



**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**Case No: LM141Jul18**

In the matter between:

**K2018239983 (South Africa) (Pty) Ltd**

**Primary Acquiring Firm**

and

**The business of Hernic Ferrochrome (Pty) Ltd**

**Primary Target Firm**

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Panel : Yasmin Carrim (Presiding Member)  
: Medi Mokuena (Tribunal Member)  
: Andiswa Ndoni (Tribunal Member)  
Heard on : 13 December 2018  
Last Submission Received : 14 December 2018  
Order Issued on : 18 December 2018  
Reasons Issued on : 23 January 2019

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**Reasons for Decision (Public Version)**

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**Conditional Approval**

[1] On 18 December 2018, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between K2018239983 (South Africa) (Pty) Ltd and the business of Hernic Ferrochrome (Pty) Ltd (in business rescue).

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

**Parties to proposed transaction**

*Primary acquiring firm*

- [3] The primary acquiring firm is K2018239983 (South Africa) (Pty) Ltd (“Newco”), a wholly-owned subsidiary of Samancor Chrome Limited (“Samancor”), a private company registered in accordance with the laws of South Africa.
- [4] Newco does not control any firm.
- [5] Samancor controls several firms and, is itself, ultimately controlled by Terris Chrome Limited (“Terris Chrome”), a company incorporated in accordance with the laws of Mauritius.
- [6] Samancor is a vertically integrated producer of ferrochrome in that it conducts upstream activities in relation to the mining of chrome ore and downstream activities in relation to the smelting of chrome ore to produce ferrochrome.
- [7] Samancor also holds interest in a joint venture with Elkem Carbon AS of Norway (“Ferroveld Partnership”) for the production and distribution of electrode paste. Electrode paste is used as an input in the production of ferrochrome and the production of various other ferro-alloys.

*Primary target firm*

- [8] The primary target firm comprises of the business of Hernic Ferrochrome (Pty) Ltd (“Hernic”), a private company registered in accordance with the laws of South Africa. Hernic is controlled by HFSA Investment B.V. (“HFSA”).
- [9] Hernic does not control any firm.
- [10] Much like the acquiring firm, Samancor, Hernic is a vertically integrated producer of ferrochrome in that its principal business is to mine both chrome ore and platinum group metals and produce and sell ferrochrome to third parties.
- [11] Hernic’s chrome ore mines have not been producing enough chrome ore for Hernic’s downstream furnace operations, primarily due to its Morula mine being under care and maintenance. Hernic has been in business rescue since 21 September 2017, however, it has continued operating while in business rescue.



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- [9] HERNIC does not control any firm.
- [10] Much like the acquiring firm, Samancor, HERNIC is a vertically integrated producer of ferrochrome in that its principal business is to mine both chrome ore and platinum group metals and produce and sell ferrochrome to third parties.
- [11] HERNIC's chrome ore mines have not been producing enough chrome ore for HERNIC's downstream furnace operations, primarily due to its Morula mine being under care and maintenance. HERNIC has been in business rescue since 21 September 2017, however, it has continued operating while in business rescue.

## **Proposed transaction and rationale**

### *Primary acquiring firm*

- [12] Samancor is of the view that a successful acquisition and restructure of Herculite will add stability and contribute to economies of scale to make the business more sustainable.

### *Primary target firm*

- [13] Herculite submitted that the best prospect of its rescue, and preservation of its employees' jobs, is through an expedited disposal of its business to a third party, who can restructure the business.
- [14] In terms of the Sale and Business Agreement, Newco intends to acquire the business of Herculite as a going concern.<sup>1</sup> Upon implementation of the proposed transaction, Newco will control Herculite. As noted above, Herculite has continued to operate despite it being in business rescue.

## **The counterfactual**

- [15] 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.
- [16] Herculite is currently under business rescue since for prolonged periods, it has traded in a negative cashflow environment as a result of low ferrochrome prices, high electricity costs and/or strong South African Rand. In order to avoid a cashflow crisis, Herculite was provided with a revolving credit facility by its major shareholder Mitsubishi Corporation ("Mitsubishi"). Herculite was unable to comply with the covenants of the credit facility and could not make repayment of the amounts due under it.
- [17] Consequently, Herculite voluntarily entered business rescue proceedings and was placed under supervision in terms of section 129(1) of the Companies Act, No 71 of 2008. The assessment of the Business Rescue Practitioners ("BRPs") indicated that Herculite could reasonably be rescued through an accelerated process of selling the business to new owners.

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<sup>1</sup> The business consists of the mining of chrome ore and the production of ferrochrome, as well as any by-products such as platinum group metals.

- [18] The BRPs commenced a bidding process during October 2017 and ultimately identified 5 (five) compliant bids. Following the evaluation process,<sup>2</sup> Samancor was identified as the winning bidder.
- [19] Hercul's finances between 2017 and 2018 reveal that its liabilities exceeded its assets by a large amount and it was indebted to its major shareholder, Mitsubishi. As such, even without Mitsubishi requesting Hercul to settle its debt, Hercul was already technically insolvent.
- [20] The merging parties submitted that the counterfactual was that if a suitable purchaser for Hercul was not identified, Hercul, would in all likelihood, be placed into liquidation. The merging parties also indicated that it would not be possible for Hercul to identify an alternate purchaser and agree terms with such purchaser without being required to enter a protracted bidding, negotiation, due diligence and regulatory approval process.
- [21] The merging parties further submitted that the proposed transaction will have benefits when compared to the harm that would arise from the counterfactual, such as:
- a. Trade creditors will now receive 100 cents in the Rand on the basis that any residue will be paid to Mitsubishi, instead of substantially less;
  - b. Hercul's approximately 690 employees will be retained whereas under the counterfactual all employees will lose their jobs;
  - c. The merger gives rise to public interest benefits for Madibeng and surrounds as Hercul's mining activities make a meaningful contribution to the region; and
  - d. The merger is likely to result in the maintenance and possible increase of ferrochrome supply levels whereas if Hercul is liquidated, its mining rights will terminate, and its assets will likely be sold off at scrap value pursuant to a liquidation sale.
- [22] The merging parties' position was that, had a suitable purchaser not been found, Hercul would likely have been placed into liquidation. The merging parties had thus invoked the failing firm doctrine in terms of section 12A(2)(g) of the Competition Act, No 89 of 1998.

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<sup>2</sup> The evaluation considered (i) the price offered; (ii) the terms of the sale proposed by the bidder; (iii) the bidder's credentials; and (iv) the bidder's ability and stated intention to ensure the sustainability of Hercul's business, including the retention of Hercul's employees.

[23] The elements to be proved in a failing firm are the following:

- a. The firm is a failing one;
  - i. The Commission concluded from Hernic's distressed financial situation that it met the criteria of a failing firm and it was highly unlikely that it would be able to turn its situation around. Without the proposed transaction, Hernic would be placed into liquidation and ultimately exit the market.
- b. The reorganization of the alleged failing firm is not a realistic option;
  - i. Although Hernic has been able to continue conducting its business and pay its creditors other than its non-BEE shareholders [REDACTED] [REDACTED] it seems unlikely that it would be able to reorganize itself, turn the business around, pay off its substantial debts and be self-sustaining, especially given the unfavorable market conditions over the years. These conditions have been confirmed by the Department of Mineral Resources ("DMR"). The DMR indicated to the Commission that due to China's slow economic growth, the demand and prices for ferrochrome have been declining for the past few years putting pressure on South Africa's chrome and ferrochrome sectors.
- c. Alternative offers for the target firm
  - i. As alluded to earlier, the BRPs conducted a bidding process for the sale of Hernic and identified 5 compliant bids of which Samancor was chosen as the preferred bidder.
  - ii. In relation to the other four bids, [REDACTED] [REDACTED] a transaction with either of them would not raise fewer competition concerns than the one before us.
  - iii. [REDACTED] [REDACTED] The bidding process required firms with a South African presence as well as the presence of historically disadvantaged South Africans. More importantly the final bidders were also evaluated on their ability and stated intention to ensure the sustainability of Hernic's business, including the retention of Hernic's employees.

- iv. [REDACTED]  
[REDACTED]  
[REDACTED].
- v. Accordingly, the Commission concluded that Hernic made reasonably good faith attempts to find a suitable purchaser, which ended up being Samancor.

[24] Based on the above analyses, the Commission concluded that Hernic meets the requirements for a failing firm and as such the Commission agreed with the merging parties' counterfactual. The Tribunal finds no reason to differ from the view of the Commission.

### **Impact on competition**

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

[26] Both Samancor and Hernic are involved in the upstream market for the mining of chrome ore and the downstream market for the smelting of chrome ore to produce ferrochrome.

[27] The two identified vertical overlaps relate to essential inputs in the manufacturing and production of ferrochrome. The first overlap occurs in relation to the mining and supply of chrome ore, and the second overlap occurs in relation to electrode paste. As alluded to above, Samancor is party to the Ferroveld Partnership for the production and distribution of electrode paste.

[28] As such, the Commission assessed the competitive effects of the proposed transaction on the following markets:

- a. The national upstream market for the mining and supply of chrome ore;
- b. The national upstream market for the production and supply of electrode paste;  
and
- c. The downstream market for the production and supply of ferrochrome.



- i. With respect to this market the Commission assessed both the national and global markets of the different grades of ferrochrome being High Carbon ("HC") ferrochrome as well as Charge Chrome.

[29] In the national market for the mining of chrome ore, the Commission found that market participants Samancor, Hernic and Glencore are all vertically integrated into the downstream production of ferrochrome. These firms do not predominantly sell chrome into the open market. Typically, surplus chrome ore after internal use in their downstream smelting operations is sold to third parties. Thus, in terms of assessing competitive effects the Commission found it appropriate to consider contestable volumes available in the market rather than production volumes of the parties. As a result, the Commission found that in this market the merged entity would have a post-merger market share of less than 8% with a minimal accretion. Further, the merged entity would continue to face competition from firms such as Glencore, Assore, Tharisa and others.

[30] In relation to the global market for the production and supply of HC ferrochrome and Charge Chrome, the Commission found that the merged entity will have a post-market share of less than 15% with an accretion of less than 5%. Furthermore, the merged entity will face competition from Glencore and mining companies situated in China, Kazakhstan, Finland and other countries.

[31] In the national market for the production and supply of HC ferrochrome and Charge Chrome the Commission found that the merged entity will have a post-market share of less than 40% with an accretion of less than 10%. The merged entity will still face competition from Glencore and smaller market participants. The Commission conducted this assessment for completeness sake as the market is technically a global one.

[32] The Commission further considered the scenario where the market for HC ferrochrome and Charge Chrome could be separate markets, without concluding on whether they are separate markets. The Commission, in these assessments, once again excluded captive sales from vertically integrated firms, in order to accurately assess the impact on competition.

[33] Whether Charge Chrome or HC ferrochrome is produced depends on the quality and composition of the chrome ore input. In this regard, the Commission found that only Brazil, Finland and South Africa produce Charge Chrome. China does produce

ferrochrome, but customers had indicated to the Commission that China is a closed market as it has excess demand for ferrochrome. The Commission noted that none of the South African producers of Charge Chrome or Ferbasa, of Brazil, are vertically integrated into the downstream production of stainless steel. However, Outokumpu of Finland is vertically integrated and only sells approximately 25% of its production to third parties.

- [34] Therefore, it was concluded that the Charge Chrome volumes available on the global market, excluding China, likely consist of South African, Brazilian and approximately a quarter of the Finnish production. Thus, in the global Charge Chrome market, the merged entity will, post-merger, have a market share of less than 35% with an accretion of less than 10%. Glencore will remain the largest producer with less than 50% and the remainder will be held by firms in the other countries.

*Unilateral Effects assessment*

- [35] In light of the merged entities' market share in the global Charge Chrome market the Commission undertook certain assessments to determine the extent to which the merged entity will have the ability to increase prices post-merger. A brief description of these assessments follows.

- [36] In relation to the closeness of competition and pricing, the Commission found that the producers of ferrochrome charged relatively similar prices. This is because ferrochrome is an internationally traded commodity with the price driven mainly by supply and demand in the global market. [REDACTED]

- [37] With regard to switching suppliers, the Commission found that domestic ferrochrome producers are generally viewed as substitutes by consumers and customers switch frequently between them. It was also found that even though the price of ferrochrome is determined by global market conditions, there remains scope for negotiation between producers and consumers.

- [38] The Commission found that despite the reduction of ferrochrome producers due to the proposed transaction, with available capacity, Glencore, as the largest producer will remain a constraint to the merged entity post-merger. The Commission was of the view that this constraint would likely prevent substantial unilateral price increases on the limited price negotiations that do occur around the international benchmark prices.

[39] Based on the above the Commission was of the view that the proposed transaction would not raise any unilateral effects in any of the chrome or ferrochrome markets.

*Vertical effects assessment*

[40] In relation to the first vertical overlap (chrome ore and ferrochrome production), the Commission found that all three domestic ferrochrome producers (being Samancor, Hernic and Glencore) are vertically integrated, meaning that they have their own chrome mining operations. As such, the merged entity would be unable to engage in input foreclosure. Regarding customer foreclosure, the merging parties submitted that in the future, Hernic will become self-sufficient in the supply of chrome ore in the same manner that Glencore and Samancor are. As a result, the Commission was of the view that the proposed transaction was unlikely to raise customer foreclosure concerns in the upstream market for chrome ore.

[41] In relation to the second vertical overlap (electrode paste and ferrochrome production), the Commission found that the only other domestic producer is Glencore. Glencore procures its required input of electrode paste through its subsidiary, Chartech. As such, the merged entity would not be able to engage in input foreclosure. Regarding customer foreclosure, the Commission found that the proposed transaction is unlikely to raise any customer foreclosure concerns in relation to electrode paste as Hernic purchases the large majority of its electrode paste requirements from Samancor's Ferroveld Partnership and a much smaller amount from Chartech. [REDACTED]

[REDACTED] did not raise any significant customer foreclosure concerns which could arise as a result of this merger.

[42] The Commission therefore concluded that it was unlikely that the proposed transaction would raise any vertical foreclosure concerns.

*Removal of an effective competitor*

[43] The Commission received concerns from various market participants. Such concerns centered around the proposed transaction resulting in the loss of an effective competitor, Hernic, in the market for the supply of ferrochrome. As a result, the removal of Hernic as an effective competitor may have resulted in the merged entity being able to raise prices post-merger.

- [44] The market participants submitted that South Africa is the second largest producer of ferrochrome after China, and as China is a closed market, the market participants depend on South African ferrochrome producers for a significant percentage of their ferrochrome requirements. They further submitted that in their stainless-steel production, they mostly use Charge Chrome, as opposed to HC ferrochrome, and as noted above South Africa is one of three countries that produce Charge Chrome, the others being Brazil and Finland. In addition, the market participants submitted that Samancor and Herculit are two out of three producers of Charge Chrome in South Africa. Thus, the proposed transaction results in one alternative supplier in the market for Charge Chrome in South Africa, Glencore.
- [45] The Commission, however, found that it was unlikely that the proposed transaction would lead to the removal of an effective competitor. This is because apart from Herculit, customers also source ferrochrome from Glencore which is in fact the largest producer. The Commission also found that customers switch between Herculit, Samancor and Glencore currently with Herculit being the smallest supplier. The Commission did note that whilst South African customers typically only source ferrochrome from local suppliers, the prices derived in South Africa are not solely influenced by South African demand and supply, rather prices are influenced by the international market, where the merging parties do compete against producers from Finland, Brazil and other countries. The Commission found that South African producers export up to 90% of their production, indicating that the local producers rely on sales outside South Africa, exposing them to international pricing dynamics.
- [46] The Commission's investigation also revealed that there is excess capacity in the market with reserves of chrome available and should economic conditions in South Africa improve, it is likely there might be new entrants. Further, the Commission noted that although China is a closed market, it is such a large user of ferrochrome in its stainless-steel manufacturing industry that developments in the Chinese market directly affect the international price of ferrochrome.
- [47] Even though South African production costs of chrome and ferrochrome affect the Chinese production costs (and thus pricing), the extent to which the Chinese firms hold stock of chrome ore, ferrochrome and stainless-steel affects international pricing of ferrochrome. As such, the Commission concluded that it would be unlikely that the merging parties would be able to unilaterally increase pricing due to the various factors that influence the international ferrochrome price. Such variables stem from international dynamics rather than purely from South African market dynamics alone.

- [48] Finally, the proposed transaction should be assessed in light of the fact that absent the merger it is likely that Hernic would exit the market. The Business Rescue Practitioners were of the view that Samancor was the most suitable firm to take over the business of Hernic as it was unlikely that any other business would match Samancor's capabilities in resuscitating failing mining operations.
- [49] Therefore, the Commission was of the view that Hernic was likely to remain in the market as a result of the merger and the concerns relating to the removal of an effective competitor leading to unilateral price increases are unfounded.
- [50] One of the above-mentioned concerned market participants that made submissions to the Commission during its investigation was Aperam Sourcing SCA ("Aperam"). Aperam is a firm headquartered in Grand Duchy of Luxembourg, with 6 production facilities located in Brazil, Belgium, and France. Aperam converts different kinds of raw materials such as scrap, ferroalloys and fluxes to produce different grades and qualities of stainless steel.
- [51] Aperam is a customer of the merging parties and requested to make submissions to the Tribunal at the hearing of the matter, which request was granted.
- [52] Aperam's concerns as articulated before the Tribunal can be summarized as follows:
- a. Post-merger, there will be a *de facto* duopoly with the market only consisting of two large players (Glencore and the merged entity) who will face limited constraints from other rivals who lack the capacity to constrain the two large firms;
  - b. There are no economically feasible substitutes for Charge Chrome that stainless steel producers can use. Thus, the *de facto* Glencore-merged entity duopoly will have both sufficient incentive and ability to raise prices; and
  - c. The proposed transaction will result in a substantial lessening of competition which will have an effect within the South African economy and on Aperam in the form of upward pricing pressure on Charge Chrome. The removal of an effective competitor in the ferrochrome production market will result in reduced security of supply and will affect Aperam's ability to compete in terms of price, service and delivery to its customers.
- [53] Aperam accordingly sought conditions relating to supply and pricing of ferrochrome to address its concerns.

- [54] In response, the merging parties submitted that the market is not a duopoly in South Africa. There are other ferrochrome suppliers such as Afarak and Traxsys operating in South Africa.<sup>3</sup> Traxsys is currently not in operation due to the worsening market conditions but did indicate to the Commission that they would re-enter the market should conditions improve. The merging parties submitted that this itself shows that (i) there are more than two producers in the market; and (ii) there is spare capacity in the market.
- [55] Secondly, from a wider viewpoint there are three countries that supply ferrochrome into the open market, being South Africa, Finland and Brazil. In its submission Aperam had claimed that it could only get most of its ferrochrome requirement from South Africa however the merging parties pointed out that according to Ferbasa of Brazil, its largest customer is Aperam who have a stainless-steel facility in Brazil.<sup>4</sup>
- [56] Based on this evidence alone, we accept that the ferrochrome market is a global one and the merger will not result in a duopoly. The merged entity will face competition from other local suppliers as well as from other countries such as Finland and Brazil.
- [57] In relation to whether Charge Chrome or HC ferrochrome are substitutable, the CEO of Samancor, Mr Jürgen Schalamon appeared before the Tribunal and explained that HC ferrochrome and Charge Chrome are up to 80% interchangeable.<sup>5</sup> This is because stainless steel producers are looking for chrome units, in different forms, be it scrap, stainless steel scrap, HC ferrochrome or charge chrome.<sup>6</sup> The use of these chrome units to produce stainless steel can be procured from these different sources and it is generally at the discretion of those producing stainless steel as to what mix they use, and what technology they employ. Their interchangeability is dependent on such factors, but it does not mean they are not in the same market.<sup>7</sup>
- [58] The Commission, during its investigation, did not conclude on whether HC ferrochrome or Charge Chrome are substitutable, or form separate distinct markets. It did however, for completeness sake do a market analysis on what the market would look like post-merger *if* Charge Chrome was a separate market.

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<sup>3</sup> Transcript page 54, lines 13 – 16.

<sup>4</sup> Transcript page 57, lines 6-25; page 58, lines 1 -9.

<sup>5</sup> Transcript page 76, lines 12 – 14.

<sup>6</sup> Transcript page 76, lines 6 – 11.

<sup>7</sup> Transcript page 81, lines 19 -25; page 82, lines 1 – 8.

- [59] The evidence put forward to the Tribunal reveals that the use of ferrochrome, be it HC ferrochrome or Charge Chrome, is complex and technical and there are varying degrees of substitutability based on numerous factors such that no conclusion can be drawn as to whether Charge Chrome is a separate and distinct market.
- [60] With regards to the potential duopoly influencing prices that customers such as Aperam may pay for ferrochrome, the merging parties put up Mr Amre Youness, the Chairman of Samancor, to address this concern.
- [61] Mr Youness explained to the Tribunal that the ferrochrome producers have little to no power when determining the price at which they sell their material to customers. This is because pricing is primarily determined by the capacity of South Africa to export chrome to China.<sup>8</sup> He explained that a tender price is issued every month for what the stainless-steel producers are willing to pay for ferrochrome in China. It is a price the producers are informed of and it is up to the producers to sell or not at that price.<sup>9</sup>
- [62] He also confirmed that the situation in Europe (where Aperam is situated) is very similar. In Europe there is a European Benchmark Price for ferrochrome. This Benchmark Price is determined by Aperam in conjunction with other ferrochrome users.<sup>10</sup> Thus the merging parties have no control over pricing and cannot offer ferrochrome at a certain price to Aperam, a price that Aperam themselves have the power to set. Further, he reiterated that the merging parties would be happy to supply Aperam and have them as a customer, but they cannot guarantee price.<sup>11</sup> The merging parties submitted that the proposed transaction would not change how the determination of the price of ferrochrome is reached and thus will have no influence on driving prices upwards.<sup>12</sup>
- [63] This evidence coupled with the Commission's findings that the pricing of ferrochrome is internationally determined and affected by international market dynamics rather than the dynamics within South Africa, lead us to dismiss the pricing concern of Aperam.
- [64] Taking into account the Commission's thorough investigation into the ferrochrome markets, its extensive analyses therein, coupled with the evidence put forth before the Tribunal, we are of the opinion that Aperam's concerns are unfounded and that the

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<sup>8</sup> Transcript page 66, lines 8 – 21.

<sup>9</sup> Transcript page 66, lines 23 – 25; page 67, lines 1 -12.

<sup>10</sup> Transcript page 68, lines 1 – 14.

<sup>11</sup> Transcript page 69, lines 1 – 10.

<sup>12</sup> Transcript page 72, lines 11 – 23.

proposed transaction will not lead to a substantial lessening of competition or unilateral price increases.

**Public interest**

*Effect on employment*

- [65] The merging parties submitted that the proposed transaction will have no adverse effect on employment. On the contrary it is likely to have a positive effect on employment, since Hernic is in business rescue and a disposal of the business of Hernic to Samancor is considered the best prospect for rescuing Hernic, preserving jobs and avoiding the possible liquidation of Hernic.<sup>13</sup>
- [66] The National Union of Metal Workers of South Africa (“NUMSA”) did submit a concern that the proposed transaction would result in retrenchments. NUMSA’s concerns culminated in it proposing that a 5 (five) year moratorium on retrenchments be imposed. In response, the merging parties submitted that the proposed transaction will create job security for the Hernic employees, as absent the merger it is likely Hernic will be placed in liquidation and all the employees would be retrenched.
- [67] In addition, the merging parties submitted that a clause in the Sale of Business Agreement gives rise to an additional public interest benefit to the vast majority of Hernic employees in that those who fall below a certain grade level cannot be retrenched for at least 12 (twelve) months following the implementation of the proposed transaction.
- [68] The Commission concluded that in light of Hernic’s likely exit absent the proposed transaction, the proposed transaction is likely to have a positive effect on employment as it will prevent the possible liquidation of Hernic and save some jobs in Hernic, which would have otherwise been lost.
- [69] Nevertheless, in order to secure the jobs of the unskilled employees of Hernic, the Commission recommended a moratorium on retrenchments for a period of 12 (twelve) months from the implementation date of the proposed transaction. The merging parties have accepted this proposed condition.

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<sup>13</sup> *Inter alia* Commission Recommendation page 95.



*Effect on Black Economic Empowerment*

- [70] The Commission was concerned about the dilution of the 26% BEE shareholding in Hercul as a result of the proposed transaction. However, the Commission noted that the benefits of the transaction appear to outweigh the dilution effects, especially when weighing up the dilution effects against the counterfactual.
- [71] The merging parties submitted that the proposed transaction raises no such concerns as Samancor has its own BEE shareholders, who will become indirect shareholders in the business of Hercul. In addition to this, special arrangements were made to ensure that, during the rescue proceedings (and subject to cash availability), Hercul's BEE shareholders will continue to receive economic benefits from Hercul, despite it being in business rescue. Further, the relevant BEE partners indicated that the proposed transaction is beneficial to the mining communities and that they are in support of the proposed transaction.

*Effect on a particular industrial sector or region*

- [72] The Greater Lonmin Community ("GLC"), who represent the communities of Marikana, Tornado, Bapo, Majakaneng, Nkane and Mooinooi, raised public interest concerns regarding the failure of both Samancor and Hercul to comply with their Social Labour Plans ("SLP") as per the Department of Mineral Resources ("DMR") regulations. The GLC submitted that both merging parties have failed to implement a large portion of their SLP commitments and wanted to understand what would happen to Hercul's current and upcoming SLP obligations post-merger. Specifically, the GLC wanted to know whether Hercul's current and upcoming SLP obligations would be transferred to the acquiring firm and how the merged entity would ensure compliance with the SLP.
- [73] The Commission found that in its SLP, Hercul had committed to various plans and initiatives aimed at promoting employment and advancing social and economic welfare objectives in respect of its own employees and in relation to broader communities in which its mines are located. In terms of Hercul's current SLP it is to undertake critical community projects including the building of schools and clinics. For purposes of the proposed transaction, the merging parties submitted that they intend to comply with and remain fully committed to current and future SLP undertakings.
- [74] The merging parties further submitted that in terms of the application lodged with the DMR for approval to transfer Hercul's mining rights to Samancor, Samancor had

already committed to the DMR that it would continue to honour the commitments contained in Heric's SLPs.

- [75] The Commission noted that while SLP monitoring and compliance was the responsibility of the DMR, compliance by the merged entity of the Heric SLPs was of concern to the GLC communities. The Commission thus found it necessary to recommend a condition that seeks to ensure that Heric and/or the merged entity do not renege on its SLP commitments. The merging parties have accepted this proposed condition.
- [76] The representative of the GLC, Mr Louie Mogaki, appeared before the Tribunal and wished to have the matter postponed.<sup>14</sup> Mr Mogaki intimated that the GLC would like time to consider the merger and how it would affect the GLC communities.<sup>15</sup>
- [77] The merging parties submitted in response that the proposed transaction should not be postponed as the target firm was in business rescue<sup>16</sup>, and that the GLC does not represent the communities affected by Samancor and Heric.<sup>17</sup>
- [78] The Commission also confirmed before the Tribunal that it had taken into account the GLC submissions made to it during its merger investigation process.<sup>18</sup> Further, the Commission confirmed that before receiving the GLC submissions it had contacted the community on which Heric and Samancor mine i.e. the Tshwaranang Community Umbrella Trust.<sup>19</sup>
- [79] After these submissions were made the GLC elected to withdraw their request for a postponement and abided by the Commission's recommendation as well as placing on record, their support for the merging parties' submissions.<sup>20</sup>

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<sup>14</sup> Transcript page 2, lines 17 – 24; page 7, lines 3 – 9.

<sup>15</sup> Transcript page 7, lines 12 – 19.

<sup>16</sup> Transcript page 8, lines 15 – 18.

<sup>17</sup> Transcript page 9, lines 9 -23.

<sup>18</sup> Transcript page 12, lines 3 -15.

<sup>19</sup> Transcript page 12, lines 12 – 25.

<sup>20</sup> Transcript page 14, lines 1 – 5.

## Conclusion

[80] 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.



**Ms Yasmin Carrim**

23 January 2019  
DATE

**Ms Andiswa Ndoni and Mrs Medi Mokuena concurring**

Case Manager:	Kameel Pancham
For Samancor:	Paul Cleland and Maryke Zietsman of Werksmans Attorneys
For Heric:	Paul Coetser of Werksmans Attorneys
For the GLC:	Louie Mogaki
For Aperam:	Adv. Anisa Kessery instructed by Vani Chetty of Vani Chetty Competition Law
For the Commission:	Mogau Aphane and Zintle Siyo