

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 130/LM/Dec08

In the matter between:

Business Venture Investments No 1311 (Pty) Ltd

Acquiring Firm

and

Sea Harvest Corporation Ltd

Target Firm

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member) and U Bhoola (Tribunal Member)
Heard on : 25 March 2009
Order issued on : 25 March 2009
Reasons issued on : 27 May 2009

Reasons for Decision

Introduction

[1] On 25 March 2009 the Tribunal approved the merger between Business Venture Investments No 1311 (Pty) Ltd and Sea Harvest Corporation Ltd. The reasons follow below.

The transaction and parties

[2] In terms of the transaction Newco will acquire the entire issued share capital of Sea Harvest Corporation Ltd ("Sea Harvest") by acquiring Brimco (Pty) Ltd's interest of 21.52%, Sea Harvest Employee Trust's interest of 5.32% and Tiger Brand Limited's interest of 73.16%.

[3] The primary acquiring firm is Business Venture Investment No 1311 (Pty) Ltd (“Newco”), a newly formed company for purposes of this transaction. The shareholders in Newco are:

- Brimco (Pty) Ltd (“Brimco”) (55%),
- Management (15%),
- Staff (1%),
- Kagiso Strategic Investments III (Pty) Ltd (“Kagiso Investments”) (25%), and
- Other Equity (5.32%).

Brimco and Kagiso Investments will jointly control Newco. Brimco is a wholly owned subsidiary of Brimstone Investment Corporation Ltd (“Brimstone”). Kagiso Investments is controlled by Kagiso Trust.

[4] Brimstone holds interests in various firms, the most important, for our purposes, is its 11.8% interest in Oceana Group Ltd, a company listed on the JSE. Brimstone and Tiger, (Tiger holds 38.5% of the shares in Oceana), have entered into a voting pool agreement, which has the effect, according to the Commission, of enabling Brimstone and Tiger to jointly control Oceana.

[5] The primary target firm is Sea Harvest. Tiger Brands Ltd (“Tiger”) which owns 73.16% of the share capital of Sea Harvest controls it. The balance is held by Brimco (21.52%) and the Sea Harvest Employee Trust (5.32%).

[6] Sea Harvest in turn controls:

- Atlantic Trawling (Pty) Ltd
- Sea Harvest Trust
- Vuna Fishing Company (Pty) Ltd which in turn controls Sea Vuna Fishing Company (Pty) Ltd
- The Sea Harvest Corporation of Namibia

Rationale for the transaction

[7] The transaction has come about because Brimstone has exercised a put option which required Tiger to sell its holding in Sea Harvest to it. Brimstone, exercised the option because it wishes to increase its shareholding in Sea

Harvest with the view of building a “Food Cluster”. The transaction will also increase Sea Harvest’s empowerment base.

Effect on Competition

- [8] Although the transaction only involves the acquisition of Sea Harvest by Brimstone we will consider the activities of both Oceana and Sea Harvest in light of Brimstone’s involvement in both companies.¹

Background to the industry

- [9] The fishing industry in South Africa is characterised by mainly two features. It is regulated by Government and in terms of the Marine Living Resource Act 18 of 1998 the Minister of Environmental Affairs and Tourism must, before granting any fishing rights, determine the total allowable catch which must be allocated to different interest groups, such as commercial, recreational and foreign fishing. These rights are allocated for periods of between 10 – 15 years.² Another feature of the fishing industry is that the major players, Oceana, Sea Harvest and Irvin & Johnson (“I&J”), are completely vertically integrated into the harvesting of fish (they own fishing vessels), the processing of fish in their processing facilities such as canneries and value-adding processing facilities and the marketing of fish and fish products to the wholesale, retail and food industries through their own marketing channels.³ Smaller competitors usually operate at only one of these three levels.

Relevant market

- [10] Oceana’s core business focus is the harvesting, processing, procurement, marketing and sale of pelagic fish products (in particular anchovy and pilchards), including canned fish and fishmeal. Oceana also engages in the catching of hake and has a small quota which represents 3.24% of the TAC⁴ for hake. Oceana has an allocated quota of 16.76% of the TAC for anchovy and 14.36% for sardines.

¹ See discussion of the cross shareholding below.

² Qotas were allocated to successful applicants in the beginning of 2006.

³ According to the parties this is one of the few mechanisms available to players in the industry to expand and grow.

⁴ Total Allowable Catch, the allocation of the total amount of fish allowed to be caught as determined by the Department of Environment and Tourism.

- [11] Sea Harvest and its subsidiaries are primarily involved in the harvesting, processing and supply of hake; it holds a quota of 26.82% of the Total TAC for hake. It also has a small quota of 0.3% of the total TAC for small pelagic species.⁵
- [12] The Commission found that the parties' activities overlap in the market for the harvesting, supply and marketing of hake, as well as in the market for the harvesting, supply and marketing of pelagic fish, in particular pilchards used in canning and anchovies used in fish meal.⁶
- [13] The geographic market for the harvesting and marketing of small pelagic fish is both national and international according to the Commission. Canned pilchards and mackerel are mostly sold and marketed by Oceana in South Africa, very little is exported. In contrast 50% - 80% of fish meal is exported and the balance sold nationally.
- [14] According to the parties, South Africa is a net exporter of hake and hake products, while local competitors in the market do not face any import competition except for a small quantity imported from Namibia. The relevant geographic market for the hake product market is therefore defined by the Commission as national.

Competitive effect

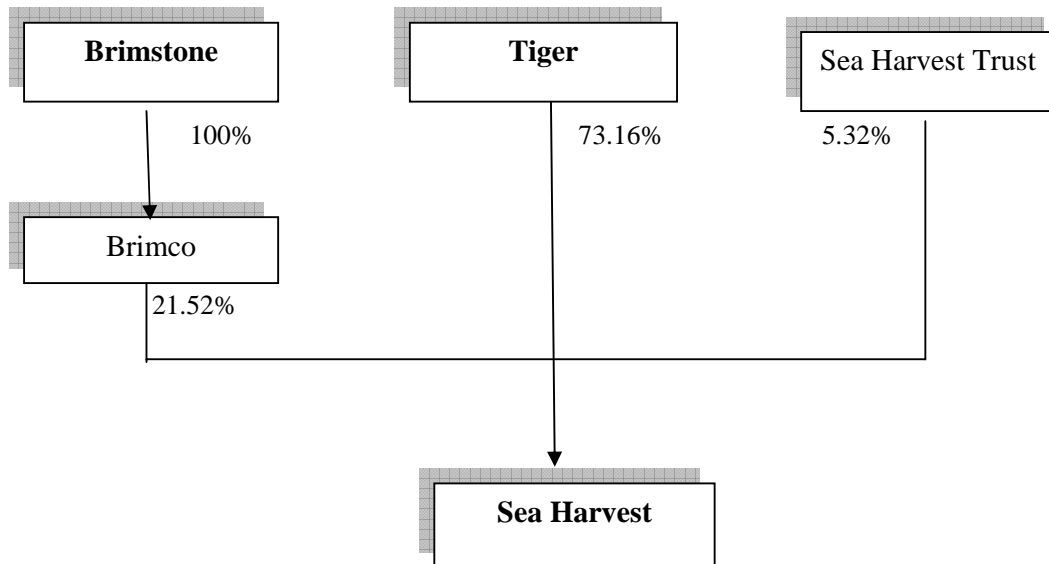
- [15] The Commission concluded in its recommendation that the increase in the market shares of the merging parties in the affected markets were insignificant and were unlikely to substantially prevent or lessen competition in any market. However some concern was raised by the Tribunal about Brimstone's shareholding in both Oceana and Sea Harvest and the co-ordinated effects, specifically market division, this might give rise to as a result of Brimstone being represented on both Boards.

⁵ In exchange for Sea Harvest's 10% interest in the Desert Diamond Fishing Company (Pty) Ltd, Desert Diamond catches and markets Sea Harvest's small mackerel quota.

⁶ Oceana utilises their allocated small pelagic quotas in their own canneries for marketing under the Lucky Star and Seafare Brands. The by-product is marketed and sold nationally as pet food under the Lucky Pet brand. Sea Harvest do not produce canned pilchards, sardines, mackerel, tuna or fishmeal and its small horse mackerel quota is harvested and marketed by the Desert Daimond Company.

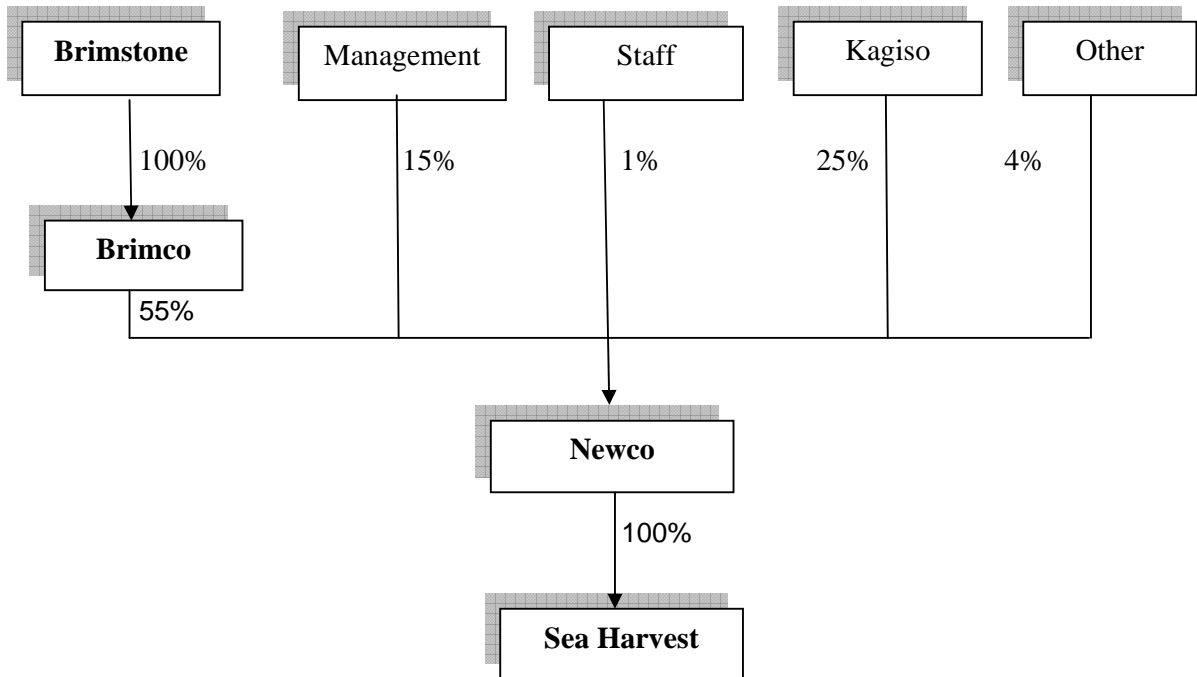
[16] According to the parties Brimstone will post the transaction hold a non-controlling stake in Oceana and together with the Kagiso Group will “step into the shoes” of Tiger as the controller of Sea Harvest.⁷ Tiger will remain as shareholder in Oceana with no stake in Sea Harvest. Although the transaction will to some extent reduce the cross shareholding problem it is not totally removed, since Brimstone remains a shareholder in both and retains the right to appoint directors to both of Sea Harvest and Oceana’s Boards. See pre-merger and post merger diagrams of Sea Harvest below.

Diagram 1: Sea Harvest’s shareholders before the transaction



⁷ The Commission disagrees with the merging parties and is of the opinion that Brimstone through a voting pool agreement will jointly control Oceana with Tiger.

Diagram 2: Sea Harvest's shareholders after the transaction



[17] Brimstone alleges that as a minority shareholder it does not control Oceana and can therefore not influence its decisions. The Commission argued that the voting pool agreement between Tiger and Brimstone, regarding their common shareholding in Oceana, gives the two firms the ability to jointly control Oceana. Although this arrangement did not come about as a result of the transaction, and indeed existed prior to the transaction, the merging parties nevertheless decided to cancel the voting pool agreement save for the pre-emptive rights in regard to the sale of shares. It is unclear whether this formal cancellation of the agreement eliminates concerns of possible co-ordination. With Brimstone as a controlling shareholder in Sea Harvest and a significant shareholder in Oceana – its stake in Oceana is worth more than its stake in Sea Harvest – the incentives to co-ordinate between the firms is still retained. Even if co-ordination does not take the form of price collusion it could be used to enforce a market division – e.g. Sea Harvest would focus on hake and Oceana on pelagic.

[18] However as the merger does not establish or strengthen the possibility of co-ordination – it is not a merger specific concern. We nevertheless advised Brimstone during the course of the hearing to try to eliminate the potential for problems in this regard.⁸

Public Interest

[19] The transaction does not raise any significant public interest concerns.

N Manoim

27 May 2009

Date

D Lewis and U Bhoola concurring.

Tribunal Researcher: R Badenhorst

For the merging parties: Adv Mike van der Nest instructed by Edward Nathan
and Sonnenbergs

For the Commission: Hardin Ratshisusu

⁸ See our decision in Main Street 333(Pty) Ltd and Kumba resources 14/LM/Feb06 at paragraph 73 - 78.