COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 56/LM/Aug09

In the matter between:

International Mineral Resources BV	**Acquiring Firm**
And	
Kermas South Africa (Pty) Ltd; and Samancor Chrome Limited	**Target Firms**

Panel	:	Y Carrim (Presiding Member) N Theron (Tribunal Member) A Wessels (Tribunal Member)
Heard on	:	07/10/2009
Order issued on	:	07/10/2009
Reasons issued on	:	29/01/2010

Reasons for Decision

Approval

[1] On 7 October 2009 the Competition Tribunal ("Tribunal") unconditionally approved the merger between International Mineral Resources BV and Kermas South Africa (Pty) Ltd.[1] The reasons for approval follow below.

The transaction

[2] The primary acquiring firm is International Mineral Resources BV ("IMR"), a company incorporated in accordance with the laws of the Netherlands, which is controlled by CIM Global Investment BV ("CIM Global"). In South Africa CIM Global holds shares in IMR South Africa (51%); Capstone South Africa (54%); and Kermas South Africa (32.5%). Capstone South Africa controls Rosal 126

[1] Samancor Chrome Limited is a wholly owned subsidiary of Kermas South Africa (Pty) Ltd.

(Pty) Ltd, which in turn controls Shaft Sinkers (Pty) Ltd ("Shaft Sinkers"). IMR's main interest in South Africa is its indirect shareholding in Shaft Sinkers.

[3] The primary target firms are Kermas South Africa (Pty) Ltd ("Kermas SA") and its wholly owned subsidiary Samancor Chrome Limited ("Samancor Chrome"); companies registered under the laws of the Republic of South Africa. Samancor Chrome is Kermas SA's only business interest in South Africa. The shares in Kermas SA are held by: IMR (39.5%); Kermas Limited[2] (34.5%); Vollmet[3] (3%); and other shareholders (23%). Samancor Chrome holds interests in various entities.

[4] In April 2006 the Tribunal unconditionally approved a merger involving IMR's acquisition of 32.5% of the issued shares in Kermas SA, which gave IMR and Kermas Limited joint control of Kermas SA (and consequently of Samancor Chrome).[4] Subsequently, IMR acquired a further 7% shareholding in Kermas SA held indirectly through Batho Barena Investments Holdings (Pty) Ltd, which is held purely in a warehousing capacity after the previous BEE shareholders disposed of their shares, and which will be dealt with in accordance with the Department of Minerals' directions. As a result of this, IMR currently has a 39.5% shareholding in Kermas SA.

[5] In the instant transaction, IMR seeks to acquire an additional 34.5% shareholding in Kermas SA currently held by Kermas Limited, which will give IMR sole control of Kermas SA with a total shareholding of 74% (including the above-mentioned warehoused 7%).

Rationale for the transaction

[6] For IMR the proposed transaction is part of its wider global objective, and is an opportunity to pursue a more comprehensive investment and capacity utilisation policy in respect to Kermas SA and Samancor Chrome. According to Kermas, the proposed transaction is an investment return, the proceeds of which will be used to participate in various other ventures and opportunities.

[2] A company incorporated under the laws of the British Virgin Islands.
[3] A Swiss entity. The merging parties indicated that IMR is in the process of acquiring Vollmet's 3% shareholding in Kermas SA.
[4] Case No. 03/LM/Jan06.

Merging parties and their activities

[7] There is no horizontal overlap between the activities of the merging parties in South Africa.

[8] The relevant activities of IMR in South Africa are limited to the business of Shaft Sinkers which is primarily involved in the sinking of mine shafts.[5] Kermas SA's only business activities in South Africa relate to the business of Samancor Chrome which is a vertically integrated ferrochrome producer, with chrome mines in Limpopo, Mpumalanga and the North West Province.[6] The relevant activities of Samancor Chrome in the context of this assessment relate to the mining of chromium ore.

Vertical relationship

[9] There is a vertical relationship between the merging parties in that Samancor Chrome may post merger utilise the services rendered by Shaft Sinkers in its mining of chrome ore operations. At present, Shaft Sinkers provides its services to third parties other than Samancor Chrome; Samancor Chrome currently does its sinking of shafts in-house.

[10] The Commission considered the merging parties' market positions in a national market for the sinking of shafts (upstream market) and a national market for the production (i.e. mining) of chromium ore (downstream market). According to the merging parties, Shaft sinkers has a [10-20]% market share in a national market for shaft sinking, where it faces competition from Murray & Roberts Cementation (>40% market share), JIC Mining Services (>20% market share), Redpath (>5% market share) and Grinaker LTA (>5% market share). According to the merging parties, Samancor Chrome has a [20-30]% market share in a national market for the production of chromium ore, and competes with players such as Xstrata Merafe (>30% market share) and a number of smaller competitors, including Hernic, Assmang, IFM, Lanxess and ASA.

[5] Shaft Sinkers provides underground contracting services, including predominantly the sinking of shafts (either vertical or decline), developing and constructing mining and underground civil infrastructure (including hydro-electrical, pump storage, underground caverns and nuclear waste storage facilities), contract mining for select clients, and the design of underground shafts and associated infrastructure.

[6] In addition Samancor Chrome is active in smelting operations of chromium ore to produce ferrochrome and in the production and distribution of electrode paste.

[11] Based on the above, potential post merger input or customer foreclosure as a result of the proposed transaction is highly unlikely.

Third party request for adjournment

[12] On 2 October 2009, the Tribunal received a letter from Christian Schoeman ("Schoeman"), a representative of two companies[7], namely Merlin Resources Limited ("Merlin UK")[8] and Hugh Brown and Associates (Pty) Ltd ("HB&A")[9]. The letter informed the Tribunal that Merlin UK and HB&A have substantial interrelated financial claims against Kermas Limited. The letter also mentioned that an *ex parte* interim order for the attachment of all the shares of Kermas Limited in Kermas SA was granted on 29 September 2009 in the South Gauteng (Johannesburg) Division of the High Court in connection with the aforesaid claims.[10]

[13] Schoeman requested to have the merger proceedings adjourned *sine die* on the basis that it would be a futile exercise to make a decision on the transfer of shares in the current merger proceedings, when such share transfer cannot take place until either the actions by Merlin UK and HB&A have been concluded in the High Court or the said attachment of shares lifted.

[14] We dismissed Schoeman's application for the adjournment of the merger proceedings on the following grounds: The Tribunal's powers are limited to that set out in the Competition Act, 1998 (Act No. 89 of 1998).[11] In a merger context we are only empowered to consider the competition and public interest effects of a proposed merger, i.e. whether or not the merger is likely to substantially prevent or lessen competition and/or raise public interest concerns. More specifically, section 12A of the Act directs the competition authorities to take "*into account any factor that is relevant to competition in that market*" and to determine "*whether a merger can or cannot be justified on public interest grounds".* At the hearing Schoeman made it clear that the issues of Merlin UK and HB&A are not grounded in competition or public interest concerns, but arise purely from their commercial interests. He stated that he is not

[7] In his capacity as a member of these two companies.
[8] Registered in terms of the company laws of England and Wales.
[9] A South African registered company.
[10] Decision of his Lordship Mr Justice Gildenhuys – Case number 40988/09.
[11] Also see, for example, the Tribunal decision in *Mapula Restaurant and Coca-Cola Fortune (Pty) Ltd*; Case No: 91/CR/Aug07, at para 35.

"*suggesting in any way that the recommendations of the Commission [that] this transaction be granted is in any way incorrect on whatever basis. I merely say that it has the effect of dissipating the value on my security*".

[15] Furthermore, approval by the Tribunal of the instant transaction will not impact the commercial interests of Merlin UK and HB&A as these interests are protected by law. The said companies already have relief in terms of the above-mentioned interim order of the High Court. It would be a criminal offence for the merging parties to implement the proposed transaction while the interim attachment order is in place and that order can only be removed by the High Court. Section 40(b) of the Supreme Court Act, 1959 (Act No. 59 of 1959) provides that any person who "*being aware that goods are under ... attachment by the court makes away with or disposes of those goods in a manner not authorised by law, or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in such a manner...shall be guilty of an offence and liable on conviction to a fine* ...".

CONCLUSION

[16] Based on the aforementioned competition analysis, the Tribunal concludes that the proposed merger is unlikely to lead to a substantial prevention or lessening of competition in any relevant market. Furthermore, no public interest concerns arise from the proposed deal. Therefore the proposed transaction is approved unconditionally.

_____ **29/01/2010**

A Wessels DATE

Y Carrim and N Theron concurring

Tribunal Researcher:	Londiwe Senona
For the merging parties:	Bowman Gilfillan
For the Commission:	K Mahlakoana