



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM124Aug17

In the matter between

Barnes Southern Palace Holdings (Pty) Ltd

Primary Acquiring Firm

And

Scaw South Africa (Pty) Ltd

Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Enver Daniels (Tribunal Member)
Heard on	: 16 February 2018
Order Issued on	: 19 February 2018
Reasons Issued on	: 13 March 2018

Reasons for Decision (Public)

Approval

- [1] On 19 February 2018, the Competition Tribunal (“the Tribunal”) conditionally approved the proposed transaction between Barnes Southern Palace (Pty) Ltd (“**Barnes Southern Palace**”) and Scaw South Africa (Pty) Ltd (“**Scaw**”).
- [2] The reasons for the approval follow.

Parties to the transaction and their activities

Primary acquiring firm

- [3] The primary acquiring firm is Barnes Southern Palace, a consortium between Barnes Group Holdings (Pty) Ltd ("**Barnes**") with [REDACTED] shareholding and Southern Palace Group of Companies (Pty) Ltd ("**Southern Palace**") holding the remaining [REDACTED]. Barnes is a holding company for a number of entities involved in the manufacture of wire, fencing, tubing and various other steel based products ("**the Barnes Group**"). Southern Palace is a wholly owned black investment holding company with diverse interests in real estate, industrial companies, information technology, mining and construction.

Primary target firm

- [4] The primary target firm is Scaw, a South African based steel producer controlled by the IDC. Scaw beneficiates iron ore and scrap to produce a wide range of steel products to be used as inputs in the manufacturing industry downstream. Pre-merger, Scaw consisted of four divisions: the cast products, grinding media, wire rod and rolled products divisions. Only the wire rod and rolled products divisions formed part of the transaction.

Proposed transaction and rationale

- [5] In terms of the proposed transaction, Barnes Southern Palace will acquire [REDACTED] of the ordinary shareholding in Scaw, as well as its immovable property and an interest in a loan owed to the IDC by Scaw. Subsequent to this, Scaw will be jointly controlled by Barnes Southern Palace and the IDC which will retain a [REDACTED] interest.

- [6] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The IDC wishes to dispose of its shareholding in Scaw to a Strategic Equity Partner ("SEP") capable of enhancing its technical and financial

strengths. [REDACTED]
[REDACTED]

Relevant market and impact on competition

- [7] The relevant markets are the upstream national market for the manufacture of long steel products and the downstream national market for wire and wire products. The proposed transaction is a vertical merger with Scaw operating in the upstream market supplying to Barnes in the downstream market.

Foreclosure Concerns

- [8] A number of downstream competitors of Barnes raised issues of potential foreclosure post-merger, including Wire Supplies and Manufacturing (Pty) Ltd ("Wire Supplies"). In the Commission's report, it was satisfied that the merged entity was unlikely to have the ability to foreclose downstream players from essential long steel inputs. This is because other upstream firms have sufficient capacity to absorb excess demand should Scaw cease to supply to Barnes' rivals. Additionally, despite relatively high barriers, there have been a number of recent entrants into the upstream market.
- [9] However, at the hearing, Wire Supplies made submissions that within a narrower upstream market for medium to high grade carbon steel, Scaw was one of only two upstream players with potential production capabilities. Wire Supplies was concerned that if Scaw's production of these medium to high grade products recommenced, they would only supply to Barnes and thus the competitive benefits of a potential duopoly would be lost as a result of the merger. In such a case, Arcelor Mittal South Africa (Pty) Ltd ("AMSA") would remain the monopoly supplier. To address this, the merging parties agreed to a supply condition in terms of which the post-merger entity is obliged to supply low, medium or high grade carbon wire rod products to any competitors of Barnes on commercially reasonable and practical terms. For low grade carbon steel products, this condition applies for a period of 3 years after the date of approval. For medium and high grade carbon steel the condition applies for 3 years after the merged entity commences production.

- [10] There are no customer foreclosure concerns post-merger as Barnes is not a significant player in the downstream market, and many other independent purchasers are available to upstream suppliers.

Co-ordination Assessment

- [11] Due to past cartel behaviour in both the relevant markets, the Commission investigated whether the merger led to enhanced conditions for coordination. The transaction creates greater symmetry between the post-merger entity and other vertically integrated competitors like Cape Gate and AMSA. This symmetry increases the ability of firms to coordinate strategies. Further, through backwards integration, Barnes will gain access to sensitive information, greater ease of communication and inherit years of customer-supplier relationships with its competitors.
- [12] Despite the increased co-ordination concerns arising from the merger, the Commission was satisfied that these issues do not justify prohibition of the merger given the relevant counterfactual [REDACTED].

Cross-shareholding concerns

- [13] The merger creates further links between Barnes and a direct competitor, Consolidated Wire Industries (Pty) Ltd ("CWI"). The IDC, which holds shares in CWI, will retain shares in Scaw post-merger and will have the right to appoint directors to both entities' boards. The IDC as a mutual shareholder represents a potential platform for sharing of sensitive information and a mechanism to facilitate collusion between CWI and the post-merger entity. To address these concerns, the parties have agreed that the IDC may not appoint any person onto the Scaw board who is, or has been in the year prior, a member of the board of CWI. Further, to prevent the exchange of sensitive information, any representative from the IDC that sits on the Scaw board may not receive any documents containing confidential business information of CWI and will be required to sign confidentiality undertakings to ensure compliance with such.

[14]

[REDACTED]

[15]

[REDACTED]

Public interest

Effect on Employment

- [16] The merging parties submitted that the proposed transaction will not result in any retrenchments. On the contrary, the change in management, along with [REDACTED] [REDACTED] will create meaningful incremental benefits to employment opportunities [REDACTED].
- [17] The Commission noted that Scaw had executed a number of retrenchments prior to the notification of this transaction. Ultimately, the Commission was satisfied that these retrenchments were not precursory to the proposed transaction, [REDACTED] [REDACTED].
- [18] The National Union of Metal Workers of South Africa (“NUMSA”), as the representative of Scaw employees, was of the view that the unbundling and subsequent restructure of Scaw represented a distinct threat to its members. NUMSA was concerned that Scaw may transfer any unwanted or

underperforming employees to the divisions that do not form part of the transaction [REDACTED]. At the hearing, the merging parties explained that the employees reallocated to the cast products and grinding media divisions were 'centralised' staff, not previously embedded to any specific division. From their investigation into the process, the Commission was satisfied that the reallocating was done rationally, according to objective criteria and not to circumvent any public interest issues. After further discussions with the Commission, NUMSA notified the Tribunal that they were satisfied with the process followed and conditions imposed to protect employment as discussed below.

- [19] Despite the Commission's finding that the proposed transaction will not adversely impact employment, the merging parties made a number of undertakings to the Minister of the Economic Development – upon which this approval is now conditional. The merging parties agree that there will be no retrenchments as a result of the merger and that should any additional jobs be created [REDACTED], preference will be given to the employees retrenched from CastCo. CastCo is a new entity created for the purpose of running the cast products division separate from Scaw post-merger

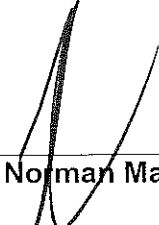
Effect on Small Business

- [20] In negotiations with the EDD, Barnes Southern Palace also committed to make available proportions of its Direct Reduced Iron to mini steel mills in order to promote competitiveness of small businesses.
- [21] The proposed transaction further raises no other public interest concerns.

Conclusion

- [22] In light of the above, we conclude that the proposed transaction subject to the supply condition is unlikely to substantially prevent or lessen competition through input or customer foreclosure in any relevant market. Further, any coordination concerns that may arise from the merger do not justify prohibition given the relevant counterfactual and the conditions in place to address them. In relation to public interest, issues that were raised, were adequately

addressed by the conditions arising out of the EDD agreement. Accordingly we approve the proposed transaction subject to the conditions annexed hereto.



Mr Norman Manoim

13 March 2018

Date

Mrs Medi Mokuena and Mr Enver Daniels

Case Manager: Jonathan Thomson

For Barnes: Derek Lotter of Bowmans

For the IDC/Scaw: Hamilton Maenetje SC, instructed by ENS.

For Wire Supplies: Greta Engelbrecht, instructed by Falcon and Hume Inc.

For the Commission: Beverly Chomela

ANNEXURE A

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC CASE NUMBER: 2017Ju0043

CONDITIONS TO THE MERGER

1. INTRODUCTION

- 1.1. The Merging Parties and the Commission have agreed to the Conditions set out below.
- 1.2. For the avoidance of doubt, these Conditions stand independent from and do not in any way amend or nullify the conditions imposed by the Competition Tribunal in the merger between IDC and Scaw and CWI, under case number 60/LM/Jun12, on 9 October 2012.

2. DEFINITIONS

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

- 2.1. **"Acquiring Firm"** or **"Barnes Southern Palace"** means Barnes Southern Palace Holdings Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa;
- 2.2. **"Approval Date"** means the date referred to in the Tribunal's merger clearance certificate (Form CT10);
- 2.3. **"Barnes"** means Barnes Group Holdings Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa;
- 2.4. **"Barnes Group"** means Barnes and all entities directly or indirectly controlled by Barnes and

all companies owned by the two individuals, Doron Barnes and Rachamim Barnes;

- 2.5. **“CastCo”** means a new company, Cast Products South Africa Proprietary Limited, incorporated by the IDC and that will hold the cast products division of Scaw. The cast products division of Scaw will no longer fall under Scaw prior to the Implementation Date;
- 2.6. **“CastCo Affected Employees”** means those employees of CastCo who may be retrenched
[REDACTED]
- 2.7. **“Commercially Reasonable and Practical Terms”** means terms that provide for the reasonable availability of goods and reasonably competitive commercial terms;
- 2.8. **“Commission”** means the Competition Commission of South Africa;
- 2.9. **“Competition Act”** means the Competition Act No. 89 of 1998, as amended;
- 2.10. **“Competitively Sensitive Information”** includes, but is not limited to, any and all such information relating to:
- 2.10.1. pricing – including but not limited to pricing of specific products, prices/discounts offered to specific clients and planned price reductions or increases;
 - 2.10.2. margin information by product or client;
 - 2.10.3. cost information for particular products;
 - 2.10.4. information on specific clients and client strategy, including information with respect to the sales volumes of clients; and
 - 2.10.5. detailed business plans and marketing strategies containing the information in paragraphs 2.10.1 to 2.10.4 above and any other information;
- 2.11. **“Competition Tribunal”** the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act;
- 2.12. **“Conditions”** means these conditions contained in this annexure A;
- 2.13. **“CWI”** means Consolidated Wire Industries Proprietary Limited, which is jointly controlled by the IDC and ArcelorMittal South Africa Limited;

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- 2.14. **“Days”** means business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 2.15. **“DRI”** means Direct Reduction Iron;
- 2.16. **“EDD”** means the Economic Development Department of South Africa;
- 2.17. **“Employees”** means any permanent employee of Merged Entity, as contemplated under the Labour Relations Act;
- 2.18. **“IDC”** or **“Seller”** means the Industrial Development Corporation of South Africa Limited, established in terms of the Industrial Development Corporation Act No. 22 of 1940;
- 2.19. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Proposed Transaction is implemented by the Merging Parties;
- 2.20. **“Labour Relations Act”** means the Labour Relations Act, No. 66 of 1995 (as amended);
- 2.21. **“Merger”** means the acquisition by Barnes Southern Palace of a controlling stake in Scaw as notified under case number 2017JUL0043;
- 2.22. **“Merged Entity”** means the Acquiring Firm and the Target Business following the Merger;
- 2.23. **“Merging Parties”** means the Acquiring Firm and Target Businesses;
- 2.24. **“Mini Steel Mill”** means any steel mill that produces less than 200 000 tons per year;
- 2.25. **“Minister”** means The Honourable Mr Ebrahim Patel, in his capacity as Minister of Economic Development;
- 2.26. **“The Target Business”** or **“Scaw”** means Scaw South Africa Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, comprising of the rolled products and wire rod products divisions as at the Implementation Date that are the subject of the Merger; and
- 2.27. **“Southern Palace”** means Southern Palace Group of Companies Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa.

3. CONDITIONS TO THE MERGER

3.1. Cross directorships

3.1.1. For as long as the IDC is able to appoint directors to the respective boards of CWI and Scaw, the IDC shall ensure that its representatives on the board of Scaw are not the same persons serving, nominated and/or appointed on any board or management committees or sub-committees of CWI.

3.1.2. The nominee appointed by the IDC to the board of Scaw shall not have served on the board of directors and/or management committees or sub-committees of CWI, for a period of one (1) year prior to being nominated to the board of Scaw.

3.2. Confidentiality of information

3.2.1. The representatives of the IDC on the board of Scaw shall not receive any board documents pertaining to the business of CWI, to the extent that they contain Competitively Sensitive Information.

3.2.2. Any IDC representative that sits on the Scaw board of directors shall be required to sign a Confidentiality Undertaking giving effect to paragraph 3.2 of these Conditions.

3.3. Direct Reduction Iron

3.3.1. The Merged Entity shall make available [REDACTED] of DRI it shall produce to Mini-Steel Mills [REDACTED].

3.4. Employment Conditions

3.4.1. There will be no retrenchments of any Employees of the Merged Entity as a result of the Merger.

3.4.2. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (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 fixed term contracts of employment.

3.4.3. For a period of 24 months following the Implementation Date, the Merged Entity shall give preference to the CastCo Affected Employees for new employment should positions become available provided that the CastCo Affected Employees (in the sole discretion of the Merged Firm) possess the necessary job specific skills, qualifications and are available to take up employment. The Merged Entity will not look outside of the CastCo Affected Employees unless it is reasonably unable to identify suitably qualified CastCo Affected Employees.

3.5. Wire Rod

3.5.1. On the written request by any customer for the supply of low, medium or high carbon wire rod being produced by the Merged Entity for manufacturing of wire and wire products, the Merged Entity shall, subject to:

3.5.1.1. demand for wire rod;

3.5.1.2. Commercially Reasonable and Practical Terms prevailing at the time and compliance by the customer with their contractual and commercial obligations to Scaw;

3.5.1.3. the availability of sufficient production capacity to meet the demand of its existing customers as at the date of such request;

3.5.1.4. the availability of suitable raw materials subject to Commercially Reasonable and Practical Terms prevailing at the time, product specification and the credit profile of the customer;

enter into an agreement for the supply of wire rod for the manufacturing of wire and wire products on terms that are non-discriminatory as regards price, volume and quality when compared with the terms and conditions applicable to supplies to the Merged Entity.

3.5.2. The Merged Entity's supply obligation in terms of the above conditions will be waived if any delay in performing, or failure to perform, any of its obligations under these conditions was beyond the Merged Entity's control or which Merged Entity could not have avoided or overcome. In such an event, the Merged Entity shall pro-rate any supplies of wire rod which are or become available, between itself and external customers, consistent with off-take in the 3 months preceding the event.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1. Within 30 Days of the Implementation Date, the IDC shall submit an affidavit listing the names of the persons nominated and/or appointed by the IDC to the board of directors of Scaw, their tenure and the nature of their directorships. This affidavit shall also confirm that the nominees to the Scaw board meet the requirements set out in clause 3.2. Such affidavit must be deposited to by a representative of the IDC.

4.2. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.

4.3. Within 30 Days of the Implementation Date, the IDC shall provide the Commission with a copy of the Confidentiality Undertaking referred to in clause 3.2.2 signed by each IDC appointed board member of Scaw.

4.4. The Merged Entity shall provide the Commission with a written compliance report, detailing the extent of its compliance with clause 5 of the Conditions on each anniversary of the Implementation Date for a period of 24 months. This report shall be accompanied by the following:

4.4.1. written and documentary proof of no retrenchments as a result of the Merger;

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- 4.4.2. written and documentary proof of the number of jobs created at the Merged Entity and the number of CastCo Affected Employees who have been employed; and
- 4.4.3. proof in the form of an affidavit, duly deposed of by the CEO of the Merged Entity, attesting to the truthfulness of the contents of the report.
- 4.5. Within 30 days of the Approval Date, the Merged Entity shall inform in writing all of its existing customers of wire rod of the Condition referred to in paragraph 3.5.
- 4.6. Within 30 days of the commencement of production of medium and high carbon wire rod products as contemplated in paragraph 3.5 above, the Merged Entity shall inform the Commission of such commencement.
- 4.7. On each anniversary of the Approval Date for the duration of the Condition in paragraph 3.5, the Merged Entity shall submit an affidavit deposed to by the CEO of the Merged Entity attesting that the Merged Entity has fulfilled its obligations in terms of this Condition.
- 4.8. An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.
- 4.9. The affidavits/reports and or documents referred to in the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.
- 4.10. The Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

5. DURATION

- 5.1. These Conditions in paragraph 3.1 and 3.2 above relating to the IDC shall apply for as long as the IDC has control of CWI and Scaw and is entitled to appoint individuals to boards of directors of CWI and Scaw. Should the IDC not have the right to appoint individuals to the boards of CWI and Scaw or dispose of its shareholding in CWI and/or Scaw, Scaw shall inform the Commission of this in writing and provide proof of either the inability to appoint directors or the sale of the shareholding.

- 5.2. The Conditions on Employment shall apply for a duration of 24 months from the Implementation Date.
- 5.3. In relation to paragraph 3.5, the Condition on low carbon wire rod shall apply for a duration of 3 years from the Approval Date. The Conditions on medium and high carbon wire rod shall apply for a period of 3 years from the date on which the Merged Entity commences production of these products.