COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 75/LM/Oct02

In the large merger between:

Coleus Packaging (Pty) Ltd

and

Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited

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Reasons for Decision: non- confidential

On the 27 January the Competition Tribunal approved, subject to certain conditions, the acquisition by Coleus Packaging (Pty) Ltd, a wholly owned subsidiary of South African Breweries Limited (' SAB') of the Rheem Crown business, a division of Highveld Steel and Vanadium Ltd, which is engaged in the manufacture and supply of bottle crowns.

Procedural Background

This merger was notified to the Commission on the 19 August 2002. On the 31 October 2002 the Commission recommended that the merger be prohibited.

A pre-hearing conference was held on the 9 December 2002. At that stage the Tribunal was advised that there were various firms who objected to the merger and that one of the objectors, MCG (Pty) Ltd ('MCG'), a competitor of the target firm, intended bringing an application to intervene in the proceedings. The Commission indicated that the other objectors, Guinness UDV South Africa (Pty) Ltd ('Guiness UDV') and Distell Limited ('Distell'), competitors of the acquiring firm SAB, had given statements to the Commission and were to be called as witnesses at the hearing.

The parties and the Commission then prepared for the hearing and exchanged witness statements.

No application for intervention was received from MCG. However, at the commencement of our hearing on 21 January 2003, the parties advised us that SAB had entered into a procurement agreement with MCG, and that this had alleviated MCG's concerns about the merger. (A copy of this agreement, which we analyse more fully later, is annexure 'A' to our order.)

The hearing commenced and we heard testimony from Maarten Van Hoven, the Commission's investigator, Mr John Reilly the Group Purchasing Manager of Distell, and Mr Grant Wall, his counterpart at Guinness UDV.

During the course of Mr Wall's cross-examination by Mr Unterhalter, counsel for the merging parties, it became apparent to us that Guiness UDV was not opposed to the merger, provided certain conditions were imposed, and that SAB for its part was willing to give certain ' comfort' undertakings to the customers of Rheem. We suggested that the merging parties consider proposing certain additional conditions to the approval of the merger to meet the concerns of customers of the target firm.

This the merging parties did, and after a series of negotiations with their customers and then the Commission, we were presented with a draft order for our consideration. The order was acceptable to Mr Wall representing Guinness UDV. It was also largely acceptable to the Commission who had also consulted with other customers of Rheem on its contents. The Commission and the parties had a fundamental difference with one term of the proposed conditions. The Commission wanted to impose a condition that SAB be required to sell control of Rheem within 3 years of the merger. SAB, whilst willing to undertake to sell a minimum of 40 % of the firm's equity to an empowerment shareholder within 2 years, was unwilling to commit to a time period to dispose of its controlling interest, although it insists that this remains its long- term intention.

The Commission and the parties agreed that they would each motivate their respective formulations for our consideration, but were otherwise in agreement on the remaining content of the order.[1] The Commission indicated that on the basis of the terms of the draft order, with the rider proposed by them requiring a sale of control within 3 years, it would no longer oppose the merger. The upshot was that on the second day of the hearing both sides had moved from their initial 'absolutist' approach to the merger and agreed to recommend to us that it be approved conditionally on the terms proposed in the draft order.

[1] This now appears in clause 2 of the order where we have adopted the parties' formulation for reasons that we explain below.

After hearing evidence from three further witnesses, Luigi Matteucci of Highveld, Mike Short and Andrew Wolf of SAB, we adjourned the proceedings to consider our order. [2]

Our proceedings had been slightly truncated as a result and we did not hear the oral testimony of the expert witnesses of either side nor what we suspect might have been a lengthier examination of witnesses who had testified after the proposed order had been put to us.[3]

OUR APPROACH

In this case, as we have mentioned above, the parties and the Commission had with the exception of one clause, reached agreement on the conditions that should be attached to the approval of the merger. If this was a restrictive practice case, not a merger, all the Act would then require of us would be to approve the terms of the order. [4] We would not be required to come to our own conclusion on the evidence. No such mechanism exists in merger cases, as the Tribunal is obliged in terms of section 16 to:

> *"..consider the merger in terms of section 12A, and the recommendation and the request, as the case may be, and within the prescribed time…"*

Nevertheless, for the same reason that consent orders are seen as desirable in restrictive practice cases – inter alia, that they curtail proceedings and encourage settlement of disputes – we should try and encourage this practice in mergers without abdicating our adjudicative function.

For this reason we have taken the approach in this case that although the hearing of oral evidence was not concluded as originally contemplated, we nevertheless had sufficient evidence of the anticompetitive effects, that had been alleged. Further hearing would have only served to test whether these allegations were sustainable, as the parties challenged some of these conclusions in their filings. Nevertheless we take the parties willingness to agree to propose conditions as a concession not to challenge the correctness of the allegations. [5]

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[2] The evidence of these three witnesses was handled on a less formal basis than the previous witnesses, as they were largely there to respond to certain issues the Tribunal sought clarity on.
[3] By lengthier we mean if we were still being asked to choose between the options of an absolute prohibition (the Commission) or unconditional approval (the parties).
[4] See section 49D.This is not to suggest that the Tribunal acts as the proverbial rubber stamp in section 49 D proceedings, but rather that it is not obliged to come to an independent conclusion on the merits.
[5] In fairness to the parties it has to be pointed out that the concession to accept conditional approval is tactical i.e. in order to speed up the resolution this matter and did not entail an acceptance by them of the correctness of the Commission's contentions.

Given this development our approach in this decision is to assume that the allegations of anticompetitive effects have been established and then to assess whether the proposed remedy adequately addresses the harm alleged. In this way we give effect to the efficiency of the proposed order without abandoning our discretion to one of simply approving a consent order.

It was for this reason that the Tribunal advised the parties and the Commission on adjourning, that if we did not feel satisfied with either of the proposals concerning the consent order, we would advise them and continue the hearing.

We are satisfied that the consent order as proposed by the parties is adequate to ameliorate any anticompetitive effects brought about by the merger. We explain below why we have come to this conclusion, and in particular why we have preferred the parties' formulation of clause 2 to that of the Commission.

Background

Rheem's business is very simple. It takes sheets of tin plate and transforms them into crowns.[6] The crowns serve as closures on glass bottles, which contain either soft drinks or alcohol. The crowns are either of a twist-off or pry-off variety. The physical dimensions and decorations on crowns vary, depending on the specifications of a particular customer.

The crowns are then packed and delivered in large volumes to the customer, typically a beverage manufacturer. The customer is responsible for inserting the crowns on the bottles, a process known as crimping.

The cost of a crown is negligible in relation to the total cost of the beverage.[7] The manufacturing process whilst requiring expensive machinery is not unusually complex. So why are beverage manufacturers so exercised by this merger?

The answer is that the mundane aspect of the crown belies its importance to the product it covers.

A poorly made crown may inhibit the high speed crimping process and thus delay a production line at great cost.[8] It can also detract from the quality of the finished product if it releases pressure from the bottle leading to premature decay of the product. Furthermore, as crowns are also often part of the get-up of the product, their physical appearance must conform to the specifications given by the customer.

[6] Crowns are what the layperson colloquially refers to as bottle tops.
[7] Crowns cost 2 to 3 cents. For SAB the cost represents approximately 0,5% of the resale price of a quart of beer.
[8] See for example the letter from Lesotho Brewing Company to Rheem, dated 18 February 1999,where they complain of huge losses due to uncrowned filled bottles. (Record page 687).

The crown manufacturer needs to be capable not only of conforming to the technical and decorative requirements of the customer, but also of delivering in time, particularly for product promotions, where deadlines are short.

Given that their strategic value exceeds their cost, beverage manufacturers pre-occupation with the source of supply is then not surprising.

Beverage manufacturers are as vigilant about their other sources of supply .In 1998 our predecessor, the Competition Board, considered a merger between Nampak Ltd and Crown Cork SA (Pty)(Ltd) a manufacturer of cans and crowns. The merger was opposed by Coca Cola SA, but not by SAB.

Although the overlap in that merger involved metal cans, and not crowns, the following observation of the Board is at least indicative of the buying power of the beverage manufacturers, that as we discuss later may be a feature of the market for crowns as well.

> *" The applicants [i.e. Nampak and Crown Cork SA] aver that the beverage can industry has two dominant customers, namely Coca Cola and SAB, who between them control the purchase of eighty- five percent of cans provided and both require competitive pricing. Nampak's prices to both have been below CPI and well below the customer's own price increases for filled products."*[9]

The Board report notes that at that time (1998) there were only two crown producers in the country, Crown Cork SA having 65 % of the market and Rheem SA having 35 %. The report further notes that the dominant customer is SAB. Just how dominant we later see.

Nampak, we are advised, found the crown business unsustainable, apparently because they were unable to agree on the terms of an acceptable supply agreement with SAB. This led SAB to enter into a five- year supply agreement with Rheem SA in 1999. The power of SAB becomes clear when we note that according to Rheem, for the year ending 2000 its share of the market was now 74 %, whilst Crown Cork's had declined to 24%. Not surprisingly Crown Cork exited the market in April 2000 and for a short period Rheem was the only local manufacturer.

Rheem also has an ad hoc supply arrangement with Coca Cola South Africa. Coca Cola South Africa ('CCSA') is a subsidiary of the Coca Cola Company based in Atlanta Georgia. However, it negotiates supply arrangements centrally on behalf of other firms in South Africa who are its bottlers. There are several

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[9] Paragraph 25 of Competition Board Report number 71 entitled Investigation into the proposed transaction between Nampak Ltd and Crown Cork SA Ltd.

Coca Cola bottlers in South Africa, but by far the largest is ABI a wholly owned subsidiary of SAB.

We described the arrangement as ad hoc, as although CCSA and Rheem have been attempting to negotiate a supply agreement, negotiations were inconclusive and they entered into an arrangement based on an exchange of letters in 2002, in terms of which CCSA has awarded Rheem the supply of 400 to 500 million crowns to Coca Cola bottlers at an agreed price. The arrangement is for the period April 2002 to March 2003. Although this arrangement was subject to the firms entering into a mutually acceptable service level agreement by June 2002, no such agreement was entered into and the ad hoc arrangement effectively continues.

Exactly how influential ABI is in these negotiations is unclear. The Commission and MCG believe that they are, whilst the parties, avoiding the substance of ABI's relationship with CCSA, rely on the fact that formally CCSA, not ABI, negotiates with suppliers on behalf of all its bottlers.

In February 2001, a new player, MCG Industries (Pty)(Ltd) ('MCG'), entered the market. MCG has been in business in South Africa since 1957 as a packaging company but was not involved in the production of crowns. It had however supplied printed tin plate sheet to Crown Cork.

MCG had undergone some changes at this time. In December 2001, its controlling shareholder Zumtobel AG, had sold the business to a consortium that included empowerment firm Wiphold. Previously disadvantaged persons now hold 44,5% of the equity in the company.

According to SAB, MCG entered into the crown market at the behest of Distell, who, concerned that it would be left with one supplier after the exit of Crown Cork SA, guaranteed it' s business to MCG. [10]

Distell entered into a three-year contract with MCG. Since entering the market MCG has acquired a few other customers mostly soft drink manufacturers. It does a small amount of production for CCSA although it says that more business may become available from this source when CCSA's contract with Rheem ends in March this year. At our hearing Mr Wall from Guinness UDV indicated that they have started using MCG to a small extent to try them out.

Nevertheless MCG's production figures show that Distell is overwhelmingly its major client.

[10] Mr Reilly, who testified for Distell, was reticent about confirming this, but it seems probable that SAB's theory is correct. It is unlikely that once the market knew that SAB had given a five- year sole supply agreement to Rheem that any other firm would enter without the security of a major contract.

Relative to Rheem, MCG is however a minor player. If we disregard SAB's purchases, MCG has 41% of the market and Rheem 59 %. However once SAB is included, the picture changes dramatically – Rheem has 90% to MCG's 10%.

MCG is currently utilising only [confidential %] of its production capacity. KPMG, in a report prepared for MCG in October last year, forecasts that it will produce [confidential figure] units by the end of its next budget year, April 2003.Yet we are advised that its break even point is [confidential figure] units.[11] This volume is only obtainable according to the Commission, assuming SAB and ABI remain with Rheem, if MCG secures all the remaining domestic production. The Commission argues that this break-even figure does not ensure the minimum level of profitability that a firm would require in order for it to be worth its while to stay in the industry. If the Commission is correct, then given the size of the domestic market this will only be achieved if they win some volume from Coke and or SAB, the two largest customers for crowns in the market. [12]

With this background we turn now to the concerns that have been raised about the mergers effect on competition.

Analysis of Competition Concerns

There is no dispute among any of the participants about the relevant market in which Rheem operates. This is defined as the market for the supply of crowns for glass bottles. The market is defined as national. Although technically other products can be used as substitutes for bottle closures instead of crowns, plastic being an obvious example, these are not considered to be substitutes for the purpose of competition analysis due to pricing and other technical reasons.

The merger is a vertical merger – a customer, SAB is buying one of its suppliers.

We have previously held in the case of Mondi Limited and Kohler Cores and Tubes, a division of Kohler Packaging Limited[13], following the seminal work of Riordan and Salop – that vertical mergers can raise three possible concerns:

i. raising rivals costs by means of either input or customer foreclosure,
ii. ability to promote co-ordinated conduct between competitors, and
iii. ability of a vertically integrated firm to evade price regulation

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[11] MCG claimed a confidential interest in these figures. However, we note that the forecasted production figure is well below the break even-point.
[12] The merging parties submitted an expert report by Lexecon in which they question some of the assumptions contained in the KPMG report and suggest that MCG's break-even should occur at lower volumes, because not all its overheads are attributable to the production of crowns and appear to be utilised as well for its non-crown production.
[13] Tribunal case no. 06/LM/Jan02 quoting Michael H. Riordan and Steven C. Salop – Evaluating Vertical Mergers: A post Chicago Approach (Antitrust Law Journal Vol 63, 1995) page 551.

In this particular merger the evasion of price regulation is not relevant so we need take that no further. The possibility of co-ordination is something that we will examine, although neither the Commission nor the objectors raise this as a concern, correctly in our view. The real concern then is the incentive the merged firm would have to foreclose.

Customer Foreclosure

Both Rheem and MCG, its only domestic rival, produce crowns. Given that SAB is overwhelmingly the dominant purchaser of crowns and further the fact that its ownership of ABI, the key Coca Cola bottler, gives it enormous leverage as to where CCSA awards it supply contract, the acquiring firm exercises considerable market power as a buyer in the market for the production of crowns.[14] The recent history of the industry, which we set out above, is consistent with this observation.

SAB's acquisition of Rheem makes MCG's concerns that the merger may lead to it being foreclosed as a supplier because its competitor is controlled by the same firm that accounts for 78.2% of the current purchases in the market, entirely reasonable. If MCG has no prospect of being awarded a contract from SAB and/or CCSA then it is unlikely to be viable on its present volumes according to the KPMG report. Nor is it likely to embark on investment that might lead it to lower costs of production and hence make it a more formidable rival to the merged firm.[15]

MCG states that a nominal investment in production would enable it to expand its production capacity to meet all of CCSA's demand. MCG is unlikely to be able to enter the export market, where there are a number of firms considerably larger than it, unless it obtained sufficient domestic custom to enable it to invest in the necessary plant to lower its costs. Another disadvantage for any SA firm wanting to enter the export market is that they are unable to produce the considerably cheaper tin free crowns. This is because ISCOR, the only local supplier does not produce tin free steel.

The merger could lead to the foreclosure of MCG and hence its exit from the market leaving customers some of whom are SAB and /or ABI 's rivals with only one source of supply, Rheem.

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[14] The relationship between SAB and Coke extends beyond ABI. According to SAB's 2002 annual report, *"The Company's recent decision to partner The Coca-Cola Company in expanding into new beverage categories has had a positive effect with products gaining market share from competitors."*(Annual Report of SAB plc 2002, Record page 57) Some parties, Guinness UDV being one of them, also refer to the fact that SAB has a 30% interest in Distell. Mr Reilly from Distell denied that Distell was controlled by SAB.

[15] One of the more important scale benefits would be to get a volume rebate from Iscor, which it seems even Rheem was not able to get. (See page 560 letter from Rheem to SAB dated 5 March 1999.)

Apprehension about customer foreclosure is justified.

Input foreclosure

Guinness UDV and Distell are two major players in the alcoholic beverage market who source their crowns locally for the most part. Both firms sell products that require crowns which compete with similar offerings from SAB, by way of example fruit flavoured alcoholic beverages or as they are commonly referred to in the industry, FAB's. Distell currently does not make use of Rheem as a supplier but has in the past. Guinness UDV currently uses Rheem but has recently placed some business on a trial basis with MCG.

Both firms expressed a similar set of concerns.

If they relied on Rheem as a source of supply they feared –

- Price discrimination, with SAB being treated more favourably;

- Supply might be refused or restricted. For instance if the Rheem plant experiences production constraints it is probable that it will favour the customer who owns it at the expense of its other customers;

- Confidential business information about their production requirements might be made known to SAB who would then be able to respond accordingly. The production information would relate to inter- alia size of product runs and seasonal fluctuations. In particular they felt that this put them at a disadvantage in respect of new product launches as the crown manufacturer would have to have access to information where reaction time to ones rivals efforts is crucial. A firm innovating wants its rivals to have the shortest possible time to react, as it maximizes it gains during the period before its rivals have reacted. If SAB has access to this type of information prematurely, it means that they can respond more quickly than they might otherwise have.

- The FAB market in which they compete with SAB is a crucial growth area where new marketing initiatives are typical and response times to market changes crucial.

- Concerns that SAB may not have the same interest as they do in introducing innovation to Rheem's technology particularly as this is not part of SAB's core business.

If they relied on MCG as their only source of supply they would be faced with a single supplier who could raise prices above the competitive level knowing that

the firms' had no domestic alternative. Furthermore MCG has only recently commenced the production of twist off crowns and, at least in the opinion of Mr Wall from UDV, have no track record yet. He also does not consider pry–off crowns as a substitute for twist-off crowns. Hence vulnerability to MCG as the only source for domestic supply is not merely a price issue.

Both firms explained that whilst they had had some experience of importing crowns this was not an attractive alternative. Firstly, unlike SAB, their volumes were too low to secure them attractive contractual terms from an offshore manufacturer. Secondly, on their volumes, imports were more expensive, and thirdly, due to the need to ship these goods, they are vulnerable to the vicissitudes of transport logistics. All this impacts on their ability to launch new product, where lead times need to be reduced if a product needs to come to market before rivals can respond.

ABI, not surprisingly did not oppose the transaction. Yet its reason for doing so justifies the concern expressed by the other firms. In a letter to the Commission ABI states:

> *" As major customer, ABI has no concerns that it would hamper its own ability to compete. Neither Coleus packaging nor SAB compete with Coca-Cola or its bottlers in the market place, nor can we foresee a situation where we might be denied access to limited supply.* (Our emphasis)

Again, we are satisfied that apprehension by SAB's rivals about the possibility of input foreclosure is justified.

Collusion

As mentioned earlier this is sometimes one of the concerns in relation to vertical mergers although neither the Commission nor any of the other competitors thought it relevant here. We would agree with this. Given the vast difference in size between the firms, the fact that the business is non-core to SAB's activities, we see no reason why Rheem would have any incentive to collude with MCG and much to risk to both it and its parent, if it did.

Market analysis

When a merger is likely to substantially lessen competition we have two possible remedies. We may prevent a merger or where appropriate approve it subject to conditions that serve to ameliorate the anticompetitive effects.

Initially, as we noted the Commission had recommended that we prohibit the merger. The parties response to this was that if the merger was prohibited Highveld would exit the market and sell the plant to an overseas buyer. Since SAB was not prepared to be dependant on one local supplier, which in any event

could not meet its needs at present, it would in all likelihood have sourced plant from overseas and set up an in-house crown division to meet its needs. It is not difficult to see why this would be the most perverse of outcomes.

Although the Commission challenged whether Highveld had tried sufficiently hard to find a local buyer we have no reason to believe it did not. [16]

It is not hard to see why. The structure of the market is such that any firm that hopes to remain viable needs to source work from SAB. With SAB currently requiring a sole supplier it is powerful enough to impose a sub-optimal contract on its supplier.[17] This was precisely the case with the Highveld contract where Rheem' s margins were under continual pressure so that it had no incentive to invest. Accordingly it was never able to lower its production costs and as the contract progressed, it experienced ever-declining returns.[18] Highveld also never saw Rheem as part of its core business so its enthusiasm for the division diminished with its returns. Staff morale suffered and key personnel were lost. The decision to exit became inevitable.

We are satisfied that prohibition is not a viable option given the current market structure as it is likely to lead to the exit of Rheem.

Conversely approving the merger will allow SAB the opportunity to introduce the efficiencies into the Rheem business, which it could not achieve in terms of its contract. As owner it will have incentives to allow Rheem to invest, which it never had as a customer, and it is probably, at the moment, the only owner to have this incentive.[19]

<u>The proposed conditions</u>

The proposed conditions have been designed to deal with all the foreclosure concerns raised by MCG, Guinness and Distell. All parties were consulted and were part of the negotiations.

The details of the conditions are contained in our order and need not be repeated here.

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[16] Highveld produced several letters from firms who had been approached and who said 'thanks but no thanks', accounting variously for their coyness from Robert Mugabe to a lack of funds

[17] This also explains why even a significant force in the packaging industry such as Nampak was reluctant to purchase Rheem when it was on offer.

[18] The agreement was subject to an escalation clause that provided that certain costs could only escalate at 87% of CPI. Without being able to reduce its production costs, Rheem's returns were decreasing annually.

[19] As the parties economic report makes clear, any party other than SAB that invested to reduce Rheem's marginal cost of production was unlikely to receive the full benefit, because SAB is in a position to appropriate any increase in profits.(See section 5 of the Lexecon report, Record page 774).

The supply contract that SAB has entered into with MCG will ensure that that firm has the minimum scale that it requires to invest in its' plant and become competitive, provided that it retains its other business. The agreement lasts for three years and although MCG is vulnerable to losing this business to Rheem thereafter, it would be inappropriate to make this condition for any longer period.

The conditions inserted for the benefit of Rheem's customers all address the concerns raised by Guinness UDV and Distell and in our view are sufficient. They provide for a mechanism to protect confidentiality, inhibit price discrimination and ensure supply. They even go further to deal with plant innovation.

The other benefit of these conditions is that they make Rheem a real alternative for SAB's beverage rivals, so they are not faced by MCG as a sole supplier. If MCG is aware that its customers have a viable alternative it will ensure that it will be more competitive in tendering for their business.

The one area of dispute between the Commission and the merging parties was whether, as part of the conditions, SAB should be required to sell its control of Rheem rather than a minimum stake that falls short of control.

The Commission argued that if SAB's rationale for the merger was to turn the company around for the purpose of selling it on to an empowerment group then they had ample time to do so, within the three- year period the Commission was proposing. SAB protested vehemently that they could not be certain how long they would need, and should not be stampeded into a fire sale to meet an arbitrarily imposed deadline.

To some extent the Commission has succeeded in calling SAB's bluff. Clever public relations by SAB had suggested that the rationale for the deal was just that – to quote a letter addressed to Mr Wall from Mr Short of SAB

> *"In short therefore, we feel that the purchase of Rheem by SAB will allow:..Significant progress in terms of further black advancement in South Africa through selling the company on to black ownership after turn around."*[20]

In his line of questions to witnesses counsel for the merging parties put forward the same proposition:

"ADV UNTERHALTER: There's one other feature of this merger, which you may know of, but perhaps you don't, which is that SAB is acquiring control of Rheem in order to undertake investments and bring it up to spec as far as its own requirements for crowns are concerned. But it wishes to do so in order then to

[20] See letter from Mike Short to Mr Wall , entitled "SAB purchase of Rheem Crown", undated.

on-sell it to a black economic empowerment company. So it means only to hold the company for a period of time. Were you aware of that? "

The Commission could be forgiven for holding SAB to what appeared to be its stated position.

Be that as it may, we must decide whether the condition suggested by the Commission is necessary or viable to cure the anticompetitive effects.

In our view forcing SAB to sell prematurely would not cure the problem. It would mean that the new owner would be forced to accept an unfavourable contract from SAB, likely to be as onerous as the one Rheem had under Highveld's stewardship, and we would soon be back where we are today with another controlling shareholder wanting to sell.

It would be better to have the company under SAB's control, but still subject to the conditions imposed by this order, than for it to *de facto* control the company by contract without having to be subject to these conditions.

It must be remembered that except for the contract with MCG, which is of a 3-year duration, the remaining conditions remain in force for so long as SAB has control.

These conditions, together with the obligation to sell at least 40 % to an empowerment partner in 2 years, are sufficient incentive for SAB to dispose of its control sooner rather than later, but at least when it does so, it will be in terms of market driven, as opposed to regulatory driven, forces and for this reason the outcome is more likely to favour the formation of a genuinely independent firm rather than one that has to be constructed to meet an imposed deadline.

For this reason we have opted for the parties version of this clause in our order.

With the exception of this clause the conditions imposed are behavioural remedies. There is some scepticism amongst competition law commentators about whether this type of remedy works. Often it is suggested they are too difficult or too costly to monitor or that they involve the diversion of resources by the regulator from other areas where they could be more productively spent. In this case there is no ongoing burden placed on the Commission. The competitors of Rheem and SAB, who benefit from the conditions, are all large and sophisticated concerns, and will for this reason be well placed to police compliance. The Commission is not obliged to perform any ongoing monitoring of market behaviour. Its only function post merger is to receive reports from SAB detailing the progress of the intended rehabilitation of Rheem, a condition that it had requested.

A powerful incentive for the merged firm to comply with the merger conditions, is that amongst the remedies for non-compliance, is revocation of the merger or divestiture. For this reason we also required that that a breach by SAB of its contract with MCG, in respect of certain material clauses, would also constitute a breach of the merger conditions, and not just be enforceable at civil law.

We are satisfied that although the merger will lead to a substantial lessening of competition in the market for the manufacture of crown closures, the conditions imposed in the order will adequately ameliorate the anticompetitive effects.

Order

The merger is approved subject to conditions contained in the annexed order. A non-confidential version of our order is annexed to the public version. [21]

__________	11 February 2003
N. Manoim	Date

Concurring: D.H. Lewis, Prof. M. Holden

For merging parties: Adv Unterhalter on behalf of Bowman Gilfillan Inc ;

For the Competition Commission: Mr H Shozi Legal Services Division

[21] The confidential version contains production information relating to Rheem and MCG, which both firms have a legitimate interest in remaining confidential.

Order: non- confidential

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b), in the large merger between Coleus Packaging (Pty) Ltd ("Coleus") and Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited ("Rheem") and having heard the representatives of the parties and Commission: -

IT IS ORDERED THAT:

1. Whilst noting the intention of South African Breweries Limited ("SAB") to dispose of its control over Coleus, SAB shall dispose of not less than 40% of the issued share capital in Coleus to a black empowerment partner(s) suitable to SAB within two years of the date of this order, provided that the crown plant acquired by Coleus has been rehabilitated to the reasonable satisfaction of SAB. In the event that SAB considers that the plant has not been rehabilitated to its reasonable satisfaction, it shall make application to the Tribunal, on notice to the Commission, for an extension, and appropriate variation, of any of the conditions set out in this order. SAB and Coleus shall furnish the Commission with a written report on a six-monthly basis commencing on 1 October 2003 regarding the steps taken to rehabilitate the crown plant;

2. The supply agreement concluded between SAB and MCG Packaging (Pty) Ltd ("MCG"), entered into on 21 January 2003, shall come into force by 31 March 2003, or such later date as may be agreed by the parties to such agreement. A material breach by SAB of the provisions of clauses 4, 5.6, 5.7 and 5.8 of that agreement shall constitute a breach of this merger condition. A copy of this agreement is annexed to the confidential version of this order marked **'A'**;

3. All employees and directors of Coleus shall be obliged to sign confidentiality agreements in relation to volume forecasts, new product launches and promotional activities of Coleus' customers, on the basis that a breach of such agreement would be treated in the most serious light which could lead to the dismissal of the employee concerned. Coleus

shall take all reasonable measures to ensure that confidential information, proprietary to its customers, and coming into the possession of Coleus or its employees, remains confidential within Coleus;

4. In the event that there are production stoppages or shortages, such that Coleus is unable to meet the full contractual requirements of all its customers, it shall reschedule its production on a non-discriminatory pro rata basis which will, inter alia, take into account issues such as the then requirements of existing customers, their volumes of purchases over the last twelve calendar months, and the then forecast requirements of customers for the next twelve weeks;

5. Coleus shall consider in good faith proposals from any customers or suppliers, which would have the effect of increasing the efficiency of the crown plant. Coleus will further undertake that appropriate steps are taken to ensure that its technology and performance is benchmarked against industry standards and that any technology interchange relationships which are reasonably necessary, are entered into;

6. Coleus undertakes that its ex works prices to customers in the South African market whose annualized volume of crown purchases from Coleus exceeds (confidential figure) crowns (based on the last audited financial year of Rheem or Coleus) shall not exceed the ex works prices charged to SAB by more than (confidential percentage), for crowns of a similar design and specification. In the event that the Commission, or a customer for whose benefit this condition has been imposed, wishes to verify compliance with this condition, Coleus shall procure such verification from its auditors in the form of an audit certificate. In addition, Coleus undertakes to ensure that all crown purchasers, to whom the above applies, are informed of the confidential contents of this clause.

7. The conditions set out above shall only apply until such time as SAB has disposed of its controlling interest, as defined in Section 12(2) of the Competition Act 89 of 1998, in Coleus.

__________ 27 January 2003

D.H. Lewis Date

Concurring: N. Manoim, Prof. M. Holden