in case number 2014Jul0338 are amended as reflected in Annexure A hereto.

11 February 2016

DATE

Ms Yasmin Carrim

Mr Imraan Valodia and Ms Andiswa Ndoni concurring

Tribunal Researcher: Karissa Moothoo Padayachie

For the merging parties: Ahmore Burger-Smidt and Graeme Wickins from Werksmans Attorneys

For the Commission: Thandile Charlie and Nelly Sakata

ANNEXURE A

Zimco Metals (Pty) Ltd

And

Atlantis Metals (Pty) Ltd

Case number: 2014Jul0338

CONDITIONS

1. Definitions and Interpretations

The following expressions shall bear the meaning as assigned below and cognate expressions bear corresponding meanings-

"Act"

- means the Competition Act 89 of 1998. as amended;

"Acquiring firm" means Zimco Metals (Pty) Ltd;

"Approval date" means the date referred to in the Merger Clearance Certificate (Form CC15);

"Commission" means the Competition Commission of South Africa;

"Conditions" means these conditions;

"Customer" means any person, business or entity located in the Republic of South Africa that purchase lead anode products from the merging parties from time to time.

"Control" has the meaning given in section 12(2) of the Act;

"Lead Anode" means a sheet of lead alloy measuring 6mm to 8mm in thickness and weighing approximately 100kgs {depending on the design of the anode}. with a copper bar (also known as a header bar) fixed to the top of the lead sheet;

"Merger" means the acquisition of control over Atlantis Metals (Pty) Ltd by Zimco Metals (Pty) Ltd;

"Merger Implementation Date" means the date, occurring after the Approval date, on which the merger is implemented by the merging parties;

"Merging parties" means Zimco Metals (Pty) Ltd and Atlantis Metals (Pty) Ltd;

"Target firm" means Atlantis Metals (Pty) Ltd;

"Tribunal" means the Competition Tribunal of South Africa.

2. Recordal

2.1. On 2 July 2014, the merging parties applied to the Commission for approval of this merger transaction.

2.2. The implementation of the merger will result in Zimco acquiring the business and assets of Atlantis, and the property on which the

anode operations of Atlantis are conducted from the Thuthuka Group as a going concern. Zimco will therefore have sole control over Atlantis as a going concern. The transaction constitutes an intermediate merger as defined in Section 11(5)(b) of the Act in that the turnover and/or asset value of the merging parties are between the lower and higher thresholds as required under section 11 (1)(a) of the Act.

2.3. The Commission assessed this transaction and identified separate markets for the production and supply of first fill anodes (New Lead Anodes) and the market for the production and supply of recycled anodes (Remakes). The Commission found that Remakes are cheaper because it excludes certain new raw materials (lead). The Commission found that the activities of the merging parties overlap in the market for the provision of lead anodes in South Africa, and that there are high barriers to entry into this market. The Commission also found that the merging parties are the only two producers of lead anodes in South Africa, and that post-merger, the merging parties will not only have 100% of the market for the production and supply of New Lead

Anodes, but also 100% of the market for the production and supply of Remakes, and that there are no imports into South Africa. From the above assessment, the Commission found that this merger transaction would result in the removal of an effective competitor. Thus, the proposed transaction is likely to substantially prevent or lessen competition in South Africa.

2.4. The Commission further found, as an outcome of its investigation that the business of Atlantis is experiencing financial

difficulties and the assets are likely to be liquidated. Accordingly, the proposed transaction is a measure adopted by the Business Rescue Practitioner ("BRP") in an attempt to salvage the business from liquidation.

2.5. Notwithstanding the financial position of Atlantis, the Commission is, nevertheless, concerned that a monopoly would be created post-merger which was likely to unilaterally increase prices to the detriment of the South Africa customers. In addition, given

that the merging parties are net-exporters of lead anodes, they may supply fewer products to the South African customers. The Commission

also considered the impact of this transaction

on employment.

2.6. Given the possible impact of the transaction on the supply to South African customers of lead anode products and on employment, as well as Atlantis' financial position, the Commission considered the imposition of the following conditions to address the concerns. The merging parties have agreed to the following Conditions. This is also in order to address any possible concerns of the Commission. The Conditions will ensure that the merging parties continue to supply South African customers with lead anode products, and will not increase prices unilaterally. The Conditions will also ensure that there are no retrenchments post-merger as specifies in paragraph 3.3.1 below.

3. Conditions to the approval of the merger

3.1. Supply to customers

3.1.1. From the Approval date and as long as Zimco has control over Atlantis, the merging parties agree to continue to supply lead anode products to customers in accordance with contractual terms acceptable to both parties.

3.1.2. For the duration of the Conditions, the merging parties undertake not to refuse to supply customers or to limit supply to customers where it is economically feasible to do so.

3.1.3. The obligation above may be suspended for the period during which an event or events occur that are beyond the control of the merging parties, and such events have the effect of delaying performance of the parties' contractual obligations. Such events may include, without limitation, fire, flood, explosion, breakdown of equipment, epidemic, riot, civil commotion, any strike, lockout or other industrial action, war, terrorist activities, any prohibition by any governments or any other event having such effect.

3.2. Relocation of the Atlantis plant

(This condition was deleted on 20 January 2016 in Tribunal case number AME1600ct15).

3.3. Employment

3.3.1. For a period of two (2) years commencing on the Approval date, Zimco undertakes that no employees of Atlantis will be retrenched by the merging parties in South Africa as a result of the merger.

3.3.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements and (ii) voluntary early retirement offers by Atlantis.

4. General

The merging parties may at any time, on good cause shown, including changes in economic conditions, approach the Tribunal for the conditions to be lifted, revised or amended.

5. Monitoring of compliance with the Conditions

5.1. . The merging parties must notify the Commission of the Merger Implementation Date within ten (10) calendar days of implementation of the merger by way of a sworn affidavit by a senior official duly authorised by the merging parties.

5.2. The merging parties must, within two (2) weeks of the Approval date and by way of written notice, inform all existing customers of

Zimco and Atlantis of these Conditions. In addition, the merging parties must, within one (1) calendar month of the Approval date,

provide to the Commission a sworn affidavit by a senior official duly authorised by the merging parties attesting to the notification

together with copies of the said notice to customers.

5.3. In the event that the Commission receives any complaint in relation to non-compliance with these Conditions. or otherwise determines that there has been an apparent breach by the merging parties of these Conditions, the breach will be dealt with in terms of Rule 39 of the Competition Commission Rules.

5.4. All correspondence in relation to these Conditions should be forwarded to mergerconditions@compcom.co.za.

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