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**12 June, 2017**

**Tribunal dismisses Ferro’s application to amend merger conditions**

The Competition Tribunal (“Tribunal”) has dismissed an application brought by Ferro (Pty) Ltd (“Ferro”) to vary certain merger conditions tendered by it and imposed by the Tribunal in a merger between Ferro and Arkema Resins (Pty) Ltd (“Arkema SA”).

Ferro sought to change the conditions on grounds that a former employee allegedly stole certain confidential and competitively sensitive information which is being used to unfairly compete with Ferro. **(For details on the merger conditions relevant to this application see the Note below.)**

On 4 August 2014 the Tribunal approved the merger between Ferro and Arkema subject to divestiture conditions. Ferro was to divest of the portion of Arkema’s business relating to the manufacture and sale of unsaturated polyester resins (the UPR business), *inter alia* because the merger would have reduced the number of UPR manufacturers from three to four, with Ferro controlling a substantial share in that market.

More specifically the part of the business to be divested comprised of product recipes and formulations for the manufacture of UPR, Arkema’s customer list and raw material suppliers as well as the right to use the established Arkema brand. It excluded the physical assets, such as industrial equipment, warehouses, and buildings to manufacture UPR.

Since the physical assets did not form part of the divestiture (for reasons more fully explained in the merger decision), the conditions also required Ferro to conclude a toll manufacturing agreement with the third party (unidentified at the time) for a certain period, while the third party gained the necessary technical know-how and expertise in UPR manufacturing and while putting in place its own manufacturing operations.

Ferro divested the relevant UPR business to Atlin in March 2015 and concluded a toll manufacturing agreement with it, including a consulting services agreement. This was to ensure that Arkema’s erstwhile customers would continue to receive UPR supply of the same standard and quality at competitive prices, and to allow time for the third party purchaser to become an effective competitor. The conditions also required Ferro to provide consulting services to the third party purchaser. Absent these conditions which were tendered by the merging parties, the merger would have been prohibited.

**NOTE:** In the application the Tribunal has dismissed, Ferro sought the deletion of the toll manufacturing and consulting services agreements on grounds that a former employee of NCS (a subsidiary of Ferro) who has since joined Atlin in its Port Elizabeth office, stole certain confidential and competitively sensitive information which Atlin is allegedly using to unfairly compete with Ferro.

The Tribunal dismissed the application on grounds *inter alia* that while theft of information was regrettable, it was not a competition issue. Ferro’s recourse lies in the High Court. Furthermore, there was no evidence that market conditions had changed to warrant the cancellation of the toll manufacturing agreement. The Tribunal found that to cancel the toll manufacturing agreement would be a disproportionate remedy as it would cut off UPR supply to Atlin nationally (to the detriment of the public interest) when the information alleged to have been stolen related to the Port Elizabeth area only.

UPRs are used in the manufacture of a wide variety of products such as swimming pools, sanitary ware, and in the automotive and mining industries, among others.

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