



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM169Nov16

In the matter between:

KGALAGADI ALLOYS (PTY) LTD

Acquiring Firm

And

KALAGADI MANGANESE (PTY) LTD

Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: AW Wessels (Tribunal Member)
Heard on	: 15 December 2016
Date of last submission	: 12 January 2017
Order Issued on	: 17 January 2017
Reasons Issued on	: 08 February 2017

Reasons for Decision

Approval

- [1] On 17 January 2017, the Competition Tribunal ("Tribunal") approved the transaction involving Kgalagadi Alloys (Pty) Ltd ("KA") and Kalagadi Manganese (Pty) Ltd ("KM").
- [2] The matter was heard on 15 December 2016, at which time the Tribunal stood the matter down so that the merging parties and the Commission could make

further representations and after considering such representations, the Tribunal issued its order on 17 January 2017.

- [3] The reasons for the approval follow.

Parties to the proposed transaction

Primary Acquiring Firm

- [4] The primary acquiring firm is KA, a firm wholly owned and controlled by an individual, Mrs Daphney Nkosi ("Mrs Nkosi"). KA does not control any firm. It is a shell company and is not active in any market.
- [5] Mrs Nkosi also controls Kalahari Resources (Pty) Ltd ("KR"). KR is an investment holding company with a 40% shareholding in the primary target firm as its only interest.

Primary Target Firm

- [6] The primary target firm is KM, a firm incorporated in accordance with the laws of the Republic of South Africa. KM's largest shareholders are KR (40%) and ArcelorMittal S.A. ("AMSA") (50%).¹
- [7] KM owns new order mining rights covering an area of approximately 6 300 hectares in the Kalahari Basin. The area is believed to hold some 960 million tons of manganese ore. KM is currently constructing an integrated commercial mining operation, encompassing a mine² and ore processing operation with future plans to develop a smelter.
- [8] We note that although KM is not yet in production, there are two offtake agreements in place for a large percentage of the manganese ore product which will be produced in the future. ArcelorMittal Sourcing SCA ("AM Sourcing") holds certain offtake rights. This right to the offtake will also be sold as part of the proposed transaction such that AM Sourcing will cede and assign

¹ The remaining 10% is held by Industrial Development Corporation South Africa Limited.

² The KM mine is not yet in production.

all of its rights to the primary acquiring firm. Traxys Africa (Pty) Ltd³ is also entitled to a certain offtake in terms of its offtake agreement with KM.

Proposed transaction and rationale

- [9] The proposed transaction involves the acquisition by KA of AMSA's 50% share in and claims against KM. Post transaction Mrs Nkosi effectively will, through her subsidiary companies, exercise sole control over KM.
- [10] In terms of rationale, the acquiring firm submitted that the proposed transaction will *inter alia* allow Mrs Nkosi to ultimately deliver the Kalagadi manganese project through its commissioning phase and into production.
- [11] The sellers identified the Kalagadi manganese project as suitable for divestment.

Impact on competition

- [12] The Competition Commission ("Commission") identified a product overlap between the activities of the merging parties insofar as Mrs Nkosi in effect is increasing her shareholding in KM from 40% to 90%. The Commission however found that there is no change in the structure of any market and no accretion in market shares in any market as a result of the proposed transaction. Accordingly the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.
- [13] At the merger hearing the Tribunal questioned the merging parties regarding what appear to be minimum sales prices provided for in the transaction agreements. These minimum prices relate to products (to be) produced and sold by the primary target firm, including manganese ore, manganese sinter or any other relevant mineral product as defined in the transaction agreements.

³ A third party future customer of the target firm.

- [14] The Tribunal questioned the merging parties regarding this pricing provision in the transaction agreements and requested both the merging parties and the Commission to make written representations on this.
- [15] The merging parties submitted that minimum sales prices had been included to ensure that the calculations of revenue and profitability of KM are based on an agreed pricing mechanism, which indirectly acts as an incentive to KA to ensure that KM does not place its product at lower prices than prevailing market prices.⁴ They furthermore stated that this pricing mechanism provides a transparent mechanism for both parties to calculate the deferred consideration payable by KA to ArcelorMittal.⁵
- [16] The Commission submitted that in its view the minimum pricing condition included in clause 5.4 of the *Term Sheet Agreement* is unlikely to result in post-merger anti-competitive behavior since the calculation methodology is clear, transparent and based on international benchmarks and it furthermore is reasonable since it protects both parties to the proposed transaction.⁶
- [17] We however take no view as to whether or not the minimum pricing condition contained in the transaction agreements may be anti-competitive in terms of the Competition Act, 89 of 1998. We approve the proposed transaction unconditionally on the basis that it does not alter the structure of the market(s) in which the merging parties are/will be active.

Public interest

- [18] The merging parties confirmed that the proposed transaction will have no negative effects on employment and particularly that no retrenchments or job losses will occur as a consequence of the proposed transaction.⁷
- [19] No other public interest concerns arise from the proposed transaction.

⁴ Letter from the merging parties in response to the Tribunal's request, page 4.

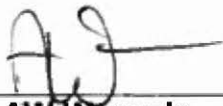
⁵ Letter from the merging parties in response to the Tribunal's request, page 1.

⁶ Letter from the Commission dated 12 January 2017, page 5.

⁷ Merger Record, pages 9, 47, 52 and 53.

Conclusion

[20] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition no public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.



Mr. AW Wessels

08 February 2017
Date

Mr. Norman Manoim and Ms Yasmin Carrim

Tribunal Researcher: Alistair Dey-Van Heerden

For the Merging Parties: Natalie von Ey of Cliffe Dekker Hofmeyr

For the Commission: Xolela Nokele