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SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM040Jul21

The Boleng Trust (Acquiring Firm)

and

Main Street 904 (RF) (Pty) Ltd (Target Firm)

REASONS FOR DECISION

[1] On 28 September 2021, the Competition Tribunal unconditionally approved the acquisition of Main Street 904 (RF) (Pty) Ltd ("MS 904") by The Boleng Trust ("Boleng Trust").

[2] The Boleng Trust is a trust which has been established in accordance with the laws of South Africa. The trustees of the Boleng Trust are six individuals.[1] The Boleng Trust is not controlled by any firm and its trustees do not control any firms. The beneficiaries of the Boleng Trust are the local communities surrounding the mining operations of Assore Limited ("Assore"), who are historically disadvantaged persons ("HDPs") as defined in section 3(2) of the Competition Act No 89 of 1998 (the "Act"). The purpose of the Boleng Trust is to hold an equity interest in Assore for the benefit of its beneficiaries.

[3] The Boleng Trust holds 51% of the shares in Main Street 350 (Pty) Ltd (RF) ("MS 350"), which in turn holds 100% of the shares in Main Street 460 (Pty) Ltd (RF) ("MS 460"). MS 350 and MS 460 are private companies that are incorporated in accordance with the laws of South Africa.

[4] MS 904 is a private company incorporated in accordance with the laws of South Africa; and is jointly controlled as follows: as to 51%, the Fricker Road Trust ("FRT"); and as to 49%, the Assore Employee Trust ("AET"); and Assore, by virtue of holding the preference shares in MS 904. FRT's beneficiaries include the HDP communities living around Assore's South African mining operations. AET's beneficiaries are Assore's South African employees. MS 904 will be renamed Assore Communities SPV, post-transaction.

[5] The proposed transaction is related to a simultaneously notified transaction involving the internal restructuring of Assore's operations by Oresteel Investments Proprietary Limited ("Oresteel"), (the "Assore Restructure").[2] This aspect of the Assore Restructure is the re-organisation of Assore's broad-based black economic empowerment ("B-BBEE") shareholding structure.

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[1] Mr. Charles Edward Walters; Ms. Gail Marlene Campbell; Mr. Jerome Bongani Phakathi; Ms. Joy-Marie Lawrence; Mr. Meshanthan Pillay; and Ms. Shiluba Mashudu Mawela.

[2] The merging parties submit that the Assore Restructure is independent of the proposed transaction and the latter will go ahead whether or not the Assore Restructure is implemented.

[6] Assore's B-BBEE participation is conducted through three special purpose vehicles ("SPVs") namely MS 904, MS 350 and MS 460. These are controlled by Assore's B-BBEE shareholders, Boleng Trust, FRT, AET and Assore (the latter by virtue of cross shareholding in MS 350). This transaction contemplates the consolidation of Boleng Trust and FRT's respective indirect shareholdings in Assore and the segregation of the merging parties' participation in Assore on the basis of the beneficiaries they represent[3].

[7] The Commission considered the activities of the merging parties and found that the proposed transaction does not raise any horizontal overlap as neither of the merging parties provide products and/or services that are considered substitutable. More specifically, MS 904 is a SPV and not active in any market. The proposed transaction does not raise any vertical overlap as the merging parties are not active at different levels of the value chain. Considering this, the Commission was of the view that the proposed transaction is unlikely to prevent or lessen competition in any market.

Public Interest

[8] The merging parties submitted an unequivocal undertaking that the transaction will not result in retrenchments or negatively impact employment. The Commission notes that neither the Boleng Trust nor MS 904 have any employees and accordingly do not have any employee representatives or trade unions. In view of the foregoing, the Commission is satisfied that the proposed transaction will not have any negative impact on employment.

Greater spread of ownership

[9] The Commission evaluated the proposed transaction's impact on public interest, in particular a greater spread of ownership. In particular, the Commission considered (i) the reduction of B-BBEE shareholding; (ii) the dividend flow derived by B-BBEE shareholders pre- and post-transaction; and (iii) the Trustees' views of the proposed transaction. The Commission interacted with BDO, the independent advisor to the merging parties as well as Mr Mesh Pillay, the chairperson of the Boleng, FRT and AET trusts.

[10] The Assore Restructure which contemplates, a restructure of its B-BBEE shareholding structure, involves Assore exiting entirely from the B-BBEE structure. The proposed transaction results in the consolidation of Boleng Trust and FRT's shareholding in Assore, through MS 904(which as mentioned will be renamed Communities SPV). The Communities SPV will increase its shareholding in Assore from 16.1% to 18.2%. In particular, Boleng and FRT's shareholding interest will increase which will have the effect of increasing the interest held by HDPs in Assore from 23.1% to 26.1% post-transaction.

[3] Prior to the Restructure, Boleng and FRT, whose beneficiaries are Assore's mining communities, separately hold interests in Assore through MS 350 and MS 904 respectively. In addition, FRT's investment in Assore through MS 904 is jointly controlled with AET, whose beneficiaries are Assore's South African employees. Post-transaction, Boleng Trust and FRT will jointly hold their interest in Assore through Communities SPV whilst AET will separately hold its interest through the Employees SPV.

[11] Notwithstanding the percentage increase in HDP ownership arising from the transaction, the Commission assessed the values of the equity pre and post transaction and the Commission found that the gross equity value of the 23.1% interest held in Assore by the merging parties pre-transaction is approximately R[redacted] However, the gross equity value of the 26.1% held by the merging parties in Assore post-transaction, is approximately R[redacted] a reduction of approximately R[redacted] However, the Commission also found that pre-transaction, the 23.1% interest held by HDPs attracted a debt burden of approximately R[redacted] whilst post-transaction, the 26.1% interest attracts a debt burden of approximately R[redacted] More specifically, the debt burden of Boleng Trust and FRT is approximately R[redacted] pre-transaction and will reduce to R[redacted] post-transaction. AET's debt burden pre-transaction is approximately R[redacted] and will reduce to R[redacted] Thus, the HDP's debt burden will reduce by approximately R[redacted] which is an overall 73% reduction in debt before and after the transaction and is material from a financial risk perspective. The net equity value of the shares held by the HDPs in Assore accordingly remains similar from R[redacted] pre-transaction, to R[redacted] post-transaction.

[12] Further, the Commission found that the Boleng Trust and FRT enjoyed approximately R[redacted] in annual dividends pre-transaction, whilst AET received approximately R[redacted] Post-transaction, these parties' dividend flows will increase to approximately R[redacted] and R[redacted] respectively. This increase in dividend flows arises from the Assore Restructure which, *inter alia*, reduces the merging parties' debt burden and the removal of the various intermediaries that were interposed between the merging parties and the mines, pre-transaction. Given that the merging parties (and HDPs more generally) only begin to reap the full financial rewards of any dividends earned in Assore once debt has been repaid, the post-transaction scenario appears to be more favourable due to there being significantly less debt to repay. The Commission found that the merging parties will likely pay off their remaining debt within a significantly reduced timeframe. The mines have an estimated life of mine until 2050, thus the merging parties and HDPs more generally will benefit from receiving unencumbered dividends for a significant time to come.

[13] As part of the Assore Restructure, Assore will be unbundling certain subsidiaries; namely, African Mining and Trust Company (Pty) Ltd ("AMT"), Ore & Metal Company ("O&M") and Assore Treasury Company (RF) ("ATC") (collectively, "Unbundled Entities"). Thus, the Commission also considered whether the fact that the merging parties, and therefore HDPs, will no longer indirectly own the Unbundled Entities negatively impacts the public interest. The Commission noted that the merging parties do not have any direct shareholding in the Unbundled Entities and do not receive dividends directly from the Unbundled Entities. BDO submitted that over the period 2016 to 2020, approximately 80% of the dividends received by Assore have been derived from the mines, meaning that the Unbundled Entities contributed approximately 20% of the dividend income received by Assore during that period. Additionally, the Commission found that the B-BBEE shareholders will retain the mining assets which collectively generate over 80% of the dividend flow to the Assore Group post-transaction.

[14] BDO also submitted that the dividends received by Assore from the Unbundled Entities were largely retained and not paid out as dividends to Assore's shareholders. As indicated for the period 2016 – 2020, approximately 80% of the dividends paid by Assore to its shareholders, were derived from the dividends received from the mines,

almost all of which is derived from Assmang. Notably, prior to the Assore Restructure, on average, 80% of the dividends that Assore received from Assmang were paid to Assore's shareholders to, inter alia, fund the international operations of Assore, some of which are conducted by the Unbundled Entities. Post the Assore Restructure, Assore will no longer conduct international operations and therefore Assore's shareholders will receive a greater percentage of the dividends received by Assore from the mines. Taken together, the Commission concluded that the transaction facilitates the broader Assore Restructure which aims to, *inter alia*, simplify the B-BBEE structure to ensure that the merging parties are closer to the income generating assets of Assore. The Commission considers that the transaction does indeed facilitate the B-BBEE shareholders and their HDP beneficiaries, to do that.

[15] The Commission canvassed the views of the trustees of the Boleng Trust. Mr Mesh Pillay, who is the chairperson, indicated that their purpose, as trustees, is to distribute as much money as possible to the beneficiary employees and communities.[4] Therefore, in interpreting the B-BBEE structure, the trustees balanced equity against maximising dividend output from the B-BBEE structure.

[16] In respect of the Unbundled Entities, the trustees did not consider the fact that the absence of indirect shareholding in the Unbundled Entities by HDPs is detrimental, as the Unbundled Entities primarily conduct their activities outside of South Africa. The trustees considered it worthwhile that they will remain invested in the South African leg of the ultimate structure due to the financial risk and dividend flow considerations identified as follows:

16.1. In respect of the potential financial risk, the trustees considered that the Unbundled Entities are mainly active in the international market with an unclear offshore strategy which could ultimately be a financial gamble if the B-BBEE shareholders remained invested. The trustees off-set the probability of growth in the international market against the fact that the largest generating asset (i.e., Assmang) in the group structure is situated in South Africa pre-transaction and post-transaction. If they remained invested in the South African structure, the B-BBEE shareholders would be closer to the dividend generating asset.

16.2. In addition, the trustees considered the impact on the trusts' indebtedness towards Assore. Ordinarily in the market, B-BBEE structures are overconsumed by debt liability to such an extent that it takes considerable time to reap the financial benefits it initially sets out. The trustees found that the proposed transaction significantly reduces the trusts' indebtedness and would reduce the debt free timeline of the community trusts from more than approximately 25 years pre-transaction to less than approximately 12 years post-transaction. The sooner the trusts pay off the debt, the more dividends will flow into the trust and ultimately benefiting the beneficiaries.

[17] The Commission found that pre-transaction, the merging parties' ordinary shareholding in Assore did not entitle them to appoint any directors at Assore. However, the Commission established that post-transaction, Communities SPV (i.e., Boleng Trust

[4] For example, AET has been able to pay its employees a 13th and 14th cheque to all employees because of good dividends received by the trust. In respect of the communities' trust, the trust has been focused on providing quality education in the beneficiary communities by equipping teachers, building learning institutes and contributing towards higher education for the learners.

and FRT) will be entitled to appoint two directors and Assore Employees SPV can appoint one director to Assore's board. Mr Pillay was of the view that the post-transaction board representation will enhance the trustee's participation and contribution in the operation of the firm on aspects such as job security and skills development. In addition, board representation will ensure that the option of paying dividends is considered first against withholding dividends for various reasons. However, in the unlikely event that Assore Holdings takes a decision to withhold dividends, through board representation, the trust will be able to ensure that the money is used to create more jobs and empower communities in the beneficiary communities. Essentially, the trustees are of the view that board representation will be beneficial as it will enable them to make a contribution on issues that impact them directly.

[18] The Commission found that the post-transaction structure facilitates the ability of the merging parties and their beneficiaries to enjoy unencumbered ownership in Assore, which is a 'firm in a market' as contemplated by section 12A(3)(e) of the Act. Moreover, as indicated above, it appears that the merging parties will have more benefits post-transaction such as reduced debt, greater dividend flows and the ability to be represented on Assore's board of directors. In view of the above considerations, the Commission found that the transaction does not appear to negatively impact the public interest. Furthermore, the proposed transaction does not raise any further public interest concerns.

[19] We agreed with the Commission's conclusions and we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market, or to have a negative impact on the public interest.

Signed by:Yasmin Tayob Carrim
Signed at:2021-10-29 12:13:50 +02:00
Reason:I approve this document

Yasmin Tayob Carrim

29 September 2021

Yasmin Carrim **Date**
Fiona Tregenna and Anton A. Roskam concurring

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For the Commission: Nonhlanhla Msiza and Wiri Gumbie