

NON-CONFIDENTIAL VERSION



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM123Oct16

In the matter between:

**Richards Bay Alloys (Pty) Ltd**

Primary Acquiring Firm

and

**Tata Steel KwaZulu-Natal (Pty) Ltd**

Primary Target Firm

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Panel : AW Wessels (Presiding Member)  
: Mondo Mazwai (Tribunal Member)  
: Andiswa Ndoni (Tribunal Member)  
Heard on : 09 November 2016  
Order Issued on : 09 November 2016  
Reasons Issued on : 08 December 2016

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**Reasons for Decision**

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**Approval**

[1] On 09 November 2016, the Competition Tribunal ("Tribunal") approved the transaction involving Richards Bay Alloys (Pty) Ltd ("RBA") and the business of Tata Steel KwaZulu-Natal (Pty) Ltd.

[2] The reasons for approving the proposed transaction follow.

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### Parties to the transaction

#### *Primary acquiring firm(s)*

[3] The primary acquiring firm is RBA. RBA does not directly or indirectly control any firm.

[4] RBA is controlled by [.....].<sup>1</sup>

[5] The Acquiring Group is a global asset manager providing financial solutions for the ferroalloy, metal mineral, mining and energy industries. Of relevance to the competition assessment of the current transaction are the activities of the Acquiring Group in the marketing and trading of commodities including ferrochrome.

#### *Primary target firm*

[6] The primary target firm is the business of Tata Steel KwaZulu-Natal (Pty) Ltd ("the Target Firm"). Tata Steel KwaZulu-Natal (Pty) Ltd ("Tata Steel KZN") is duly incorporated in accordance with the company laws of the Republic of South Africa. Tata Steel KZN does not control any firm.

[7] Tata Steel KZN was placed under business rescue on 08 July 2015. However, the Business Rescue Practitioner was unable to secure post commencement funding and there were no potential buyers for Tata Steel KZN after having followed a sale process. As a result, Tata Steel KZN has not been operational since June 2015 and is currently under final liquidation.

[8] Prior to being placed into liquidation, Tata Steel KZN was controlled by Tata Steel Limited, a public company listed on the Bombay Stock Exchange and the National Stock Exchange of India.

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<sup>1</sup> Certain information has been claimed as confidential by the merging parties and has been removed from the public version of our Reason for Decision.

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[9] When it was still in operation Tata Steel KZN produced ferrochrome. It is located in Richards Bay on the KwaZulu-Natal coast.

### **Proposed transaction and rationale**

[10] In terms of the proposed transaction RBA wishes to acquire the business of Tata Steel KZN as going concern. Post-merger the Target Firm will be wholly-owned by RBA.

[11] RBA submitted that the proposed transaction will *inter alia* ensure the revival of the facility so that it can be fully utilised in the beneficiation of chrome ore in South Africa's Richards Bay Industrial Development Zone.

[12] The liquidators of Tata Steel KZN submitted that the proposed transaction will provide an opportunity to realise some value and save jobs.

### **Impact on competition**

[13] The Competition Commission ("Commission") found that the merging parties' activities give rise to a vertical overlap since Tata Steel KZN produced and supplied ferrochrome and the Acquiring Group trades and markets commodities including ferrochrome.

[14] Furthermore, the Acquiring Group produces chrome ore, which is an important raw material in the production of ferrochrome.

[15] Given the above, the Commission identified two relevant markets, namely (i) the upstream global market for the production and supply of ferrochrome; and (ii) the downstream global market for the marketing and trading of ferrochrome.

[16] The Commission found that Tata Steel KZN's past production accounts for approximately 1% of the global production and supply of ferrochrome. The Commission further found that Glencore and Samancor are the largest producers and suppliers of ferrochrome globally, followed by Herculit

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Ferrochrome. The Commission also found that the Acquiring Group accounts for less than 1% of the global marketing and trading of ferrochrome. Furthermore, Tata Steel KZN has not been operational for more than a year. The Commission therefore concluded that the merged entity will not have the ability to successfully apply a strategy of either input or customer foreclosure post-merger.

[17] In relation to the production of chrome ore the Commission found that the Acquiring Group is a small player in this product market even when production only in South Africa is considered.

[18] Given the above, the Commission concluded that the proposed transaction is unlikely to substantially lessen or prevent competition in any relevant market. We concur with the Commission's conclusion.

### **Public interest**

[19] We next discuss the effects of the proposed transaction on employment. The proposed transaction raises no other public interest concerns.

### *Effect on employment*

[20] The merging parties submitted that the Acquiring Group will acquire the Target Firm out of liquidation as a going concern and that the employees of the Target Firm will transfer across with the business in terms of section 197(A) of the Labour Relations Act 66 of 1995.

[21] As stated above, Tata Steel KZN has not been operational since June 2015. The employment contracts of the employees have been suspended until such time as Tata Steel KZN is either brought out of liquidation or permanently terminated. As the employment contracts of the employees have been suspended, they have not been receiving any remuneration and they are currently uncertain whether their contracts will be revived. Upon the

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implementation of the proposed transaction, these employees will become employed by RBA and will be in a position to resume work and start receiving remuneration.

[22] The merging parties submitted that absent the proposed transaction all 157 employees of the Target Firm will lose their jobs. They further submitted that the merged entity may post-merger consider a restructuring that may result in the retrenchment of a maximum of 55 employees - on a worst-case scenario, subject to consultation with the trade unions and the affected employees in terms of the applicable labour legislation. The level of skill of the employees that may be retrenched ranges from unskilled to skilled.

[23] Given the anticipated job losses, the merging parties gave the following employment-related undertakings to mitigate the employment effects:

[23.1] Should any employees be retrenched, the merged entity undertakes, for a period of 12 months pursuant to the implementation of the proposed transaction, to consider any of the retrenched employees for positions should vacancies arise, depending on whether the employee meet the relevant criteria, job specifications, qualifications, skills and experience required.

[23.2] In addition, the Acquiring Group will distribute the CV's of any affected employees to potential contractors who will be requested to preferentially consider suitably qualified individuals from this group when making appointments should vacancies arise, as a result of being awarded the contract.

[24] The employees of the Target Firm are represented by the National Union of Metal Workers of South Africa ("NUMSA"). The Commission contacted NUMSA and it confirmed that it is aware of the restructuring and the possible retrenchments associated with that.

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- [25] The Commission noted that the proposed transaction may lead to the retrenchment of a maximum of 55 employees out of a total workforce of 157 employees of the Target Firm. Further, the Commission noted that the Target Firm is currently not operational and that all of its employees are currently not earning an income. In the Commission's view the counterfactual is that no jobs would be saved absent the proposed transaction and therefore the abovementioned potential retrenchments are justifiable in the circumstances.
- [26] The Tribunal informed NUMSA of the hearing and invited it to make either written or oral submissions, if desired. NUMSA indicated that it had no further submissions other than those already made to the Commission.
- [27] The Tribunal also questioned the merging parties regarding the potential number of retrenchments and when operations at the Target Firm are likely to resume. Mr David Ellwood on behalf of the Acquiring Group spoke to the urgency of the matter and the intention to immediately, following approval of the proposed transaction by the Tribunal, call back the first employees for work and to ultimately save as many jobs as possible and uplift the Richards Bay area.<sup>2</sup>
- [28] The Tribunal furthermore requested an undertaking from the merging parties to provide feedback to the Commission regarding their undertakings (see paragraph 23 above) including the ultimate number of jobs saved and number of retrenchments as a result of the post-merger restructuring.
- [29] The merging parties gave the following reporting commitments in relation to their undertakings:
- [29.1] RBA shall inform the Commission of its efforts made and the results thereof within three months after the expiry of a period of 12 calendar months of the Effective Date, as defined in the *Sale of Business*

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<sup>2</sup> See Transcript pages 5 to 10.

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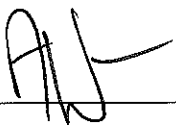
*Agreement* dated 27 October 2016. More particularly, the information provided to the Commission will include:

- (i) the name and number of employees that resumed employment as at the Effective Date;
- (ii) the name and number of employees retrenched<sup>3</sup> as a result of the acquisition by RBA of the Target Firm (the "Affected Employees"), which should be limited to a maximum of 55 employees;
- (iii) the name and number of Affected Employees considered for vacancies by RBA and the outcome thereof; and
- (iv) the name and number of Affected Employees who were offered and secured positions from third party contractors of RBA.

[30] Given that a large number of jobs will be saved as a result of the proposed transaction and the employment-related undertakings provided by the merging parties (as discussed above), we have approved the proposed transaction unconditionally.

**Conclusion**

[31] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Given the number of jobs saved as a result of the proposed transaction and the employment-related undertakings provided by the merging parties, we have approved the proposed transaction unconditionally.

  
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**Mr AW Wessels**

08 December 2016

DATE

**Ms Mondo Mazwai and Ms Andiswa Ndoni concurring**

<sup>3</sup> For the sake of clarity, retrenchments do not include (i) voluntary retrenchment or mutual separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act 66 of 1995, as amended; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the merger contemplated herein; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a fixed term contract worker.

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Tribunal Case Manager: Caroline Sserufusa

For the merging parties: Wade Graaff of Edward Nathan Sonnenbergs Inc

For the Commission: Rakgole Mokolo