

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO.: 07/LM/JAN07

In the matter between:

NEWSHELF 809 (PTY) LTD

and

CONSOL LIMITED

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 15 March 2007

Order issued on : 15 March 2007

Reasons issued on : 13 April 2007

REASONS FOR APPROVAL

Approval

[1] On 15 March 2007, the Competition Tribunal unconditionally approved the proposed merger between Newshelf 809 (Pty) Ltd (“Newshelf”) and Consol Limited (“Consol”). The reasons for the approval follow.

The Merger Transaction

[2] The proposed merger involved the acquisition of the entire issued share capital of packaging company, Consol Ltd (“Consol”) by Brait Private Equity through Newshelf 809 (Pty) Ltd (“Newshelf”).¹ This transaction will be implemented by way of a scheme of arrangement in terms of section 311 of the Companies Act. As soon as this transaction is implemented and as part of the integrated transactions, Newshelf intends to transfer the business of Consol to Maxitrade 91 General Trading (Pty) Ltd, a newly incorporated wholly owned subsidiary of Newshelf.² According to the merging parties, no single shareholder will control Consol post-merger. Brait will hold 32% of the equity in the new entity and thus will not be able to exercise de jure

1 Newshelf is a newly formed entity for purposes of the proposed transaction. It is currently controlled by Brait IV SA Partnership (“Brait RSA Fund”), which in turn is managed by Brait South Africa Ltd (“Brait South Africa”).

2 There was no sale agreement to be entered into between Maxitrade and Consol to acquire the business of Consol. In addition, the merging parties asserted that there were no further consents required regarding the Maxitrade-Consol sale. However, the merging parties will be required to file with our Registrar a Maxitrade-Consol Agreement as soon as it is concluded.

voting control it on its own. As the company will be closely held and has a provision in its articles providing for a 60% approval of most resolutions, this stake is unlikely to constitute a de facto controlling stake either.³

Rationale

[3] This is a private equity transaction. The private equity investors are motivated by a sense that they can enhance the value of the target firm, whilst sellers are presumably persuaded to sell by the offer of a considerable premium to the current market price.

Relevant market

[4] Brait SA is an international investment and financial services group focused on private equity, corporate finance and specialized funds. It has interests in a variety of sectors. In particular, it has interests in the wine bottle market and in beverage packing. Consol is a packaging company and focuses primarily on consumer glass packaging products (i.e., bottles) for use in the packaging of beverages, food, pharmaceuticals and cosmetics. According to the Commission, glass comprises 95% of Consol's business whilst 5% is its rigid plastic packaging for chemicals, food products, and containers for paints and for healthcare products.

Competition evaluation

[5] Consol is the largest bottling firm in the country. It operates in an industry which according to the merging parties' internal documents "is a stable duopoly".⁴ The other constituent of the alleged duopoly is Nampak which has a 22% market share to Consol's 76%. Consol is also a minor player in plastic packaging, an industry in which Nampak is the major player. Ordinarily, a transaction such as this in which the company changes from being widely held to being held by institutional shareholders, would not raise competition issues. However Brait, which leads the consortium doing the private equity deal, holds interests both in the glass sector and related downstream sectors. Given the concentrated nature of the glass bottling market, the merger warrants further scrutiny.

[6] Brait owns a 40% interest in Douglas Green Bellingham ("DGB"), a customer of Consol. DGB sources wine bottles from Consol (as well as from third parties) and uses them to bottle wine. Brait also owns a 37% interest in Beverage Packaging ("Bevpack"), an independent beverage contract packing company with facilities to package beverages in cans, glass and PET bottles. Brait has appointed two directors to the Bevpack board.

[7] The above interests raise both horizontal and vertical implications. The horizontal implications arise from that Bevpack may be a competitor of Consol. The vertical implications arise because DGB is a customer of Consol.

³ See page 2 of the transcript.

⁴ See page 179 of the merger record.

[8] With regard to the vertical implications, the merging parties submit that Consol's annual sales of wine bottles to DGB amount to approximately 5,4% of its total wine bottle sales and approximately 1,1% of Consol's total sales. According to the Commission, DGB purchases 53,5% of its wine bottles from Consol whilst the balance of 46,5% is sourced from Nampak. The merging parties submitted that Consol's sales to DGB do not constitute a material component of Consol's total sales to its wine bottle customers. Consol asserted that it would prefer not to jeopardize its relationship with major wine bottle customers. For this reason the Commission was of the view that input foreclosure would not be profitable on the part of Consol because DGB purchases only 3% of Consol's total wine bottles. This effectively means that if Consol were to do so, it would lose 97% of its customers.

[9] The Commission was also of the view that the proposed transaction would not lead to customer foreclosure because DGB is a smaller player which purchases less than 1% of the entire wine bottles market notwithstanding that it sources 53,5% of its wine bottles from Consol. The Commission submitted that should Consol foreclose its competitors (such as Nampak) from selling wine bottles to DGB, then these competitors can sell their wine bottles to the remaining 99% of wine bottle customers.⁵ The merging parties asserted that it is unlikely that Brait SA's investment in DGB and in Consol could be beneficial to DGB because Brait SA does not control or manage DGB. Neither does Brait Fund IV control Newshelf.

[10] We agree with the Commission that the vertical issues are insufficient to justify any concerns with the merger.

[11] With regard to the horizontal implications, Brait SA had advised the Commission that it had concluded a sale agreement in respect of the disposal of its 37% interest in Bevpack. On 27 February 2007, the merging parties advised the Commission that the Bevpack deal had been partly implemented – the only outstanding issue was that the Brait Group was awaiting final payment from the purchaser. As a result of these assurances the Commission did not further investigate the horizontal issues since Brait was voluntarily divesting its packaging interest pre-merger.

[12] At the hearing of the matter on 15 March 2007 the Tribunal sought clarity on whether the sale of the interest had taken place. The merging parties were - surprisingly - unable to provide the exact details of the buyer, but asserted that the Bevpack sale had been concluded. They testified that the only outstanding issue was between themselves and the relevant municipal council relating to the rates on the property that was subject to sale. They believed that the council had incorrectly calculated the relevant rates, and that the council was at that time recalculating the rates. They asserted that once the rates issue was sorted out the sale could be completed.⁶ We were advised that in the interim the incumbent Bevpack

5 DGB has 9% of the bottled wine market whilst others constitute about 52%. The rest is shared amongst the smaller players.

6 See the testimony of Mr Maharaj from Brait, page 5 of the transcript.

management was carrying on with the management of the Bevpack business.⁷ In light of all these submissions, we advised the merging parties that we were considering imposing a condition relating to the sale of Brait's interest in Bevpack.⁸ They responded that they did not think there was any objection to the condition being imposed, but argued that such condition would be highly immaterial to the proposed transaction.⁹ At the conclusion of the hearing, the tribunal wrote to the merging parties requesting further information about the sale of Bevpack and the identity of the buyer. In the letter we indicated that we were considering imposing a condition requiring that the sale take place by no later than a date to be specified in the order. Later that same afternoon, the merging parties filed with us papers indicating that Brait had divested itself of all interests in Bevpack with effect from 15 March 2007 i.e on that very day.¹⁰ Both the signed CM42 (Securities Transfer Form) and the letters of resignation of the two Brait directors who sit on the Bevpack board were signed and dated 15 March 2007.

[13] It would appear that the merging parties desire to get the Consol transaction approved unconditionally had expedited, in a matter of hours, a deal that seems to have taken weeks to resolve – the sale of the Brait interest in Bevpack. What induced this new expedition is not a matter of concern for us – the result is that the divestiture has taken place prior to us making our decision. We are therefore satisfied that the potential overlap has been eliminated and therefore need not be evaluated.

Public interest

[14] There are no significant public interest issues at stake.

Conclusion

[15] Given the information submitted before us, including the confirmation by the merging parties that Brait had divested fully divested its interest in Bevpack, we are satisfied that the proposed merger is unlikely to substantially prevent or lessen competition in the affected market/s.

7 See pages 4-6 of the transcript.

8 Note that the problem for the merging parties was that they had persuaded the Commission not to investigate whether the overlap was problematic as they were in a great hurry to complete the merger because of its enormous funding implications. The Commission was entitled to insist if it was being asked to not to pursue this enquiry that the merging parties either dispose of the interest prior to our approval or that our approval was subject to this condition.

9 See page 6 of the transcript.

10 We are advised that the sale is for the full 37% interest that Brait had in Bevpack.

N Manoim

Concurring: **D Lewis and Y Carrim**

Tribunal Researcher: **T Masithulela**

For Brait: M Phillips (Read Hope Phillips Inc.)

For Consol: E van Biljon (Tabacks Inc.)

For the Commission: M Dasarath and L Blignaut (Mergers & Acquisitions)