

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 54/LM/Jul09

In the matter between:

Remgro Limited

Acquiring Firm

And

VenFin Limited

Target Firm

Panel : N Manoim (Presiding Member) A Wessels, (Tribunal Member),
and M Mokuena (Tribunal Member)

Heard on : 4 November 2009

Order Issued : 4 November 2009

Reasons Issued: 1 December 2009

Reasons for Decision

Approval

[1] On 4 November 2009, the Tribunal approved with conditions the merger between Remgro Limited and VenFin Limited. The conditions are contained in Annexure "A" to our order issued on that day. The reasons for approving the transaction with conditions follow.

The parties

The primary acquiring firm

[2] The primary acquiring firm is Remgro Limited ("Remgro"), a public company incorporated under the company laws of the Republic of South Africa and is listed on the JSE Securities Exchange. Remgro controls various companies locally and internationally. The list of subsidiaries where there are overlaps or potential overlaps with the target firm are listed in the Commission's Recommendations.¹

¹ See Commission's Recommendations p8.

- [3] Remgro is controlled by the Rembrandt Trust (Pty) Ltd (“Rembrandt Trust”) which holds a significant interest in Remgro in the form of 100% of the B ordinary shares, each which has ten times the voting rights in Remgro compared to the Remgro ordinary shares. Rembrandt Trust is able to exercise an aggregate of 44.89% of the voting rights in Remgro. Rembrandt Trust is controlled by members of the Rupert Family including Johann Rupert and Hanielle Rupert.²
- [4] The ordinary shareholders who have significant voting interests in Remgro are Allan Gray (20.68%), the Public Investment Corporation (with 15.09%), Sanlam Investment Management (with 7.18%), Old Mutual Fund Managers (with 4.99%), and Coronation Fund Managers (with 4.15%).³

The primary target firm

- [5] The primary target firm is VenFin Limited (“VenFin”), a public company listed on the JSE Securities Exchange. VenFin also controls entities locally and internationally. The subsidiaries of VenFin relevant for purposes of this transaction are listed in the Commission’s recommendations to the Tribunal.⁴
- [6] VenFin is controlled by the Johann Rupert Trust and the Hanielle Rupert Trust which are capable of exercising 34% each of voting rights of the issued share capital of VenFin. The Johann Rupert Trust holds the 34% voting interest in VenFin through its wholly owned subsidiary, Business Venture Investments No. 1040 (Pty) Ltd (“Business Venture 1040”). Business Venture 1040 holds half of the B shares in Venfin, which carry ten times the voting rights of the ordinary shares. It also holds approximately 8.7% of the ordinary shares in VenFin.
- [7] The Hannelie Rupert Trust holds its 34% voting interest in VenFin through its subsidiary called Business Venture Investments No. 1027 (Pty) Ltd (“Business Venture 1027”). Business Venture 1027 holds half of the B shares in Venfin, which carry ten times the voting rights of the ordinary shares. It also holds approximately 8.7% of the ordinary shares in VenFin.

² Commission’s Recommendations p11.

³ Record p836.

⁴ See Commission’s Recommendations p9.

- [8] The ordinary shareholders in VenFin who have significant interests in VenFin are Sanlam Investment Management (with approximately 31.97%), Old Mutual Asset Managers (with approximately 3.91%), Liberty Life (with approximately 5.93%) and Tantalum Capital (with approximately 3.23%).⁵

Brief Background

- [9] During 2000, the Rembrandt Group was split into two holding companies to create Remgro and VenFin. In this transaction Remgro and VenFin are being combined again into a single entity under the control of Remgro. When the separation occurred in 2000, the various assets and investments were allocated between Remgro and VenFin on the basis that technology focused investments would be held in VenFin and the so-called traditional investments (like tobacco, financial services, mining and industry) would be held by Remgro. At that time, the creation of two listed companies, Remgro and VenFin, was intended to allow investors to spread the risk of their investments between the two companies.

- [10] The Rupert family has significant interests in both Remgro and VenFin. Rembrandt Trust, which is controlled by the Rupert family currently owns a significant percentage of shares in Remgro and VenFin. The Johann Rupert Trust and the Hannelie Rupert Trust together indirectly hold the majority of shares in VenFin. Mr Johann Rupert is a director of the Rembrandt Trust which owns all the issued unlisted B ordinary shares in Remgro; he is also the Chairman of Remgro and the non-executive Chairman of VenFin.

Rationale

- [11] The primary acquiring firm has given four reasons as the rationale for this transaction, namely:
- a. The injection of potentially high growth VenFin assets to complement Remgro's assets;

⁵ Record p836.

- b. Remgro will have increased exposure to unlisted investments;
- c. Conflicts of interest will be reduced particularly in South Africa;⁶
- d. Remgro will benefit from VenFin's wider corporate memory, manpower and ability to exploit short-term opportunities.

[12] The primary target firm has submitted that the rationale for entering into this transaction is twofold. First, VenFin shareholders will benefit from increased liquidity of shares and access to capital. Second, management time and cost will be reduced when VenFin becomes a wholly owned subsidiary of Remgro

Overlapping Activities

[13] Both Remgro and VenFin are investment holding companies and have invested in a wide range of assets to numerous to enumerate in this decision. However, notwithstanding the original 2000 rationale for separating the investment focus of the separate companies, they have landed up holding some interests in businesses that compete in similar markets. It is to these that we will turn our attention. The Commission has identified these overlaps in the market for DC power systems, radio broadcasting, media content, digital advertising sprints and stolen vehicle recovery together with fleet management.

DC power system

[14] In the DC power systems market, Remgro has an indirect interest in Battery Technologies (Pty) Ltd ("Battery Technologies") through Kagiso Ventures Limited's 25.1% shareholding in Battery Technologies.⁷ VenFin holds a 96.2% interest in Dartcom (Pty) Ltd ("Dartcom") through its wholly owned subsidiary, VenFin Technology, and holds a 30% interest in CIE Telecoms.

⁶ See p8 of Merging Parties' Competitive Report.

⁷ Remgro's wholly owned subsidiary called Industrial Partnership Investments Limited, has a 37% interest in Kagiso Trust Investments ("KTI"). KTI in turn has a 100% investment in Kagiso Ventures.

Radio broadcasting

[15] In the radio broadcasting market in Gauteng, Remgro has indirect interests in Kaya FM and Jakaranda FM through Kagiso Media, a company in which KTI has a 50.1% interest. Kagiso Media holds 80% interests in Jacaranda FM and 50% of the preference shares and B shares in Kaya FM. VenFin, through VenFin Media Investments, has a 31.5% interest in Sabido and enjoys negative control by virtue of its veto rights over strategic decisions. YFM is a wholly owned subsidiary of VenFin.

Media content

[16] Remgro controls Urban Brew through its indirect shareholding in Kagiso Media. Kagiso Media has a 50.15% shareholding in Urban Brew. Kagiso Media is 50.1% owned by KTI.

[17] VenFin indirectly controls Sasani Africa (100%) and its subsidiaries, as well as Natural History Unit (100%), Dreamworld (39.58%) and Cape Film Studios (45%), through Sabido Investments (Pty) Ltd ("Sabido"). VenFin Media Investments holds 31.5% in Sabido and has veto rights over strategic decisions of Sabido.

Digital advertising sprints

[18] Remgro, through KTI's 50.1% in Kagiso Media holds an indirect interest in Mobile Alliance. Kagiso Media holds a 50.1% interest in Mobile Alliance. SAIL is 33.5% controlled by VenFin Media Investments, which is a wholly owned subsidiary of VenFin.

Stolen vehicle and fleet management

[19] Remgro has an indirect shareholding of 12.5% in Mix Telematics through Kagiso Strategic Investment, a subsidiary of KTI. The Kagiso group does not have control over Mix Telematics, since they appoint only one of ten directors.

[20] Remgro also has indirect non-controlling interest in Tracker (a 17.5% economic interest) by virtue of its interest in FirstRand Limited and RMB Holdings.

Remgro has a non-controlling minority in FirstRand Limited (9.3%) and RMB Holdings (23.7%). FirstRand has a 32.5% interest in Tracker. The parties submitted that the directors of FirstRand that sit on the board of directors of Tracker are not Remgro directors.

- [21] VenFin has a 31% interest in Tracker (through subsidiaries) and the right to appoint three of the nine directors. The parties submitted that VenFin does not have control or any minority protection in Tracker.

Analysis

- [22] VenFin and Remgro are not operating companies. Rather they are investment holding companies which invest in operating companies or to complicate matters further, invest in other companies that invest in operating companies.⁸

- [23] For this reason it is necessary to delve deep into corporate structure to identify operating companies where overlaps may occur between companies in which Remgro and VenFin respectively were invested pre-merger. As noted above, the Commission has done this exercise and identified those firms which fall into this category.

- [24] The analysis is complicated by the fact that in most cases the economic interests of Remgro and Venfin are small, may be held through different entities and questions of the degree of control it can exercise over the operating companies are opaque without a far more detailed factual enquiry in each case.

- [25] The Commission proceeds on the assumption that the acquiring firm will be able to exercise a degree of control be it sole or joint over the operating companies in question and examines whether this would lead to possible post merger co-ordinated effects.

DC power system

- [26] The target company in this market, Dartcom, is an insignificant player in that market; it only has a 2% share of the market and its primary business is not in

⁸ Eg Kagiso Trust Investments in which Remgro has a 37% stake which is itself invested in other operating companies or companies that invest in operating companies.

DC power systems. Its primary business is that of fibre optic cables. Battery Technologies, the acquiring firm, has a market share of 20%. The market share increment as a result of this transaction is 2%. The Commission submitted that collusion in this market is unlikely as there are many alternative players in the market, including First National Batteries (30%), Saab Grintek (28%), and Contract Kitting (20%).

Radio broadcasting market

[27] The Commission concluded that Kaya FM, Jacaranda FM and YFM are not competitors. YFM is different from Jacaranda FM and Kaya FM and should those radio stations collude, it is likely to be unsuccessful, as the advertisers view them differently and there are significant differences in the demographics of their target audience and licensing conditions.

Media content

[28] The market shares of the merging parties will be less than 6% post merger. The Commission contended that collusion in that market is unlikely given the small market shares of the merging parties in the market for studio and content production. In addition, approximately 95% of that market is held by other players and competition is high in that market.

[29] In addition, Natural History Unit, a VenFin subsidiary which has less than 1% of the market, is not active in (i) the production of specialist business and government educational videos that are produced by Remgro Subsidiaries (Kagiso TV) and (ii) the audio content produced by Kagiso TV and Urban Brew (jingles and soundtracks), but instead produces media contents in relation to wildlife, travel and cultural documentaries primarily targeted at the export market.

Digital advertising sprints

[30] The merging parties only have three contracts and they compete with many international competitors and local competitors. There are other credible market players other than the merging parties and these include Stella Vista and Megaview, with eleven major contracts in South Africa, and TGI Systems and

Worldwide Sports, with three major contracts and ADI TV which has one contract.

Stolen vehicle and fleet management

[31] The Commission submitted that Tracker and Mix Telematics (which trades as Matrix), do not have an incentive to collude and any attempt to coordinate on raising prices would result in customers moving to other competitors such as Netstar, Cartrack and Digicore. The Commission added that no significant information exchange occurs as a result of the merger given that Remgro does not have direct board representation in Mix Telematics, but Kagiso Strategic Investments has one member sitting on the board of Mix Telematics.

[32] In four out of the five cases the Commission is persuasive on the point that post merger co-ordination is unlikely and if attempted is unlikely to be successful. More concern exists in respect of the vehicle tracking and fleet management markets. Despite the Commission's conclusion on this market which we refer to above, the Commission concedes that co-ordination through information sharing is possible given the nature of the industry, its high levels of concentration and the fact that the two firms in question may have between them more than half the market. There is at present a case before the Tribunal in which the Commission alleges that Tracker and Matrix together with another rival, Netstar, were involved in co-ordinated conduct to set standard for the industry in order to exclude rivals from the SVR market. In those proceedings the firms in question deny the allegations. For the purpose of this proceeding we can only have regard to the existence of allegations not whether they are established. During the course of its investigations, the Commission interviewed Netstar which alleged that Tracker and Matrix were involved in a tender in which they were two out of the three firms that tendered and raised the possibility of the merger facilitating collusive tendering.⁹ Again this is only an allegation and it has not been further investigated by the Commission.

[33] Although the Rupert family, the ultimate controller of both companies, could merely be said to arranging their investments from two vehicles into one, and hence on this argument the merger may not change the status quo, the fact is that different personnel operate below them in the management of the

⁹ Record p625.

investments, who will now be aligned into one vehicle and which may make information flow at the coal face more likely or easier to arrange than pre-merger.

[34] For this reason, as a matter of comfort, the Commission sought and obtained a letter of undertaking from Remgro's chief executive the essence of which was that Remgro would use its best endeavours not to be a conduit for information flow between the firms concerned.¹⁰

[35] The Commission did not however seek to make the undertaking a condition of approval. We queried this at the hearing with the Commission and the merging parties. Our concern was that if the undertaking was cardinal in disincentivising Remgro from serving as a conduit for information sharing in the SVR market, then the undertaking needed to have teeth. Without making it a condition of approval and thus activating the provisions of the Act in the event of a breach it was in our view of dubious utility.¹¹

[36] Whilst we raised with representatives of the merging parties how information sharing would be managed post merger, we did not find much comfort from their answers. Although the representatives stressed that no information sharing would take place they did concede that shareholder requests for funding might be transmitted to some level in Remgro where persons concerned would be party to information from rival companies. We were not convinced that a procedure exists presently for dealing with this situation and other than mention of overlapping investments at one stage in the banking sector it does not seem to have been a problem the acquiring firm has had to confront as yet.

[37] After raising the issue the merging parties and the Commission agreed that the undertaking could be made a condition of approval. This has obviated the need for us to make any further enquiry into the possibility of the merger increasing co-ordination post merger in the SVR market. The present condition will serve

¹⁰ As the undertaking is replicated in Annexure "A" to our order on the same terms it is not set out here.

¹¹ The Act provides that the competition authorities with remedies in the event that a merger is implemented in a manner contrary to any conditions imposed upon it. See for instance sections 15, 16(3) and 59(1)(d)(iii). No such provisions exist to provide for a breach of an undertaking that is not made an order.

to ensure that Remgro adopts proper procedures to avoid information flow between the firms that may be potentially anticompetitive.

[38] In our view, this eliminates any potential concerns that the merger may bring about. Let us be clear on our approach. We have not found that the merger will make co-ordination more likely or that there has been a history of co-ordination. We have only found that this is a matter that would have otherwise required further investigation, but given the undertaking offered to the Commission and which we have now made a condition, we would not need to do so as the condition adequately addresses the information flow concern.

[39] The merger raises no public interest concerns and is approved subject to the condition set out in Annexure A to our order of 4 November 2009.

N Manoim
Tribunal Member

1 December 2009

DATE

A Wessels and M Mokuena concurring.

Tribunal Researcher : R Kariga

For the merging parties: J Gauntlett SC, instructed by Cliffe Dekker Hofmeyr Inc

For the Commission : E Ramohlola and L Tshigomana (Mergers and Acquisitions)