COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 31/LM/May02

In the large merger between:

Crown Gold Recoveries (Pty) Ltd

and

Industrial Development Corporation of South Africa Limited

and

Khumo Bathong Holdings (Pty) Ltd

Reasons for Decision

Approval

On 29 May 2002, the Competition Tribunal approved:

(a) the transaction in terms of which the Industrial Development Corporation of South Africa Limited acquires control of Crown Gold Recoveries (Pty) Ltd; and subsequently

(b) the transaction in terms of which Khumo Bathong Holdings (Pty) Ltd acquires control of Crown Gold Recoveries (Pty) Ltd from the Industrial Development Corporation of South Africa Limited.

The reasons for the Competition Tribunal's decision follow.

The parties

The primary acquiring firm is Khumo Bathong Holdings (Pty) Ltd ("KBH"). KBH has the following interests in the mining industry: a 30% shareholding in East Rand Proprietary Gold Mines Limited (ERPM) and a 25% shareholding in Open Solutions (Pty) Ltd which has a 10% participation right in the Elandskraal mine of the Harmony Gold Mining Company Limited. KBH is controlled by two trusts, namely the Ncholo and Baird family trusts. Both trusts, we are advised, have historically disadvantaged persons as their beneficiaries.

The other acquiring firm is the Industrial Development Corporation of South Africa Limited (IDC), a self-financing state-owned development finance institution. The IDC provides finance to entrepreneurs in competitive industries through loans and other financial instruments including equity.

The primary target firm is Crown Gold Recoveries (Pty) Ltd ("CGR"), a wholly owned subsidiary of Crown Consolidated Gold Recoveries Limited ("CCGR"). CCGR in turn is a wholly owned subsidiary of Durban Roodepoort Deep Limited which controls a number of firms, mostly in the gold mining industry, both in South Africa and abroad.

CGR is a gold reclamation business which processes old dumps and slime dams to recover gold and silver.

The transaction

According to the parties, the transaction seeks to transfer control of CGR from a larger player in the market to a smaller empowerment firm thereby enabling the latter to have a meaningful stake in gold mining. In terms of the share purchase agreement, the IDC will purchase 57% of the issued share capital of, and take cession of 57% of the claims of CCGR against CGR; and KBH will purchase 3% of the issued share capital of, and take cession of 3% of the claims of CCGR against CGR. The transaction is funded by the IDC.

The IDC's will warehouse its acquired portion for sixty months during which time CGR will pay the IDC the outstanding claims it acquired from CCGR. Upon payment, the shares held by the IDC in CGR will be transferred to KBH. The IDC will therefore effectively hold shares in CGR as security for the repayment of the claims amount. The IDC's involvement in the transaction is in keeping with its mandate as a development finance institution. The IDC does not have any interests in the gold mining industry.

The transaction will eventually result in KBH acquiring 60% of the claims and issued share capital of CGR with the remaining 40% held by CCGR.

Evaluation of the merger

We agree with the Commission that the relevant market for this transaction is the international market for the production and supply of gold. Both the target firm, CGR, and the acquiring firm, KBH through its shareholding in ERPM and Open Solutions, operate in the gold mining industry.

The instant transaction involves two stages in which the IDC will first acquire a 57% control in CGR and subsequently, after a period of 60 months, KBH will assume a 60% controlling shareholding. Even though the Commission's recommendation to approve the transaction was based on a competition evaluation of both legs of the transaction, the

Commission argued that the merging parties were obliged, in terms of the Act, to notify the second leg of the transaction and that we should confine our approval to the first leg viz. the IDC leg. The Commission argued that an evaluation of the relevant market 60 months hence may result in different conclusions about the transaction if market conditions were to significantly change.

The parties' view was that, considering that the IDC's involvement in the transaction was purely financial and in the ordinary course of its business as a development finance institution, the transaction should be assessed in its entirety and that a second notification was not necessary. The parties also pointed out that the Competition Act does not specify a time lag between the notification of a merger and its implementation.

The Commission's observation that market conditions are not static and that a market may look very different between the date of the approval of a merger and its implementation is a truism. That however does not justify from a policy point of view utilising merger control in an unnecessary burdensome or bureaucratic fashion. On the facts of this case the second leg is the rationale for the merger and but for it the first leg would never take place. The first leg is merely to facilitate the possibility for the second to happen. Legally and factually the two legs constitute parts of a single transaction. As long as the Commission can evaluate both changes of control contemplated in this merger and come to a conclusion that neither gives rise to concern, which is precisely what they have done, there is no reason to require two separate notifications. Such an arrangement would unduly burden merging parties. Perhaps the group most affected by such an inflexible policy would be empowerment firms, since they often cannot finance a transaction from their own resources and may need to acquire control in stages,- these are precisely the kinds of firms the Act is intended to assist in becoming competitive.[1]

Furthemore, we are satisfied that, given the peculiar nature of the industry in which Khumo Bathong participates, it is highly improbable that market conditions will change to the extent that the second phase of transaction will impact negatively on competition. The Commission conceded this point at the hearing.

Gold is produced by a large number of producers around the world. All gold produced in South Africa is converted to bullion at the Rand Refinery in Germiston and sold on the international bullion market. Gold producers are "price-takers" with the price determined by reference to the London daily price fixings of the London Bullion Association. No single producer therefore has the ability to influence the gold price.

Both stages of this transaction will therefore not impact on the level of concentration in the relevant market and, given the peculiarities of the international gold market, the transaction viewed in its entirety is unlikely to substantially prevent or lessen competition in the relevant market.

[1] Section 12 A(3)(c).

Public interest issues

We agree with the Competition Commission that the transaction does not raise any public interest concerns. Indeed, the transaction will advance black economic empowerment as KBH is controlled by two family trusts, the Ncholo Trust (60%) and the Baird Trust (40%), whose beneficiaries are historically disadvantaged individuals.

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N. Manoim **Date: 4 June 2002**

Concurring: D.H.Lewis, P. Maponya