

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 128/LM/Nov07

In the matter between:

Investec Bank Ltd

Acquiring Firm

And

RJ Southey (Pty) Ltd

Target Firm

Panel	:	N Manoim (Presiding Member), Y Carrim (Tribunal Member) and M Mokuena (Tribunal Member)
Heard on	:	20, 25 & 29 August and 03 November 2008
Order issued on	:	29 August & 10 November 2008
Reasons issued on	:	30 January 2009

Reasons for Decision

Introduction

- [1] The Commission recommended that this merger be approved subject to conditions. In its recommendations, the Commission came to the conclusion that this transaction is likely to substantially prevent or lessen competition in the markets for ship repair and marine blasting and painting. The Commission also found that this transaction is likely to lead to co-ordinated effects in the above-mentioned markets.
- [2] We approved this transaction with conditions which were subsequently revised in order to address competition concerns identified by the Commission. The reasons for our decision follow below.

Parties

[3] The primary acquiring firm is Investec Bank Ltd (“Investec”), a company incorporated under the company laws of the Republic of South Africa. Investec is controlled by Investec Ltd. The primary South African subsidiaries of Investec Ltd are:

- Investec Group Data (Pty) Ltd
- Investec Bank
- Investec Management Holdings (Pty) Ltd
- Investec Assurance Ltd
- Investec Employee Benefits Holdings (Pty) Ltd
- Fedsure International Ltd

[4] Investec has a number of subsidiaries.¹ For purposes of this transaction, the following entities are relevant:

- DCD Dorbyl (Pty) Ltd (“DCD Dorbyl”)
- Dorbyl Marine (Pty) Ltd (“Dorbyl Marine”)
- Nautilus Marine Cape Town (Pty) Ltd (“Nautilus Marine”)²
- Uni-span Holdings (Pty) Ltd (“Unispan”)

[5] The primary target firm is RJ Southey (Pty) Ltd (“RJ Southey”), a company incorporated under the company laws of the Republic of South Africa. RJ Southey has in excess of forty subsidiaries.³ It is controlled by the Brunt Trust, which owns 38.59% of its shareholding.⁴ The other shareholders in RJ Southey are as follows:

- | | |
|------------------------------------|---------|
| • Clidet No 717 (Pty) Ltd (Clidet) | 36.13% |
| • CJA Kirkwood (“Kirkwood”) | 13.665% |
| • JGC Donaldson (“Donaldson”) | 5.93% |
| • BJR Wickins (“Wickins”) | 5.69% |

¹ Refer to the competitive report, annexure “C” for the complete list of Investec’s subsidiaries.

² Nautilus Marine is a joint venture between Dorbyl Marine and Globe Engineering.

³ These subsidiaries are in schedule 3 of the merger filing.

⁴ The Brunt Trust controls Global Pact Trading 170 (Pty) Ltd.

[6] RJ Southey controls the following subsidiaries, which are relevant for the purposes of this transaction:

- Dormac Marine (Pty) Ltd (“Dormac Marine”)
- RJ Southey Contracting (Cape) (Pty) Ltd (“Southey Contracting”)
- Okapi South Africa (“Okapi”) (Pty) Ltd.

Description of the transaction

[7] This is a two-stage back-to back transaction whereby Investec will initially purchase all the shares in RJ Southey in order for certain shareholders to exit and immediately thereafter introduce the new shareholders by selling 54.5% of the shares to the new shareholders. In terms of the shares and claims agreement, Investec intends to acquire 63.87% of the issued ordinary share capital of RJ Southey and 100% of the issued share capital of Clidet 717. Investec will thus acquire all claims against RJ Southey. Post-merger, the shareholding in RJ Southey will be as follows:

- | | |
|---------------|-----|
| • Investec | 45% |
| • BEE Company | 15% |
| • Brunt Trust | 10% |
| • Management | 30% |

Rationale for the transaction

[8] Investec submitted that this transaction represents an attractive investment opportunity for it. However, the Commission was of the view, formed during its investigation that Investec’s rationale for this acquisition is to consolidate the marine business. The Commission further submits that it appears that part of Investec’s strategic objective is to invest in markets with high barriers to entry and this transaction is in pursuit of that strategy.⁵

[9] The shareholders of RJ Southey submitted that they view this transaction as a good opportunity to realize their investments. It was further submitted by these shareholders that the transaction will, inter alia, result in the introduction

⁵ The Commission came to this view after perusing Investec’s internal strategic documents.

of a broad based BEE shareholder into the RJ Southey Group of companies as well as the introduction of a shareholder of reference, namely Investec. It appears that an additional motive for the sale was a fall out among the RJ Southey shareholders.⁶

Parties' Activities

The Acquiring Group

[10] Investec Bank is an international specialist banking group that provides a diverse range of financial products and services to a niche client base through its subsidiaries. Its principle business is divided into, inter alia, investment banking, treasury and specialised finance, private banking and asset management.

[11] DCD Dorbyl is involved in the provision of ship repair through Dorbyl Marine. Ship repair includes providing services such as steel fabrication and replacement, hydraulics and mechanical work and engine overhauls. Nautilus Marine is involved in marine blasting and painting. Uni-span is a manufacturer of scaffolding.

RJ Southey Group

[12] RJ Southey is involved in ship repair, ship building and heavy industrial engineering. It also manufactures scaffolding, pocket knives, agricultural tools, expanded polystyrene products, modular accommodation, panels for cold rooms, gas tanks and pressure vessels. In addition, RJ Southey is involved in the provision of contracting services in relation to industrial and marine corrosion protection, thermal insulation and ducting, scaffold hire, fire proofing, sandblasting and painting, sheeting and cladding.

[13] Southey Contracting, a division of RJ Southey, is an industrial non-marine firm that performs corrosion protection, industrial painting, thermal insulation, scaffold erection and hire, fireproofing, sheeting and cladding in Gauteng, Kwa-zulu Natal and the Western Cape. In Cape Town it is involved in marine

⁶ This was confirmed by the parties in a meeting they held with the Commission on 21 July 2008.

blasting and painting services in respect of oil and gas rigs. Dormac marine is involved in ship repair. Okapi is involved in the manufacturing and hiring of scaffolding.

Summary of submissions

- [14] In their submissions to the Commission the merging parties had identified two relevant markets namely ship repair and the manufacture, sale and rental of scaffolding. The merging parties provide ship repair services to vessels and ships through Dormac Marine and Dorbyl Marine respectively.
- [15] Scaffolding is described as a temporary framework used to support people and material in the construction or repair of buildings, industrial facilities and ships. Scaffolding equipment serves a similar purpose to other forms of access equipment such as ladders, towers, cradles and scissor lifts. The supply chain for scaffolding begins with the manufacturer who manufactures and sells the scaffolding to customers.
- [16] These customers include construction firms, industrial companies and contractors who either buy or rent the scaffolding. The post-merger market share in the market for the manufacture, sale and rental of scaffolding is 12%. This market does not raise any competition concerns. We will therefore not deal with it any further.
- [17] Ship repair is a bidding market in which the bidding players submit a quote which includes all forms of repairs even if the shipyard does not possess the necessary capabilities. Individual companies may bid for large contracts and sub-contract elements of that to other players in the market. Alternatively players form joint ventures and quote for all repair work as a joint venture.
- [18] The merging parties argued that the market for ship repair encompasses various types of work (such as steel and pipe repair, electrical and mechanical work, engine work, hydraulic work and underwater repairs) including blasting and painting because the market was a bidding market in which bidding players submit tenders for the full repair. They further argued that barriers to entry were low and although a local market could be identified, consisting of Durban, Cape Town and East London, the market was

international because ship owners generally communicate with hundreds of ship yards worldwide via email when advertising tenders for ship repair and the majority of their customers were international companies.

- [19] Marine blasting and painting involves blasting, high pressure blasting and ultra pressure blasting, industrial cleaning, tank cleaning, waste disposal, anti-corrosion measures, insulation and cladding of vessels such as ships, oil and gas rigs as well as fixed structures in the harbour.
- [20] The Commission argued that it considered marine blasting and painting as a separate market from ship repair. In its view barriers to entry were high in both these markets and the merger may lead to unilateral effects in both these markets.
- [21] The Commission's investigation revealed that the ship repair market is characterised by high barriers to entry. These barriers include dry docking facilities, equipment and skill, accreditation and insurance as well as relationship with customers. The merging parties' combined post-merger market share in this market would be approximately 30%, creating the largest competitor in this market.
- [22] In the Commission's view the marine blasting and painting market is also highly concentrated with the merging parties combined post-merger market share estimated to be 60%, with its largest competitor South Eastern Marine, having only 20%, Atlatech 10% and Robben Marine 0.5%.
- [23] The Commission was also concerned about the merger resulting in co-ordinated effects. Post-merger Investec will hold 43% and 45% shares in DCD Dorbyl and RJ Southey respectively, with minority protection. In the blasting and painting market DCD Dorbyl has a 50% joint venture with Globe Engineering, which competes with Southey Contracting. The Commission was concerned that these structural links⁷ were likely to lead to coordinated effects in the affected markets and accordingly recommended a conditional approval.

⁷ According to the ICN Merger Guidelines, these cross-shareholding/joint ventures enhance coordination/collusion.

- [24] The Commission submitted further that its investigations revealed that the geographic market for ship repair is influenced by the size of the project to be undertaken. For small projects, the geographic market seems to be local. For large projects, on the other hand, the market seems to be international. This is because large projects involve substantial repair work which is advertised internationally and quotations are received from big engineering companies, including international ones.⁸
- [25] Further, the Commission found that most of the ship dry dock facilities are situated at the Cape Town Harbour, competition amongst suppliers occur in Cape Town and that customers turn to Cape Town for their suppliers. In addition, an industry study conducted by Who Owns Who⁹ found that ship repairs are done mainly in Cape Town and Durban. The Commission, however, did not conclude on the relevant geographic market for ship repair but rather analysed the effect of the transaction on competition in the local market, specifically the Cape Town Harbour.

History of proceedings

- [26] On the first day of the hearing the Tribunal raised with the merging parties that, having gone through the record, our prima facie view was that Investec would indeed be in a position to influence the strategic direction of both RJ Southey and DCD Dorbyl, and that the merger was likely to result in the removal of an effective competitor in the affected markets by what might be the equivalent of a merger between the two marine divisions of Dormac and of Dorbyl Marine.
- [27] The Tribunal also indicated to the parties that whilst it had understood the concerns raised by the Commission in its analysis of the transaction, our view was that the proposed conditions did not adequately address those concerns and seemed inconsistent and ineffectual. On the other hand the merging parties placed the Commission's conclusion in dispute – on their version Investec was not able to control either firm, and the merger would not lead to anticompetitive effects. We decided given the inadequacy of the remedies to

⁸ This was confirmed by SA Five Engineering, Ivan Engineering and Belmet Marine.

⁹ Who Owns Who's research report – Maintenance of Ports and Harbours – July 2007.

address the anticompetitive effects, if any, and the dispute over whether there were such effects that we should hear oral evidence. The matter then proceeded on 20 & 25 August 2008. As it was not possible to hear the remaining witnesses of the merging parties and the Commission in that period the matter was set down to proceed on the 03 September 2008.

Decision

- [28] The hearing proceeded with the testimony of the merging parties' witnesses, namely Thomas Prins, Head of Investec's Principal Investments, Gregory Hirschowitz, Investec's representative responsible for this transaction and Vincent Langlois, Investec's representative on the DCD Dorbyl Board. The Commission led its first witness John Edward Binns, Belmet Marine's Marketing and Human Resource Manager. In the course of this evidence being led it became apparent from the minutes of Investec's Principal Investments Monthly Meetings that strategic discussions pertaining to the acquisition of RJ Southey, its marine division and to DCD Dorbyl, were routinely held in the presence of Investec's representatives on the board of DCD Dorbyl.
- [29] On 28 August 2008 and prior to the Commission's and the merging parties other witnesses being led, Investec advised the Tribunal that it was willing to provide undertakings to the Commission and requested that the Tribunal grant an order incorporating these undertakings as conditions by 31 August 2008, which was the final agreed closing date for the transaction. On 29 August 2008 the parties appeared before the Tribunal and placed on record the conditions agreed between the merging parties and the Commission and which are attached hereto as annexure "A".
- [30] The effect of the revised conditions is that Investec will divest all its shares in RJ Southey ("Investec shares") to an independent third party within a specified period. In the interim until the divestiture is effected, Investec will waive its minority rights and its shareholding and voting rights in respect of the entire RJ Southey Group.
- [31] In our view the above conditions, once fulfilled, would adequately address the potential concerns raised by the Commission and the Tribunal, and obviates

the need for us to deal any further with the merits of the transaction in these reasons. Once the conditions are fulfilled Investec will have no financial interest in the Southey business, and issues of whether the merger could lead to unilateral or co-ordinated effects via the structural link created by the Investec stake in RJ Southey's Dormac Marine business, fell away.

[32] This transaction was therefore approved subject to the above conditions on 29 August 2008. However, soon thereafter, a dispute ensued between Investec and RJ Southey, which led to Mr. Barry Wickins, the CEO of RJ Southey, launching a review application with the Competition Appeal Court ("CAC") seeking to set aside our decision to approve the merger.¹⁰ The dispute revolved around whether Investec had been entitled to agree to the undertakings on behalf of the target firm and if not whether this was required.

[33] As a result of this dispute, the transaction was not closed following our order and Investec was not therefore able to take transfer of the Investec shares. The parties however settled their dispute on 10 October 2008, and the review application was withdrawn.

The Merging Parties' Application for a Variation Order

[34] On 24 October 2008, the merging parties lodged an application with the Tribunal to vary certain clauses in the order that was initially issued. In the first part of the application, the parties requested the Tribunal to agree to a variation that the divestiture process starts running from 10 October 2008 as opposed to 29 August 2008 (the date of the order).

[35] In the second part of the variation application, the parties requested that Investec Corporate Finance ("ICF") be appointed to manage the divestiture sale process. The reasons given by the merging parties for wanting ICF to manage the sale process was that it was already familiar with the business of RJ Southey, had prepared the disposal timetable and draft information memorandum and reviewed all existing due diligence and other reports. In other words, ICF would be in a position to run the sale quickly and effectively whereas another third party would take a bit longer. The Commission

¹⁰ Paragraph 41 of Mr. Wickins' affidavit.

supported the first part of the application, but was opposed to the second as it believed it would undermine the protections introduced in the original order in which Investec had undertaken to waive its shareholder rights during the divestiture period.

[36] The application was heard on 03 November 2008. On 10 November 2008 we granted the merging parties' request that the divestiture period start running from 10 October 2008. The second request was, however, not granted.

Y Carrim

30 January 2009
Date

N Manoim and M Mokuena concurring.

Tribunal Researcher: I Selaledi
For the merging parties: Cliffe Dekker Hofmeyr
For the Commission: L Khumalo (Mergers & Acquisitions)

ANNEXURE A

CONDITIONS (Non-confidential)

- 1 Investec Bank Limited ("Investec") shall, for as long as it holds shares in RJ Southey (Pty) Ltd ("RJ Southey") or of any company that directly or indirectly holds shares in R J Southey ("the Investec shares"):
 - 1.1 not exercise any of its rights emanating from the Investec shares to appoint any directors to the board of directors of R J Southey;
 - 1.2 not be present or represented at any meeting of the shareholders of RJ Southey;
 - 1.3 not vote (in person or by proxy) any of the voting rights attaching to any of Investec's shares in RJ Southey;
 - 1.4 not request or be entitled to receive any minutes of any meetings of the board of directors or the shareholders of RJ Southey or its subsidiaries; and
 - 1.5 not be entitled to any information of any nature from RJ Southey and/or its subsidiaries relating to ship repair and marine blasting and painting activities.
- 2 Investec shall, within a period of [] from the date of the approval of this merger by the Competition Tribunal ("the divestiture period"), have disposed of all the Investec shares ("the disposal transaction") to an independent party, as defined in clause 8 below ("the proposed purchaser");
- 3 The time required for regulatory approval of the disposal transaction (if necessary) shall suspend the running of the [] period provided that the Commission may suspend such suspension of the time periods if in its view the notifying parties in the disposal transaction are not sufficiently co-operative or forthcoming with information;

- 4 Notwithstanding the provisions of paragraph 1 above, Investec shall be entitled to receive group consolidated financial information to enable Investec to facilitate the disposal of its shareholding.
- 5 If Investec has not disposed of the Investec shares within the divestiture period as required in clause 2 above, the Trustee, described more fully in annexure B1, will have an exclusive mandate and power of attorney to sell the Investec's shares within a period of [] at no minimum price ("the Trustee divestiture period") to a proposed purchaser as described in clause 8 below.
- 6 Should the Trustee fail to dispose of the Investec shares within the trustee divestiture period, the Commission may apply to the Tribunal for a further [], on good cause shown ("the extended period").
- 7 Should the Tribunal not grant the application for an extension or has granted it and the Trustee has failed to sell the Investec shares within the extended period, the merging parties shall undo the merger as if it had never been implemented.

8 THE PROPOSED PURCHASER

- 8.1 The proposed purchaser of the Investec shares shall be independent and shall not be –
- 8.1.1 an employee or director of Investec,
- 8.1.2 related to Investec; or
- 8.1.3 directly or indirectly, an affiliated member of the Investec group of companies.

- 8.2 The proposed purchaser must obtain all necessary approvals from the Commission and other regulatory authorities for the acquisition of the Investec shares (taking into account any remedies that might be offered).
- 8.3 The proposed purchaser shall provide the Commission with an affidavit deposed to by a senior official of the proposed purchaser confirming the accuracy of all information provided to the Trustee and the Commission.
- 8.4 In order to maintain the structural effect of this order, Investec or any directly or indirectly affiliated member of Investec's corporate group, will not subsequently directly or indirectly re-acquire influence over the whole or part of R J Southey (Pty) Ltd.
- 8.5 When Investec has reached an agreement with a proposed purchaser they will submit to the Trustee and the Commission a fully documented and reasoned proposal enabling the Commission to:
- 8.5.1 Verify in consultation with the Trustee that the proposed purchaser is a suitable purchaser of the Investec shares.
 - 8.5.2 Grant any approvals required under these commitments with respect to any ancillary arrangements.
- 8.6 Such a proposal shall be submitted no later than one month prior to the end of the divestiture period and shall include copies of the draft and/or final sale agreement and all other ancillary agreements and/or other documents related to the proposed divestment.

- 8.7 The Commission will approve or reject Investec's proposal in writing. The approval of the proposal shall not be unreasonably withheld.
- 8.8 Once the sale agreement with the proposed purchaser has been concluded, Investec shall submit a signed copy of the sale agreement, together with any other relevant documentation to the Commission.

9 DUTIES AND OBLIGATIONS OF THE PARTIES DURING THE TRUSTEE DIVESTITURE PERIOD

- 9.1 If Investec is not able to transfer its shares to an approved purchaser within the divestiture period, the Trustee shall have an exclusive mandate with the necessary power of attorney to sell the Investec shares at no minimum price.
- 9.2 At the expense of Investec, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Investec's approval, which approval shall not be unreasonably withheld or delayed, if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Trustee mandate, provided that any fees and other expenses incurred by the Trustee are reasonable.
- 9.3 If Investec refuses to approve the advisors proposed by the Trustee, the Commission may approve the appointment of such advisors, after having heard Investec's objection thereto.
- 9.4 Investec will indemnify the Trustee, its employees and members of the Trustee team (each an "Indemnified Party")

and hold each indemnified party harmless against any liabilities arising out of the performance of the Trustee's duties under this order, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence of the Trustee, its employees or members of the Trustee team.

- 10 Save for the time periods in which the Tribunal requires Investec or the Trustee to dispose of the Investec shares, the contents of "Annexure A" are not confidential.