



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM110Jul18

In the matter between:

**Robor (Pty) Ltd and Macsteel Service Centres
South Africa (Pty) Ltd**

Primary Acquiring Firms

and

**The steel tube and pipe businesses of Macsteel
Service Centres South Africa (Pty) Ltd and
Robor (Pty) Ltd**

Primary Target Firms

Panel	: Andiswa Ndoni (Presiding Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 19 December 2018
Order Issued on	: 19 December 2018
Reasons Issued on	: 4 February 2019

Reasons for Decision

Conditional Approval

[1] On 19 December 2018, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between Robor (Pty) Ltd and Macsteel Service Centres South Africa (Pty) Ltd, as the acquiring firms, and the steel tube and pipe businesses of Macsteel Service Centres South Africa (Pty) Ltd and Robor (Pty) Ltd, as the target firms.¹

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

¹ Note: A member of the Tribunal Panel was conflicted and had been recused. The parties consented to the hearing taking place before a Panel of two Tribunal Members. See Transcript page 1, lines 1-19.

Background to the proposed transaction

- [3] The proposed transaction was initially structured differently in that Macsteel Service Centres South Africa (Pty) Ltd ("Macsteel") and Robor (Pty) Ltd ("Robor") were to establish a new company called Newco (a firm yet to be incorporated), which was to be held as follows: Macsteel (49% shareholding) and Robor (51% shareholding).
- [4] Newco was to then acquire the steel tube and pipe business divisions of both Macsteel ("MT&P") and Robor ("RT&P"). Thus, upon completion of the proposed transaction, Newco was to control the steel tube and pipe business divisions of both Macsteel and Robor.
- [5] However, the merging parties encountered commercial difficulties in establishing Newco and therefore agreed to amend the commercial structure of the proposed transaction.
- [6] In terms of the agreed amended structure, Robor will be restructured as follows pre-merger:
- a. A new holding company, Robor Holdings (Pty) Ltd ("Holdco") will be established. The shares in Holdco will be held by the existing shareholders of Robor.
 - b. Holdco will acquire from Robor's existing shareholders the entire issued share capital of Robor in exchange for shares in Holdco.
 - c. Holdco will also acquire all of Robor's shares in subsidiaries: namely Tricom Structures (Pty) Ltd, MSP (Pty) Ltd, Robor (Pty) Ltd and the 40% non-controlling interest Robor holds in Aegion South Africa ("the excluded companies"), such that Robor holds only the tube and pipe business of the Robor Group ("RT&P").
- [7] Following the restructuring of Robor, Robor will acquire MT&P as a going concern. As a consideration for the acquisition of MT&P, Robor will issue to Macsteel 49% of the entire issued share capital of Robor (which will constitute joint control), by way of an asset for share swap. As such, on completion of the proposed transaction, MT&P and RT&P will be controlled by Robor, who in turn will be jointly controlled by Holdco (51%) and Macsteel (49%).

Parties to proposed transaction

Primary acquiring firms

- [8] In light of the amendments to the proposed transaction structure, the primary acquiring firms are Robor and Macsteel. Robor will now acquire the MT&P business whereas Macsteel will acquire a 49% shareholding in Robor. This shareholding will give Macsteel joint control over Robor.
- [9] Robor is controlled by Tiso Blackstar Holdings SE ("Tiso Holdings"), a company incorporated in accordance with the laws of England and Wales. Tiso Holdings owns 48% of the issued share capital of Robor, with the remaining 52% being held by Robor's management.
- [10] Tiso Holdings is in turn controlled by Tiso Blackstar Group SE ("Tiso Blackstar"), a company that is listed on both the Johannesburg Securities Exchange and the London Stock Exchange. Tiso Blackstar is not controlled by any firms.
- [11] Robor and Tiso Blackstar both control a number of firms in South Africa.
- [12] Macsteel is controlled by Macsteel Holdings Luxembourg SARL, a company incorporated in accordance with the laws of Luxembourg. Macsteel controls a number of companies in South Africa.

Primary target firms

- [13] The primary target firms are Macsteel in respect of MT&P and Robor in respect of its 49% shareholding.
- [14] MT&P is owned and controlled by Macsteel, and as noted above, Robor is controlled by Tiso Holdings. Further, MT&P does not control any firm/s.
- [15] As noted in the background above, pre-merger Robor is to be restructured in such a way that it will only control the tubes and pipes business of the Robor Group (RT&P). The remaining Robor businesses and subsidiaries shall be transferred to Holdco as part of the pre-merger Robor restructure.

Proposed transaction and rationale

- [16] The merging parties submitted that the steel industry is under significant pressure and that national demand has declined significantly from 2009. This has resulted in significant overcapacity in the tubes and pipes industry. The current levels of demand are insufficient to sustain the number of players and installed capacity; the merging parties submitted that because of these factors, consolidation in the industry is inevitable and necessary for the survival of producers and job retention.
- [17] The transaction has been fully described earlier in these reasons. Ultimately, as a result of the proposed transaction, Robor will control both RT&P and MT&P businesses. Robor will in turn be controlled by Macsteel and Holdco.

The counterfactual

- [18] Before we go on to assess the impact of the proposed transaction on competition and on the public interest, it is important to provide the context in which the proposed transaction is taking place.
- [19] The merging parties invoked the failing firm doctrine in terms of section 12A(2)(g) of the Competition Act, No 89 of 1998 as the counterfactual for the proposed transaction.
- [20] In order to determine if the firms/divisions within the firms were in fact failing the Commission conducted the following tests as part of its failing firm assessment:
- a. A profitability and liquidity ratio analysis to determine if the MT&P and RT&P businesses are likely to fail;
 - i. The Commission in its liquidity and profitability assessments concluded that in recent years the merging parties have been making sustained losses and are unlikely to meet their short-term financial liabilities.
 - b. Whether there are less anticompetitive alternatives to the proposed transaction;
 - i. The Commission found that the merging parties have tried a number of alternatives to restructure their businesses including: Tiso Blackstar trying to sell its shares in Robor and engaging with a number of potential buyers; moving of various businesses to one site; closure of operations and branches; no replacement of staff; no staff increases; reduction of shifts and retrenchments. The Commission concluded that the merging parties

have attempted other less anticompetitive strategies, such as restructuring their businesses and finding alternate buyers.

- c. Whether absent the merger, the MT&P and RT&P businesses will exit the market.
 - i. The Commission accepted the submissions of the merging parties that absent the proposed transaction, the assets of MT&P and RT&P may exit the market as the Commission found that they have been loss-making and other alternate less anticompetitive strategies have not yielded success.

[21] Based on the above assessments the Commission concluded that MT&P and RT&P are failing firms and absent the merger they are likely to exit the market. Thus, the Commission accepts that the counterfactual to the proposed transaction is the exit of MT&P and RT&P from the market.

[22] We agree with the Commission's assessment on the relevant counterfactual and their assessment on the failing firm.

Impact on competition

[23] The Commission found that the proposed transaction would result in both horizontal and vertical overlaps in the activities of the merging parties.

[24] The horizontal overlaps occur in respect of MT&P and RT&P in the following markets:

- a. The national market for the manufacture and supply of carbon-based small bore welded tubes and pipes;
- b. The national market for the manufacture and supply of open sections; and
- c. The national market for the provision of value-added services.

[25] In the national market for the manufacture and supply of carbon-based small bore welded tubes and pipes, the Commission found that in terms of total capacity in this market the merged entity will have a market share of over 60% with an accretion of more than 20% and will compete with ProRoof, Aveng Trident and Augusta amongst others. In terms of production volumes, the merged entity will have a market share of approximately 40% with an accretion of approximately 20% and continue to compete with ProRoof, Aveng Trident and Augusta.

- [26] The Commission was of the view that the total capacity market share was more accurate of competition in the market. The Commission also noted that the merging parties did not operate at capacity even when the market was stable.
- [27] In the national market for the manufacture and supply of open sections the Commission found that in terms of total capacity, the merged entity will have a market share of approximately 50% with an accretion of approximately 30% and will compete with Clotan Steel and Allied Steelrode etc. In terms of production volumes, the merged entity will have a market share of 30% with an accretion of 16%. Again, the Commission was of the view that the total capacity market share was more accurate of competition in the market. The Commission also notes that the merging parties did not operate at capacity even when the market was stable.
- [28] In the national market for the provision of value-added services the Commission found that the merged entity will have a post-merger market share of approximately 30% and will continue to face competition from a number of market participants. Further, customers are not forced to obtain value added services from the same supplier they procured the product from.

Unilateral effects assessment

- [29] The Commission found that the merged entity would have high post-merger market shares in the above identified markets and that the merged entity might be able to dominate these markets. Thus, the Commission undertook a unilateral effects assessment and found that the following factors would mitigate against the high market shares:
- a. There are other competitors in the market that will still constrain the merged entity from unilaterally increasing its prices post-merger;
 - b. None of the competitors of the merging parties that were contacted by the Commission are operating at full capacity. As such there is excess capacity which will constrain the merged entity from unilaterally raising prices post-merger;
 - c. The Commission found that customers have countervailing power. Customers are not tied down to any contracts and they utilise a quotation system to order from various suppliers offering the best prices and they can import the products from international suppliers; and

- d. The Commission also found that there is an increase in the imports of small bore welded tubes and pipes. They noted that this may serve to constrain the merged entity.
- [30] Based on the abovementioned factors, the Commission was of the view that the proposed transaction would not raise any unilateral effects in any of the identified markets.

Vertical effects

- [31] The vertical overlap occurs in that Macsteel Trading, a separated division of the Macsteel Group, is active in the downstream market as a merchant of steel products, including small bore welded tubes and pipes and open sections. Macsteel Trading purchases a portion of its tubes and pipes and open section products from MT&P and competitors of MT&P which are on-sold to end consumers.
- [32] Regarding the merged entity being able to engage in an input foreclosure strategy, the Commission found that the high market shares of the merged entity suggested that it would have the ability to do so, however, the Commission found that this is likely to be tempered by the number of alternative suppliers in the relevant markets such as Aveng Trident, ProRoof, Barnes Wire, and Augusta amongst others.
- [33] Further, the Commission found that the merged entity would have no incentive to foreclose as the upstream market has excess capacity and demand for the affected product is in steady decline.
- [34] Based on the above findings, the Commission concluded that the proposed transaction is unlikely to result in significant input foreclosure concerns as the merging parties will not have the ability nor the incentives to significantly foreclose its downstream competitors' access to inputs (tubes and pipes and open sections).
- [35] With regards to customer foreclosure, the Commission found that there is unlikely to be any significant customer foreclosure concerns as Macsteel Trading purchases more than half of its products mainly from MT&P. This was confirmed by the competitors of Macsteel Trading in the upstream market who indicate that their sales to Macsteel Trading constitute a limited portion of their total sales for small bore tubes and pipes and open section products.

- [36] In light of this the Commission concluded that it would be unlikely that the merged entity will have the ability to foreclose its upstream competitor's access to sufficient customers in the downstream market.
- [37] The Commission therefore concluded that it was unlikely that the proposed transaction would raise any vertical foreclosure concerns.

Public interest

- [38] The Commission found that pre-merger both the merging parties reduced their staff compliments by approximately 1425 employees over the past three years (2015-2018) due to financial losses resulting from the difficulties experienced by the steel industry. The methods employed in reducing the staff included voluntary severance packages, natural attrition and retrenchments. Macsteel had reduced its staff compliment by approximately 1235 employees while Robor reduced its staff compliment by 190 employees. The Commission did not find any evidence that any of these 1425 pre-merger job losses were as a result of the proposed merger.
- [39] The merging parties submitted that the proposed transaction would result in a total of 130 permanent job losses due to duplication of roles as the operations of the merging parties are similar in nature. During its investigation, the Commission found that the actual number of retrenchments is likely to be 311. The merging parties submitted that the reason they indicated only 130 job losses was that the additional 181 employees are contract employees. After engaging with the Commission, the merging parties did concede that the 181 contract employees are indeed employees of the merging parties in terms of the Labour Relations Act ("LRA").
- [40] The merging parties submitted that the planned retrenchments should be considered in light of the relevant counterfactual, that absent the transaction, the merging parties are likely to close down their respective tubes and pipes businesses, which would result in the contracts being terminated in any event. The Commission noted that the respective divisions currently employ a total of 939 employees. The MT&P division currently employs 402 employees while the RT&P division employs 537 employees. After considering the requirements of the new merged operations, the merging parties concluded that the new entity would require 629 employees. As such, the proposed transaction is likely to result in the retrenchments of approximately 311 employees.

- [41] The National Union of Metalworkers of South Africa (“NUMSA”) were concerned that the merging parties did not follow a rational process in determining the number of jobs to be lost and as such they were of the view that employment conditions should be placed on the proposed transaction. NUMSA wanted a three-year moratorium on employment on the basis that a rational process was not followed by the merging parties. Further, NUMSA indicated that the merging parties are members of the Steel and Engineering Industries Federation of Southern Africa (“SEIFSA”). As a result, the merging parties are bound by the New Consolidated MEIBC Main Agreement. NUMSA was unclear whether Newco (subsequently Robor) will be a member of SEIFSA.
- [42] In response, the merging parties submitted that retrenching the estimated number of employees is the only viable basis on which the transaction could take place. Consolidation of the two tubes and pipes business inevitably gives rise to a duplication in roles. As such, a moratorium sought by NUMSA will undermine the objective of the proposed transaction, which is to save both businesses and ultimately stop further retrenchments of 939 employees if both businesses are eventually closed down.
- [43] The merging parties indicated that without the ability to undertake the proposed retrenchments, the proposed transaction would likely not proceed and a section 189 LRA process shall take place and the winding down of the respective businesses. Accordingly, the merging parties were unable to agree to a moratorium as proposed by NUMSA. Further, the merging parties highlighted that they did follow a rational process in identifying the positions that are likely to be affected by the proposed transaction.
- [44] Despite NUMSA taking note of the submissions of the merging parties, they still persisted with their request for a moratorium. Alternatively, NUMSA indicated that the Commission should impose a condition that would require the merged entity to honour all the existing and future collective agreements which are, or would become, binding upon the merging parties as at the approval date or in the future, as well as conditions that related to the merging parties undertaking relating to retrenchments and redeployment. Both of these aspects are covered in the conditions to this transaction.

- [45] The Commission noted that the merging parties based the number of employees likely to be retrenched on the additional volumes that RT&P's existing equipment will have to be producing, based on the current volumes produced by MT&P. The parties had assessed the number of shifts that will be required according to the volume to be produced by the merged entity post-merger into the RT&P facility. The Commission also notes that the merging parties have been loss-making which could also trigger the need for retrenchments. In light of this the Commission concluded that the merging parties did follow a rational process in identifying the number of employees likely to be affected by the proposed transaction and that the merging parties have justified the retrenchments that they intend to undertake.
- [46] Based on the above, the Commission was of the view that the proposed transaction be approved subject to certain conditions. The conditions seek to limit merger specific retrenchments and ensure that the affected employees will receive a right of first refusal should vacancies avail themselves within the merging parties' businesses. Further, the conditions require the merging parties to comply with the provisions of the New Consolidated MEIBC Main Agreement in as far as it is applicable to the merging parties.
- [47] It should be noted that with regards to redeployment of the affected employees should vacancies avail themselves within the merged entity, there was initially a three-year period attached to such redeployment. Upon questioning by the Tribunal, the merging parties agreed to remove the three-year period from said condition.²
- [48] There are no further public interest concerns.

Conclusion

- [49] In light of the above, we approved the proposed transaction subject to the set of public interest conditions, attached hereto marked as "**Annexure A**". In our view these conditions adequately address any public interest concerns arising from the proposed transaction.

² Transcript pages 18-19.



Ms Andiswa Ndoni

4 February 2019
DATE

Mrs Medi Mokuena concurring

Case Manager: Kameel Pancham

For the merging parties: Adv. Anthony Gotz instructed by Webber Wentzel

For the Commission: Themba Mahlangu and Michelle Viljoen