COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 108/LM/Oct08

In the matter between:

DCD Dorbyl (Pty) Ltd Acquiring Firm

And

Globe Engineering Works (Pty) Ltd Target Firm

Panel	:	N Manoim (Presiding Member), M Mokuena (Tribunal Member) and N Theron (Tribunal Member)
Heard on	:	18 February and 02, 03, 04, 12, 13 & 16 March 2009
Order issued on	:	19 March 2009
Reasons issued on	:	30 April 2009

Reasons for Decision

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1. Order

[1] On 19 March 2009 the Tribunal conditionally approved the acquisition by DCD Dorbyl (Pty) Ltd of Globe Engineering Works (Pty) Ltd. The conditions are contained in annexure "A" hereto. The reasons follow below.

2. The Parties

[2] The primary acquiring firm is DCD Dorbyl (Pty) Ltd, ("DCD Dorbyl"). DCD Dorbyl is controlled by Investec Bank Limited ("Investec"), Reyapele Investments (Pty) Ltd and Management. Investec is the largest shareholder owning 47.3 % of the equity.[1] DCD Dorbyl is active in the ship repair market through DCD Marine ("DCD Marine").

[1] An empowerment company Reyapele Investments Pty Ltd holds37.47% of the shares and the remainder are owned by various members of the management team. See competitiveness report file page 41-2.

[3] The primary target firm is Globe Engineering Works (Pty) Ltd ("Globe Engineering"). Globe Engineering is controlled by Up-Front Investments (Pty) Ltd and West African Ship Repairs (Pty) Ltd. It is active in the ship repair market and industrial engineering.

[4] Prior to the merger the two firms had an existing relationship with one another through two joint ventures. The first, which has been in existence since 1972, is Nautilus Marine ("Nautilus"), a company which performs marine blasting and painting services. The other, is a proposed joint venture to lease the working area of a part of the Cape Town harbour, known as the A-berth. The outcome of this merger is that DCD Dorbyl acquires 100% of the issued share capital in Globe Engineering from its present controlling shareholder Globe Engineering Holdings.

3. Rationale for the transaction

[5] Both parties provide ship repair services in the Cape Town harbour. The broad category of "ship repair" can be further delineated into four categories, i.e. the repair of smaller ships, large ships, large oil and gas vessels and very large oil and gas vessels and structures. This market delineation will be dealt with more fully below.

[6] In terms of the rationale for the merger, the evidence put forward by the primary acquiring firm[2] was that it had made a strategic decision to develop an oil and gas repair facility in the harbour of Cape Town. This strategic decision has been taken as a result of the stagnation of the business of DCD Marine and financial losses suffered as a result.

[7] DCD Dorbyl indicated that although it had won some major international contracts in recent times (e.g. the repair of the Polaris vessel), it was not confident that the business would be sustainable if it did not have access to permanent staff and infrastructure to conduct such repairs in the future. In this regard, the special engineering expertise of Globe Engineering could be used in large projects. Furthermore, access to the A-berth facility in the Cape Town

[2] Mr Venter the managing director of DCD Dorbyl said: "*The fourth item was to develop an oil and gas repair facility, those were the 4 strategic actions that were taken to get out of this loss making"* - p. 592 of the transcript.

harbour would enable the merged entity to be able to market itself efficiently and to win large tenders in the oil and gas repair market.

4. Background to the hearings

[8] This merger has an interesting and complicated history. The ship repair industry in South Africa has been characterized by a series of joint ventures and attempted mergers. Some of the more recent relevant transactions are the formation of Dormac in 2000 (as a result of the merger between Dorbyl Marine and Fluid Contracting (Pty) Ltd)), the RJ Southey and Dormac merger in 2004, the aborted Dormac Marine and Globe merger in 2005, the acquisition of a controlling shareholding by Investec in DCD Dorbyl in 2007, and the acquisition of control over RJ Southey by a consortium led by Investec and the consequent divestment of the Investec shares in RJ Southey in 2008.[3] These transactions form the background to the current merger.

[9] During the Investec and RJ Southey transaction, the Commission found that Investec's rationale for this acquisition was to consolidate the marine business. The Commission argued that part of Investec's strategic objective was to invest in markets with high barriers to entry and that the merger was part of this strategy. The Tribunal ruled that the merger be approved subject to the divestiture of Investec of its entire shareholding.

[10] The current merger should therefore be seen against the background of increasing consolidation in the ship repair market and the concerns the Commission raised in the Investec/ RJ Southey transaction, around high barriers to entry. However, having analysed the market in the current case, the Commission concluded that despite high barriers to entry and the fact that the merger will result in the removal of an effective competitor, the merger is unlikely to substantially prevent or lessen competition and should therefore be approved. As stated by the Commission:

> *"Although choice will be reduced the Commission is of the view that the transaction will create an attractive firm with all the credentials to*

[3] See our decision in RJ Southey, case number 128/LM/Nov07.

be able to facilitate and conclude large oil and gas rig contracts for Cape Town".[4]

[11] The Commission seems to have recommended an approval without conditions because it took a narrow view of the ambit of the transaction. During the course of the Commission's investigation many competitors whom it interviewed, were concerned about the merging parties' rights to the A-berth.

[12] A-berth is a quay that is located at the entrance of the Cape Town harbour and although specifically designated for the repair of rigs can be used to repair other vessels. The Commission's interviewees were concerned that the merger might lead to rival firms being foreclosed from access to A-berth. The Commission was not dismissive of these concerns, but as it was of the view that the A-berth lease, which has not yet been finalized, was a separate notifiable merger, it considered that these issues could be addressed in the course of that notification.[5]

[13] The difficulty with the Commission's position is that the merging parties have never considered the acquisition of their rights to the A-berth as constituting a merger. They argued that the A- berth lease was not a notifiable merger and that if the issues surrounding their utilization of the A-berth were merger specific, the appropriate time was to raise them in the course of this hearing.

[14] This was what was before the Tribunal when we commenced our hearings into this merger on 18th February 2009. As we were not persuaded by the Commission's legal submission, we decided that the A - berth issue must be considered as part of the present merger, as it seemed to constitute a central part of the transaction, and we instructed the Commission to call as witnesses a representative sampling of the firms who had raised concerns. This then gave rise to a full merger hearing which ran for another six days, ending on the 16th of March 2009.

[4] See the Commission's Competitive Report, p. 58

[5] See the Commissions' Competitiveness Report, p 44: "Should these lease agreements come into effect for any reasons the Commission is of the view that these transactions are highly likely notifiable to the Commission and any potential competition concerns that might arise from these agreements will be addressed by the Commission".

5. Competition Analysis

5.1 Introduction

[15] In order to determine whether this merger will lead to a substantial prevention or lessening of competition, it is necessary to define the relevant markets and to examine each in some detail. However, market definition was not a contentious issue, as most parties agreed that the primary focus must be on the oil and gas repair market. Most of the evidence led dealt with the position of the other competitors in this market and how the merger would affect their ability to compete in the market for oil and gas repair.

5.2 Relevant markets

5.2.1 Ship repair

[16] The Commission delineated[6] the broader ship repair market into three broad categories, i.e. standard commercial shipping, extraction industry vessels and regionally based vessels. In subsequent analyses the Commission grouped "standard commercial" and "regionally based vessels" together and distinguished this from the other category "repairs on extraction industry vessels".

[17] This is therefore an acknowledgement that the oil and gas repair market is indeed a separate market from general ship repair. It is not necessary to apply more formal tests to this distinction, as it seems that it was common cause among both the merging parties and some of the competitors who testified, that this was indeed a separate market. In Dormac's submission to the Commission they explained this distinction as follows:

> "*Yes, ship repair services are different to repair services undertaken on oil and gas rigs. Although the two forms of repair services entail the same engineering disciplines …they are very different in respect to project timing, scope size, commercial requirements, quality requirements, etc. The basic difference between a ship and oil or gas*

[6] P. 17-21 of the Commission's Competitiveness report.

rig means that the work needed to repair and maintain them is different.

An oil rig is a platform from which deep sea drilling and extraction can be carried out in a fixed position whereas a ship is built to carry cargo and travel the oceans. An oil and gas rig is built to house people and extraction machinery whereas a ship is built to carry cargo. The result is that oil and gas rig repairs require specialist engineering skills associated with the machinery for deep sea extraction whereas ship repairs require nautical and maritime engineering skills associated with moving a ship which carries cargo". [7]

[18] It is also important to point out, as indicated by Mr Kelly of SA Five that the oil and gas market does not only consist of rigs.

MR KELLY: "Yes you would. I mean I think that also we've got to realize that when we're talking about oil and gas here, we're not only talking about rigs. We're talking about FSPO[8]*s that are also operating in the west coast of Africa that could also quite easily come to Cape Town. We're also talking about Sub-sea structures, which are built or fabricated on land and then taken to whichever well or block field that is oil fuel that's required for it.*

I think most of today and yesterday we were always talking about rigs in the oil and gas and I or SA Five don't only regard rigs as being oil and gas".

[19] The merging parties submitted that there are four relevant markets:

- **Smaller Ships** are those that are small in size, travel shorter distances and can be worked on the synchrolift dock;
- **Large Ships** are those ships that require to be docked in either the Sturrock dock or the Robinson dock, in Cape Town harbour, and fall into the category of classical ship repair jobs;

[7] Dormac's submission to the Commission dated 20/10/2008, page 1312 of the Record.
[8] Floating Production Storage and Offloading Vessel

- **Large Oil and Gas vessels** such as crane barges, pipe laying barges. The clients are international companies, typically operating off the West Coast of Africa. The jobs require access to the Sturrock dock (for below waterline repairs) and afloat repairs at one of the berths; and

- **Very large Oil and Gas vessels and structures** such as FSO's, FPSO's, jack-up rigs and semi-submersible rigs. The clients are again international companies, typically operating off the West Coast of Africa. These vessels and structures are repaired afloat at one of the berths.

[20] The first two markets listed above, i.e. smaller and larger ship repair, did not receive much attention during the hearing. The main reasons for this were the following:

- Although the market for ship repair is probably a local market, there are enough smaller players in this market;

- The merging parties have generally moved away from the ship repair market (due to their strategic drive towards servicing the more lucrative oil and gas market). The market shares of the merging parties in these markets were consequently low[9];

- There are enough facilities available at the harbour where these smaller projects can be carried out, e.g. any of the docks (Sturrock, Robertson, synchrolift, etc); and

- The market for larger ship repair was said to be a regional and probably an international market.

[21] On the basis of the above, there did not seem to be any real competition issues arising from the general ship repair markets.

5.2.2 Oil and gas vessels and structures

[9] Here it must be noted that the evidence of the merging parties' economist on market shares – percentage of the number of days in docks – was not entirely satisfactory. However, it is not clear that a different or better indicator of market shares would have yielded dramatically different results.

[22] The remaining two markets are the markets for large oil and gas vessels and very large oil and gas vessels and structures. During recent times, both the merging parties have increasingly shifted their focus to these two (lucrative) markets. We were not provided by market shares in these markets by the merging parties. It emerged during the hearing that it is not exactly clear how these two markets should be delineated and who the players in each are.

[23] The evidence led by the merging parties (both Mr Venter and Mr Blackbeard) was that there are only three players in Cape Town that can compete for the business of the very large oil and gas structures. These three being DCD Dorbyl, Globe and SA Five. Mr. Blackbeard spent quite some time during his testimony[10] pointing out that they have researched the market – mainly through contacting the SA Oil and Gas Alliance - and have found the market to be populated by these three firms only.

[24] Some competitors regard the delineation of the market into oil and gas repairs as erroneous. They maintained that the correct characterization relates to the type of services demanded by a customer seeking ship repair work. Since ship repair work entails a range of services, making different resource and skill demands of repairers, their view seems to be that it is the nature of the 'service', not the nature of the 'client' that determines the correct market delineation.

[25] Even if this view is correct, it does still seem that the nature of the customer has a bearing on the nature of the firms which can compete to serve them. We do not need however to come to a determination on this issue in order to come to a decision on the central competition concern in this merger, which is that of foreclosure. That issue is largely determined for us by the fact that the TNPA has determined that all oil and gas repairs in Cape Town harbour must take place in this berth and further that this berth's lay down area will be the subject of a ten year lease agreement.

[26] Thus firms competing to provide oil and gas customers with repair services will only be able to do so in the future from this facility, as stated by Mr. Claasen:

[10] See p. 513-516 of the transcript.

"I think what is important is to stick to the zoning of the port and I've just explained that the zoning in respect of A-Berth is very clear for the oil and gas industry..."[11]

[27] It is thus of less importance to determine whether a firm is one that provides electrical engineering services to vessels, including oil and gas vessels and structures, or whether one repairs the latter and provides as one of the services, the former.

[28] The competition issue remains the same – can the firm compete without access to the A-berth facility and if they cannot, what are the implications for competition post merger. A brief history of the A-berth and the merging firms' relationship to it, is necessary to appreciate the effect of the merger on access to this berth.

[29] The proposed utilisation of A-berth can be seen as the outcome of an alignment of two industrial policies then current. The TNPA wanted to use its berths in a more efficient manner in order to create the best return. This meant creating dedicated berths for particular industries such as container shipping. At the same time arising from the arms deal the government had imposed an obligation on successful bidders to make large scale investments into infrastructure.

[30] These investments referred to as offsets formed part of a program administered by the Department of Trade and Industry, known as the NIPA. One such bidder was MAN Ferrostaal, a large German engineering firm that had been a partner in a consortium for the supply of submarines to the South African Navy. It agreed to explore various possibilities for an offset program, and when its first proposal for a steel mill came to naught, the idea was suggested that it invest in improving port infrastructure.

[31] This idea met with its approval and those of the relevant authorities. This led to two investments in harbours in the Western Cape - one at Saldanha Bay and the other at the A-berth in Cape Town. The structure of the two investments was to be similar. MAN Ferrostaal's local entity, Ferromarine

[11] Page 61 of the transcript.

Cape (Pty) Ltd (Ferromarine) would enter into a main lease with the TNPA and agree to make the investment into improving the port's infrastructure.

[32] In respect of A-berth the investment was R60 million. In turn it would be given the right to sublease the particular facility to an operating company composed of local firms. The operating company would then generate turnover, which together with the original fixed investment, would be taken into account in assessing whether the offset obligations had been met. The task of setting up the structures fell to a company headed by Brian Blackbeard, a former naval engineer, who is also the managing director of Ferromarine.

[33] Two groupings were formed comprising of local firms one around Saldanha and one around the A-berth, they were to be the prototypes of the operating companies who would run the facilities once established. Each group commenced negotiations with both Ferromarine and the TNPA. Initially DCD Dorbyl was a member of both groups, although represented on the prospective operating companies through different divisions of the company.

[34] It eventually withdrew from Saldanha, leaving Grinaker LTA to become the sole constituent of the operating company. Although we were assured that the Saldanha project does not compete with A-berth, as the former has an emphasis on fabrication not repair, the minutes of meetings that designed the projects are filled with references of the need for the two projects not to compete.[12]

[35] That however is not an issue relevant to the consideration of the present merger, other than to illustrate the point that competition in the country is relevant to an assessment of this merger, despite the merging parties' suggestion that we should consider the large ship repair market as an international one. The concern that the two consortia might compete suggests that local competition for ship repair is considered possible by the industry players.

[36] The A-berth operating company has had a difficult history. Originally three companies were to comprise the membership of the operating company, i.e. the two merging parties and another ship repair company based in Cape

[12] See by way of an example File 3 page 201.

Town, SA Five. As we discuss more fully later, SA Five, seemingly at the behest of its overseas associate and controller, RBG, wanted either control of the operating company or nothing. Not having got the other partners to concede control to it, it withdrew leaving the operating company with two members, Globe and DCD Marine.

[37] With the merger, the operating company, once intended to be representative of the local industry, will have a single firm as its member. It is not clear whether this is a matter of concern for any of the project's stakeholders, but perhaps the elapse of time has made them reluctant at this late stage to introduce any new complexity. It has however made the project controversial in the opinion of local industry who claims that no proper process was followed in selecting members for the operating company. Whilst Blackbeard disputes this, he does concede that there was no public call for participation.[13]

[38] Whilst the fairness of the process is not relevant to our enquiry it has proved relevant to one aspect, because it explains why the A- berth joint venture is not yet in place. The TNPA has prepared a draft lease agreement with Ferromarine and seemingly negotiated its terms to both parties satisfaction. Ferromarine has in turn entered into a sublease with the operating company.

[39] There is as yet no agreement in place between the members of the operating company, but with the approval of this merger this may become academic. Thus a sublease has been signed, but not the main agreement, without which the former is of no force and effect. We were advised during the hearing that the reason that the TNPA has not yet signed the main lease is because it is awaiting a decision from the Minister of Transport to issue a directive to the TNPA in terms of the relevant legislation.[14]

[40] As we understood the rationale for the directive was that it would have the effect of exempting the TNPA from having had to comply with a public tender process.[15] It is not yet clear whether the Minister will decide to do so, and if so, when. In the interim we were advised that the A-berth has been leased

[13] Transcript, p. 444 – 446.
[14] Section 79 of the National Ports Act, no 12 of 2005.
[15] This all set out in a letter from Ferromarine to the Minister of Transport dated 12 January 2009, Exhibit B.

out to a rig owner for a large scale repair which will last several months – and that DCD Marine and Globe have tendered for some of this repair.[16]

[41] The implications for the merger are that the A-berth is a probable, but not yet inevitable, asset of the merging firms. We will approach the merger as if it is – this has been the approach of the merging parties. Thus pre-merger the two merging parties were members of an operating company that had exclusive rights to lease the A-berth working area for a period of ten years. It is not clear how this relationship would work between them. In their merger filing the merging parties stated that:

> *13.7.1 neither party has or will transfer its existing business (or any part thereof) to the joint venture company;*
> *13.72. both parties will tender independently and separately for ship repair contracts and they will not share information in respect of prices, costs and the like;*[17]

[42] The internal documentation discovered by the merging parties subsequent to the Commission's investigation reveals that this was never their intention and indeed they appear to have discussed the benefits of collaboration. It is thus most likely that even without the merger the firms would have approached customers as a single entity. This might suggest that the merger makes no difference in respect of A-berth – it was to be run as a single entity prior to the merger and the merger will not bring about any change in that regard.

[43] However the fact that the parties may have contemplated operating as a single entity does not mean they could have done so without considerable legal risk. The joint venture as contemplated may well have been considered collusive.[18] It is apparent from the papers we have had discovered that the parties were sensitive to this issue and had taken opinion on the issue and indeed even considered applying for an exemption in terms of section 10 of the Act.

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[16] Transcript 663.
[17] See merging parties' competitiveness report file 1 page 99.
[18] For instance one minute of the joint venture working committee refers to the need to develop a bid strategy in respect of each opportunity identified. File 3 page 332. See also minutes undated at file 3 page 227 where Venter remarks on the need to have a collaborative approach to avoid the duplication of bid costs.

[44] The fact that parties may have acted in an unlawful collaboration absent the merger, does not therefore mean that the merger makes no difference to its competitive effect. The approach we are adopting is that without an exemption such collaboration would have been collusive. We therefore make the presumption that even though the merging firms were the sole partners to a joint venture pre-merger, they would have had to manage the joint venture in such a way as to ensure competition between them was maintained.

[45] This is the position they adopt in their competitiveness report in the passage cited above. Post merger, it is clear from the evidence of Mr Venter that the benefits of the merger are to run the operating company as a single entity so as to enhance its efficiency. Since the merger would lead to the elimination of this competition it thus has merger specific implications which we now proceed to examine.

5.3 The transaction's impact on competition

[46] The main competition issue that seems to arise, and this is specifically relevant to the A-berth, is the possibility of foreclosure of competitors. Although the only customer to testify Mr Jones of De Beers testified that their preferred suppliers in Cape Town are DCD Dorbyl and Globe and that the merger would result in the removal of an effective competitor it seems that in the markets his company was concerned with alternatives do exist[19]. The fact that his firm has thus far not chosen to use them does not mean that post merger it will be without choice for the particular services it requires to its vessels.

[47] On the issue of foreclosure, we heard from quite a number of competitors who gave evidence on how they expect to be affected by the merger. Nor was the possibility of excluding competitors simply the fanciful notion of rivals – internal documents reveal that the exclusion of rivals was contemplated by the parties to the joint venture.[20] In order to analyse the potential for foreclosure, one has to first establish who the participants in the relevant market are.

[19] Page 354 of the transcript.
[20] See for instance the minutes of a meeting dated 19 May 2005 where it is stated that "other than Opco no other companies would be allowed to work at A-berth. File 5 page 125.

[48] In the Commission's competitiveness report they refer to the following companies who (apart from the merging parties) participate in the broader ship repair market, SA Five, Dormac (a subsidiary of RJ Southey), Belmet, Hesper and EBH. However, as stated above, there do not seem to be specific competition concerns relating to the general ship repair market. The more pertinent issue is to analyse who would be potentially foreclosed from the oil and gas market, if the merging parties were to control A-berth as a single firm.

[49] There are various sources of information as to which of the companies' active in ship repair in the Cape Town harbour are also active in the oil and gas market. If one looks at the DCD Dorbyl document "Marine Cape Town Business Defined", dated November 2007, one sees a list of competitors in each of nine sub-segments of the ship repair market.[21] In the four oil and gas segments (O&G Dry Dockings, O&G Offshore, O&G Rig Refits, O&G FPSO's), the only companies listed are DCD, Globe and SA Five (Belmet also appears in the O&G Offshore segment).

[50] The other competitors that made presentations during the merger hearing were Mr. Kelly of SA Five, Mr. Peter Kroon of Belmet and Mr. Cook of Atlatech. Mr. Jones also testified on behalf of De Beers, a large customer of the ship repair industry. The first competitor that gave evidence, Mr Kelly from SA Five, explained that SA Five is essentially a fabrication and pipe services organization, and started operating in the oil and gas market from the mid-1990's:

> *MR KELLY*[22]*: "We are essentially a fabrication and pipe services organisation with project managers. And in the mid 90's we moved towards oil and gas industry and therefore required additional facilities than what we had at Blackheath, which was at A-berth, clearly because of a contract that we obtained in 1997/1998 with the upgrade of the FA Platform off Mosselbay. And from that date onwards we have operated at A-berth and thus have marketed ourselves having that facility".*

[21] Page 747 of the record.
[22] Transcript p. 170.

[51] During the evidence of Mr. Kelly it became clear that SA Five operates in the oil and gas market mainly through its overseas associate company, RBG. RBG would obtain the work and this would then be channelled to SA Five locally. The facility of the A-berth was used as a marketing tool. This is also clear from the listing of A-berth under 'facilities' on the SA Five website[23]. It is therefore not clear whether SA Five would be able to compete for large tenders in the oil and gas market on its own. The evidence of Mr. Kelly was that SA Five would not tender as a main contractor[24], but would always work through RBG.

[52] However, in terms of potential foreclosure, Mr. Kelly did indicate that SA Five would not be able to compete in the oil and gas market if it does not have access to the A-berth. This is clear from the following exchange between Mr. Kelly and the Chairperson:

> *CHAIRPERSON: "Mr Kelly does SA Five want to oil and gas work in the Cape Town harbour?*
>
> *MR KELLY: Yes we do.*
>
> *CHAIRPERSON: And if you did do that, where would you do that work?*
>
> *MR KELLY: In the present circumstances we wouldn't be able to do it if A-berth is not available to us. And once again it comes down to the size of the project and the type of work that's required".*

[53] Mr. Kelly also indicated that if they had to put in a tender on a large oil and gas project and A-berth was not available, that they would not tender. He suggested that RBG would tender for the project and then do the work at Walvis Bay and not Cape Town[25]. However, Mr. Kelly also stated that they are "neutral", and do not oppose or support the merger[26]. Recall that SA Five

[23] See exhibit G.
[24] Mr. Kelly (page 220 of the transcript): "I can say that SA Five more than likely wouldn't want to be and we haven't been the main contractor. It has always been through RBG, if we are the main contractor. So, in future SA Five as SA Five would not be the one to tender as the main tenderer for a rig to come here".
[25] P. 209-210 of the transcript.
[26] P. 178 of the transcript.

was originally a member of the OPCO that would have leased the A-berth facility from Ferromarine Cape. However, SA Five wanted a greater involvement, and when this did not happen they withdrew from the OPCO, and shifted their focus to the port of Walvis Bay.

[54] The next witness, Mr. Kroon of Belmet indicated that his company would not be the "sole contractor" on a large project, but might well be the "lead contractor". Mr. Kroon also indicated that Belmet was neutral on the subject of the merger, but that it had concerns regarding the A-berth issue[27]. The principal concern was that A-berth should not be the exclusive domain of some parties. Mr. Kroon testified that he became aware of the fact that A-berth was marketed by DCD Dorbyl as an exclusive facility and that this was also communicated to other parties. Mr. Kroon testified that his company Belmet does compete in the same market as DCD Dorbyl:[28]

> *CHAIRPERSON: "Let me ask the question differently. Would you be a fir[m] that would be competing with DCD Dorbyl in tendering for oil and gas repair work?*
>
> *MR KROON: Well, like I said before, if you look at the last couple of projects, the Trans Ocean, Expedition, the Scarabeo 7, the Pride vessels, the Pride vessel coming in now, I know for a fact we are tendering against them and have been, yes".*

[55] It seems therefore that although Belmet does not act as a 'main' or 'sole' contractor, it regards itself as a competitor in the oil and gas market. Finally, Mr. Cook from Atlatech also testified that his company was not opposed to the merger, but was concerned that the merging parties would be able to "lock" other competitors out of A-berth at various times, if they controlled this facility.[29]

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[27] P. 245-246 of the transcript.
[28] Transcript p. 291.
[29] Mr Cook (page 309 of the transcript): "*We have no objection to the proposed merger being approved. We do, however, have some serious concerns as to what may happen following the approval of the transaction. These concerns arise from rumours, which have been circulating in the Cape Town harbour for quite some time. According to these rumours, one or more agreement may be concluded between the National Ports Authority, NPA, and the merging parties. In terms of these agreement certain facilities, such as A-Berth, etc, would be let by the NPA to the merging parties. Access to such facilities is essential to firms such a Atlatech conducting their activities in the ship repair industry*".

[56] The evidence from the competitors, i.e. SA Five, Belmet and Atlatech seems to indicate that the only issue that really concerns them is access to the A-berth. The important question here is whether these companies can be considered as market players in the markets for "large oil and gas" and "very large oil and gas vessels and structures". It would probably be more correct to define a separate market for "main contractors" on large oil and gas structures.

[57] But it is possible that even the three players mentioned, might not be proper contenders in such a narrow market. It seems that although each of SA Five, Globe and DCD has been a main contractor in the past, the experience of DCD with the Polaris project has made them hesitant to tender again as main contractor on a large project, if the circumstances were to remain the same (i.e. not control over their 'own destiny' and dependent on sub-contractors).

[58] The evidence from Globe was that although they have been a main contractor in the past, they would no longer be in a position to play such a role, and at best would be a sub-contractor. Mr Blackbeard insisted in his evidence that the market for large oil and gas repairs only include DCD Dorbyl, Globe and SA Five, and that enquiries with the Oil and Gas Alliance yielded no other names[30] at the time. The fact is that we have the evidence from the merging parties and Mr Blackbeard indicating that there are very few players (possibly only three) in the market for large oil and gas vessels and structures.

[59] On the other hand we have the evidence of SA Five, Belmet and to a lesser extent Atlatech, who also consider themselves participants in this market and have real fears about foreclosure. Whether smaller players can evolve into "main contractors" is not clear at this point, although a company like Belmet clearly sees itself competing in this market.

[60] Even if none of the other firms present in the Cape Town market for ship repairs is capable of bidding successfully for a large oil and gas repair

[30] Mr Blackbeard (p. 516 of the transcript): "*Well obviously everybody aspire, no matter when we start this business. If we started it today and we included the others, we went to 7 companies, tomorrow there will be 9. It is a never ending loop potentially because it will cause more work to happen and then it will grow. We had to … at that point in time this was the best information available and we had no complaint to us and had no third party requesting to participate in the Opco as I said last week to this very day, including the complainants"*.

contract at this point in time, this does not justify coming to the assumption that they never will, or that they would not be able in conjunction with another international firm skilled in project management be able to do so. The relationship that SA Five has with RBG is just such an example and there was evidence of a number of sizeable international ship repair firms even though they were not presently located in Cape Town who could tender with a local partner.

[61] Thus foreclosure of rivals post merger remains a valid concern. The merging parties placed much emphasis on trying to show that the oil and gas market is international and that there would be no loss of consumer welfare as customers post merger would have the choice of any number of international ports to go to if Cape Town was considered uncompetitive.

[62] The evidence on this point was inconclusive. Whilst there was evidence that for some customers for some repairs there were a range of ports available it was not wholly persuasive. At the same time there was evidence that customers lose an enormous amount of revenue for so long as a rig or vessel is travelling to and from a repair berth, and that this downtime, as well as the time spent in port, is factored into any decision where to repair. It also emerged that not all ports are suitable for all repairs. Thus Walvis Bay which is newly emerging as a rival for Cape Town for this market has some physical limitations as well as a less developed local engineering industry, which makes sub-contracting less feasible.

[63] Whilst Cape Town would be constrained by the competition from other ports it is by no means clear that this constraint is as meaningful as the constraint that would emerge from local competition for repair work most of which is tender based. As we noted earlier, internal documents of the parties showed their concern about local competition on pricing.[31] Geography remains an element in a ports' competitive advantage. It is also correct that customers are not wholly concerned with price. The quality of repair work, reputation of firms doing the work and the management of the port authority all take part in the mix of factors going into a decision to award a tender.

[31] See for instance an email from Baret to a Mr Contarini in which he refers to ongoing price wars in the industry which he says have gone well beyond the normal free market dynamic - file 3 page 577.

[64] On the other hand the evidence that the merged firm will be able to foreclose its rivals, actual and potential in the Cape Town port from this market is strong. Since evidence on the effect of the merger on consumer welfare is equivocal, we cannot dismiss concerns expressed by rivals to the merged firm in the Cape Town harbour that they will be foreclosed from this market by denial of access to the A-berth. We examine this issue by considering whether A-berth is a 'must have' for rivals wanting to compete with the merged firm in Cape Town for oil and gas repairs.

5.4 The A-berth as an essential facility

[65] A-berth has unique features which makes it specifically suitable for oil and gas repairs; it has a long berthing area with a length of 274m and a depth of 12m; at the back of the berth is a lay-down area, which according to the Commission is an "essential facility".[32] Mr. Claasen of the TNPA also pointed out in his evidence that the A-berth has been designated as a zone for oil and gas repairs[33].

[66] The crucial question here is whether other areas in the port of Cape Town can be used for large oil and gas repair work. Mr. Claasen indicated that although another area in the port, the repair quay, has in the past been used for oil and gas work, this was on a very "limited basis". He explained that if it is a large project, a lot of backup space will be required and the area around the repair quay would not be sufficient.[34] But most importantly it appears from his evidence that the TNPA wants all oil and gas work to take place at A-berth and not at any other quay.

[67] Before continuing to discuss issues of access to the A-berth, it should be pointed out that the A-berth consists of various elements, i.e. a shed that houses offices, a large lay-down area,[35] and a quayside area. The latter, the strip between the face of the quay and the shed (plus minus 18 metres), is not part of the lease agreement and is available to any party on a common user basis. Any third party can gain access to this area by booking this with the TNPA who allocates this space on a first-come-first serve basis.[36]

[32] See the Commissions' Competitiveness Report, p. 44.
[33] Page 79 of the transcript.
[34] Transcript p. 107.
[35] A lay down area is the space where work can be performed on the quay.
[36] Transcript p. 53.

[68] The part of A-berth that will be affected by the merger, and the subsequent lease of the facilities to the merging parties via their operating company, is therefore the shed as well as the lay-down area. Much of the evidence presented focused on whether parties that do not have access to the A-berth (shed and lay-down area) would be able to compete in the market for large oil and gas repair. We have already referred above to the evidence of Mr. Kelly who testified that SA Five will not tender for a large oil and gas project if they do not have access to A-berth. The following excerpts from Mr. Kelly's evidence are also important:

> *MR KELLY*[37]*: "A-berth is essentially used for what I call offshore projects. Processing plant is more inland and done on various other companies that we do work for. A-berth is also used for the rig and ship maintenance. And so it's essentially those two projects that are used for where we use A-berth. Our facilities at Blackheath are not big enough to be able to do the structural steel fabrication for offshore work, as well as that you need quayside facility to be able to deliver to the client. In respect of ships and/or rigs, you do need the quayside to be able to not only fabricate on land but also to do certain work on the vessel itself along the way".*

[69] Mr. Claasen also said in his evidence that they cannot accommodate more than one oil rig at A-berth[38]. He did indicate that an oil rig can be repaired at the repair quay, but only if it is a smaller project, as the repair quay offers only about 8 000 square metres, compared to the 47 000 square metres at A-berth.

[70] Although the merging parties were at pains to illustrate that large oil and gas vessels and structures can be serviced in other areas of the port, it does seem from the evidence that very large oil and gas structures do need the facilities at A-berth and cannot be handled at the dry docks or at the repair quay (although the latter might be used temporarily). Even one of their own witnesses, Mr. Blackbeard explained why the A-berth is essential for large oil and gas repairs:

[37] Transcript p. 171-172.
[38] Transcript p. 157

MR BLACKBEARD[39]: "*So everything said here is exactly pointing to that, whereas Cape Town the access to the A-Berth quay side or other quay sides is easier because of a greater water depth and a quay of 200 metres plus in length versus 35 in Saldana and hence the rigs cannot be brought to Saldana for repair and it is only fabrication of new components and modules that can be floated away by a barge is limited to the scope of work for Saldana, which is still a problem for us to this very day I can add, whereas rigs can only be floated into the port of Cape Town, because of sufficient water depth and quay sides.*

These rigs, just to complete your pictures they are approximately 100 metre by 100 metre square and to tie up alongside a quay you can imagine with the mooring lines they need approximately 200 metres of quay side to secure them safely especially in the strong South Easter".

[71] It would seem therefore that any company that wants to attract business in the market for "very large oil and gas vessels and structures" and probably as a "main contractor" will need access to A-berth. This raises the question of whether A-berth can be classified as an "essential facility". The Competition Act defines an essential facility as follows:

> *"An 'essential facility' means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers".*[40]

[72] Although this is not an abuse of dominance case and section 8(b)[41] is therefore not applicable, the A-berth does seem to have the characteristics one would generally associate with an essential facility. It cannot be easily duplicated and the evidence indicated that competitors cannot reasonably provide services to large oil and gas vessels and structures without access to A-berth. The Commission in their report also referred to A-berth as an

[39] P. 488 of the transcript.
[40] Section 1(1)(viii).
[41] Section 8(b) states that it is prohibited for a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so;

essential facility and mentioned that: "*Preferential access to essential facilities may limit competition in the market*".[42]

[73] The merging parties denied – both in the evidence of their economist and during closing argument – that A-berth can be classified as an essential facility. Although the issue of A-berth as an essential facility is not crucial to the outcome of this case, it is worth pointing out that there is a substantial body of literature that indicates that ports are often considered by competition authorities as essential facilities.

[74] The economist for the merging parties argued that A-berth cannot be an essential facility, as downstream users will not be negatively affected. This does not seem to be the only test suggested in the literature, and without adopting a dogmatic stance on the issue of A-berth as an essential facility, it remains true that it certainly has some of the features of an essential facility. As explained by Motta:[43]

> *"Any input which is deemed necessary for all industry participants to operate in a given industry and which is not easily duplicated might be seen as an essential facility…There are many examples that might satisfy this very loose definition of essential inputs. In the airline industry, slots at an airport; for maritime transportations, a port's installations"*.

[75] Motta also deals specifically with port infrastructure as an example of an essential facility. The literature generally speaks about upstream access and not only about downstream effects.[44]

[76] Given the evidence that participants in the market for very large oil and gas vessels and structures do indeed need access to the A-berth, it seems that one could very well use the principles applied to an essential facility, i.e. that there should be open access to all. The condition offered by the merging parties – that the sub-lease covers no more than 50% of the A-berth area – is

[42] Competitive Report, p. 30.
[43] Motta, M. (2004). 'Competition Policy – Theory and Practice'. Cambridge University Press at page 66.
[44] See Motta op cit at page 67.

therefore a solution to the A-berth problem. This will be dealt with more fully in the next section.

6. The condition

6.1 Lease of A-berth restricted to 50% of the facility

[77] During the course of the hearing, on the 4th of March 2009, the merging parties proposed a condition relating to A-berth. The essential feature of the condition was that the merging parties agreed that if it wished to lease the A-berth lay-down area, that such lease would not be for more than 50% of the property. Further to discussions with various parties, the initial condition was amended to include two important aspects:

- Firstly, the requirement that the remaining area i.e. that portion of the lay down area not the subject of the merging parties lease, must be reasonably accessible to the quay;
- Secondly, the parties drew a diagram showing the proposed split into leased premises and the remainder, and undertook that they would propose to the TNPA that the premises to be leased by them, be situated as indicated on the shaded portion of the diagram.

[78] During the hearing, the Commission seemed to be of the view that the condition was not viable as access issues had not been sufficiently canvassed with other role players. . There are however, various reasons why this condition seems to solve the issue of access to the A-berth. The first aspect is that there has been evidence led that ship repairers seldom need access to the full lay down are in A-berth and often let only a portion of that space. Mr. Claasen said the following on this issue:

> *MR CLAASEN*[45]*:* "*Another option is where people are saying maybe we need 50% of the shed and that's why you even see in the lease agreement there is an option in the agreement that they might take 50% of the shed down to create extra lay-down areas. So, I'm saying once again it differs from project to project.* ***My experience is 90% of***

[45] Transcript p. 161-162.

the time they only require maybe 50% up to 10, 15% of the shed. I cannot recall when a rig was in the port of Cape Town occupying the whole of A-shed. *I can't recall. This deal we signed last Friday, once again they are looking only at 25% of the shed. They don't require the rest. So, I'm saying I think it's a nice-to-have".*

[79] Mr. Kelly[46] from SA Five also testified that they used to rent only portions of A-berth. He mentioned figures of 50% of the workshop and around 20% of the lay-down area. From this evidence it seems perfectly viable to lease smaller portions of A-berth to companies without impeding their ability to perform their services. The second important point is that when the option of accessing 50% of A-berth was put to various of the competitors, they did not object to this proposal. This position is clear from the evidence of Mr. Kelly when asked by counsel for the merging parties whether SA Five would be satisfied with such a condition[47]:

ADV VAN DER NEST: "I had a hypothetical debate with Mr Claasen yesterday and I want to have a similar hypothetical debate very briefly were you. If the heavens were to open and Transnet were to say I make 50% of that lay-down area available on common user basis not to the merging parties. I'm only going to lease to them 50% of the lay-down area in A-Berth and 50% of the sheds and 50% of everything and I'm leaving 50% open on a common user basis to the port. What would your response be to that?

MR KELLY: We will be happy.

ADV VAN DER NEST: And would that cure any complaints that you could possibly have?

MR KELLY: The only complaint that we have had is the right of use of A-Berth, up until the 28th of February 2009 and the perception was that A-Berth was not available to anyone other than the merging parties. As of today it has changed and I'm happy with that change, if it is put into practice.

[46] Page 117 of the transcript
[47] Page 237-238 of the transcript.

ADV VAN DER NEST: Did you not know that the quayside, the apron and the operational area were still subject to common user principle? Did you not know that?

MR KELLY: Yes, it is available and I did know that, but you cannot use that area for any work on a rig other than if you are doing the work on the rig.

ADV VAN DER NEST: Right, so now if Transnet were to say I cut it in half and 50% - I'm taking a random figure – were to be made available on a common user basis to other parties, that would cure your complaint.

MR KELLY: Of the quayside area?

ADV VAN DER NEST: No, no, the lay-down area.

MR KELLY: The lay-down area, we are happy with that.

[80] Access to A-berth was also the only issue raised by Mr. Cook of Atlatech and in his evidence he proposed the following[48]:

MR COOK: "In the circumstances, what we would like to ask the Tribunal, if it were to approve the proposed merger, is to render its approval conditional upon the merging parties providing an undertaking that they will not prevent the competition in the ship repair industry from using any essential facilities, and in particular the A-Berth and other facilities in the Cape Town harbour in the future".

[81] It seems therefore, that if this is a condition that satisfies the requirements of TNPA, the merging parties[49] and the competitors, these parties will find a way of implementing this condition. It is also worth pointing out at this point that there is another regulator, the TNPA that controls access to A-berth by means

[48] Page 310 of the transcript

[49] Mr. Venter (DCD Dorbyl) testified that OPCO is prepared to lease a reduced area and pay a new pro-rated fixed rental. He also indicated that OPCO accepts and agrees that the remaining area will be available to third parties on an *ad hoc* and on a common user basis.

of the harbour master. One of the functions of the port regulator is to promote equity of access to the port and to facilities provided by the port (National Ports Act 12 of 2005, section 30(1)(b)). Any practical issues would be better solved by the harbour master who is responsible for access to the port facilities. We agree therefore with the merging parties that the condition is 'practical, workable and cures competition concerns.[50]

[82] Furthermore, the condition also satisfies Ferromarine who indicated that they are still committed to the investment of the full sum, i.e. R60 million to upgrade the facilities at A-berth. The result of the condition is that there will be more development on the smaller portion of A-berth. While this may not be an optimal allocation of scarce resources, this is the inevitable outcome of the attempt to resolve the issue of competitor's access to A-berth.

6.2 Employment issues and condition

[83] It is trite law that one of the issues the Tribunal considers in evaluating a merger is whether the merger can or cannot be justified on substantial public interest grounds. One of the public interest grounds set out in the Act is the effect that the merger will have on employment.[51] The issue of employment arises in this merger as the merging parties have indicated that retrenchments are likely post merger.

[84] When they filed the merger with the Commission on 1 0ctober 2008 the merging parties indicated that 28 "white collar" jobs might be lost in the first 12 months following the approval of the merger. The 28 jobs under consideration were those of 4 executive managers and 24 support staff. The support staff work in the following areas: administration and finance, human resources (including training), stores and security.[52]

[85] According to the merging parties, the relevant employees were skilled and had experience which would enable them to find jobs in other industries. In addition the parties stated that additional employment might be created in 12 months after the merger. They stated that this was because the merger would result in "*envisaged growth*". The categories of employment thus created

[50] See the merging parties' heads of argument, p. 5.
[51] Section 12A (3)(a).
[52] See File 1 page 86

would be for skilled and semi-skilled workers.[53]The parties notified the union, in this case the National Union of Metalworkers of South Africa (NUMSA) of the merger.

[86] There was no response from NUMSA during the course of the Commission's investigation and hence the Commission assumed the merger would not create any adverse effects on employment and hence any substantial public interest concern.

[87] During the course of our hearing a representative of NUMSA asked to make representations to us. Eugene Mutileni, NUMSA's national legal officer indicated that he had only become aware of the merger a few days before our hearings commenced. This was because although the merger filing had been served on the union's local office it had not come to the attention of NUMSA's head office, where these issues are dealt with.

[88] There can be no criticism of the merging parties for this, as they complied with their service obligations. Nevertheless we gave Mr Mutileni an opportunity to make submissions to us. Mr Mutileni indicated that he had read the parties filing and after initially being predisposed to oppose the merger, was satisfied with the extent of the losses set out there and on that basis would no longer oppose the merger. This is because NUMSA organizes blue collar workers and in the filing no job losses for blue collar workers are indicated.

[89] Mutileni also advised us that in the previous week Globe had sent out a notice of intention (dated 26 February 2009) to retrench in terms of section 189 of the Labour Relations Act of 1995. He was told that if the merger prevailed then this situation would be alleviated and although there could be no 100% guarantee that jobs would not be lost, the situation was better with the merger than without it.

[90] Counsel for the merging parties in response made a long submission about how the recent downturn in the economy since October necessitated further retrenchments at Globe, but that matters were better with the merger than without it from the point of view of employees. Pressed by us on whether

[53] See file 1 page 88.

more retrenchments were envisaged beyond those postulated in the October filing, counsel indicated that the position was unsure and the merging parties could not give further undertakings. Mr Mutileni was not unsympathetic, and as he put it:

> *"We know you cannot give us 100% assurance, given the recent economic recession, but the guarantee is that our members, would their employment be safe in the long run or in the 12-month period that is starting from the day the merger is concluded".*[54]

[91] Counsel responded that it would be too irresponsible to give such guarantees.[55] At the end of the case the merging parties offered an employment condition on the following terms:

> *"That the merging parties will make their best endeavours not to retrench any blue collar workers, but in any event, undertake not to retrench more than 25 blue collar workers for a period of six months"*[56]

[92] As we understand the position this reference to blue collar workers is in addition to the white collar workers contemplated in the merger filing. As counsel argued it, this position was more favourable for labour than would be the situation if there were no merger, because in the no-merger scenario, Globe would retrench up to 100 blue collar workers.[57] (In essence this means that 75 workers are better off for six months than they would be if the merger did not go ahead.)

[93] Thus the merging parties' case is that post filing in October 2008 and by the time of our hearing in March 2009, economic conditions because of the world wide recession were such as to necessitate retrenchments not contemplated four months earlier. But the Tribunal had sought and obtained discovery of internal communications between the merging parties, written during the course of the merger negotiations - a period that appears to have stretched,

[54] See Transcript page 416.
[55] See Transcript page 416.
[56] See Merging parties heads of argument paragraph 37.
[57] See merging parties counsels' address to the Tribunal, transcript page 963 and 965.

with some interruptions, from at least July 2007[58], until concluded in July 2008 with the signing of the sale agreement.

[94] The 2007 negotiations were aborted as Globe announced it was negotiating with another party,[59] but that buyer never came through and negotiations with DCD Dorbyl were then resurrected in early 2008[60]. This correspondence was not before the Commission at the time it evaluated the merger nor had it ever been communicated to the union, as far as we are aware.

[95] The evidence of this correspondence and the testimony of Mr Baret, the managing director of Globe, indicate that the negotiations for the merger were delayed by the actions of DCD Dorbyl. DCD Dorbyl took an inordinately long time to sign the Sale of Shares Agreement, quibbling about the appropriate NAV of Globe. In addition DCD Dorbyl did not respond to Globe's repeated inquiries about the strategy going forward (2009) with regard to Globe's business, yet it had stipulated in the sale agreement that any changes in the ordinary course of Globe's business required its consent.

[96] DCD Dorbyl had thus placed itself in the position where it would neither give guidance to the merged firm nor waive the requirement for its consent to a change in the business. Baret's frustration is evident from a series of emails he writes during this period. There are indications that in May 2008, negotiations were getting bogged down and Baret writes in an email to Mr Taljaard of DCD Dorbyl that he is uncertain as to whether Globe will survive the acquisition process.

[97] Later that month he writes to Venter complaining about not knowing what DCD's strategy was going forward and advising that he had been instructed by his controlling shareholder to suspend further discussions until there was a signed agreement.[61] In May as well, emails indicate a difference of opinion on whether Globe should work on another major ship repair known as the Polaris project and if they did, how this should be valued for the purpose of the

[58] File 5 page 90
[59] File 5 page 93.
[60] File 5 page 1. This is an email from Baret to Taljaard at DCD confirming what appears to have been an earlier discussion and is dated 17 January 2008.
[61] File 5 pages 144-5.

purchase price. Baret suggests that if they could not reach agreement on this, Globe should be excluded from the project as they had had some good enquires and would be fine on their own.[62]

[98] In August 2008, which appears the time at which the filing with the Commission is being discussed, because Baret is being asked to comment on its content, Baret remarks about the potential damage to the Globe business over the last 6 weeks as they had had no costing, no WIP and no management review meetings.[63]

[99] In October 2008, the gloomy picture continues, at least from Globe's perspective, as they signal opportunities being lost. In an email from Mr. Bailey of Globe to DCD, dated 1 October, he indicates that discussions he was having with a Canadian bearings company have been put on hold due to the transaction – he suggests setting up a meeting between the Canadian firm and DCD Dorbyl. In an email from Baret to DCD Dorbyl, dated 27 November 08, he expresses frustration again, and notes that senior staffers have resigned. In an email dated 29 October 2008 to Venter, Baret informs him that a senior employee, Gunnar Math, has resigned, as he was not comfortable with the merger and concerned about the lack of planning and communication with regard to restructuring. [64]

[100] In an e-mail dated 12 November 2008 written to Vincent Langlois, one of the directors of DCD Dorbyl, but who is also an appointee to that board by Investec the largest shareholder in DCD Dorbyl, Baret writes:

> *"From operational point of view, Globe was prevented by DCD (instructed in fact) not to proceed with its 2009 Business Plan based on the anticipation of a quick and easy resolution with the CC. "Low fruit hanging" type of opportunities were parked despite several attempts on my part to motivate the capex.. resulting in the loss of a few million rand of revenue for absolutely no good reasons whatsoever (Valve repairs, etc), recruitment of key personnel was*

[62] File 5 page 88.
[63] File 5 page 94.
[64] File 5 page 423

cancelled, internal restructuring stopped, development of the electrical workshop stopped, …. The business was in standby". [65]

He further said:

"Following on the signature of the sale agreement, Globe was also expected to support DCD Marine literally at all costs, which not only resulted in other opportunities (tender turned down by the estimating department) to be lost but also to expose us to DCD's learning curve on large projects such a s Polaris and Globe taking a bath in the process. We have just started in the Scarabero but so far it looks like it will be a repeat of the Polaris."

[101] Effectively Globe was being run down. According to Baret, Globe had no prospects of revitalizing its business if the merger failed. In his own words he said:

"I would go as far as saying that Globe is now so "damaged good", that should DCD's application be rejected by the CC, it will no longer be a sustainable business"

[102] These communications are highly instructive as they put a completely different perspective on the reasons for Globe's now dire financial straits. The evidence that emerges from this series of emails indicates that the reasons for Globe's current difficulties, arose from the merger process itself - the delays created by the negotiations themselves and the resultant managerial impasse meant that Globe instead of pro-actively moving its business forward through taking up investment opportunities and competing for tenders stagnated, whilst waiting for guidance from its future controller, which appears to have been indifferent in the face of these queries, neither encouraging or discouraging any course of action.

[103] Whilst DCD Dorbyl might contend that it could take no steps to implement the merger, it did not signal to Globe that it was free to act in its own best business interests until the merger was approved. Between the helplessness of the target firm and the indifference of the acquiring firm, the future

[65] File 5 pages 405-6.

employment prospects of employees at Globe deteriorated. It is more probable that employment prospects of Globe's blue collar workers is a function of the merging parties merger machinations than external economic conditions.

[104] At the same time the doom and gloom supposedly attaching to Globe does not seem to have affected its new proprietor. Post merger we must judge the merged firm as a whole not as two discrete entities. The parties have motivated this merger at all times as efficiency enhancing and justified the need to bulk up to attract major projects. This posture sits inconsistently with a firm that is forced to retrench. In addition there was an indication that even without the A-berth agreements finalized the merging parties were likely contenders in a major repair at the A-berth that would last from July to November of this year. According to Mr Venter, *"We are confident of getting the order"* and he went on to say *"... it would take all our resources to execute".*[66]

[105] We therefore conclude that the merger has been the probable cause of employment losses at the target firm, that in relation to the original projections of job losses in the original October filing, these can be regarded as substantial, and that it is appropriate for us to consider a condition that addresses the adverse public interest concern.

[106] Clearly by now the public interest dictates that the merger is better for employment than a prohibition. It then remains for us to consider whether an appropriate condition can be crafted to ameliorate the employment consequences brought about by the merger. The Tribunal has always been reluctant to impose its own view of what level of retrenchment is permissible in any given merger scenario.

[107] However given that the merger regime in our legislation is designed to create a transparent process of negotiations between labour and management around merger specific employment consequences we have intervened in the past to ensure that this process is observed.[67] Here it is fair to hold the merging parties to the original indication which they made to both the

[66] Transcript page 663-664. The evidence was that both DCD and Globe had tendered for this.

[67] See Daun et Cie AG and Kolosus Holdings Ltd, case no: 10/LM/Mar03.

Commission and labour and to which neither at the time of the merger filing objected to. Had they been advised at the time of filing of the more adverse scenario for labour now being presented, they may have responded differently.

[108] The subsequent departure from this indication to introduce a far more severe regime of retrenchments has undermined this process. The merging parties new intentions in respect of retrenchments come very late in the day and have thus frustrated the very process that the legislature has introduced into the Act for management and labour to engage in.[68] Nor would labour have been aware of how the merger process has impacted on the economic health of Globe. This justifies our intervening with a condition on a substantial labour issue, whereas ordinarily we would have been more deferential to the outcome of a fair consultation process between employees and management.

[109] As a matter of substance we come to the conclusion that on a balance of probabilities the retrenchments are more probably the result of the merger process than economic conditions external to this and thus the merger has led to a substantially adverse effect on employment for workers in the most vulnerable category. Accordingly, to ameliorate these adverse effects we imposed the following condition on the merger:

> *"The merged entity must not retrench any employees of the merging firms, for a period of one year after the date of the approval of the merger, except as provided for in paragraphs 11.3.1.1 and 11.3.1.2 of the merging parties' competitive report."*

7. **Other public interest issues and efficiency gains**

[110] The remaining public interest issues favour the approval of the merger and are not compromised by the conditions we have imposed on it. In the Commission's competitiveness report they summarise the reasons given by the Western Cape Provincial Government why this merger will be beneficial

[68] Noteworthy is the fact that the section 189 Notice was served after our proceedings commenced on 18 February Had we completed proceedings on that day the issues would not have come to our attention.

for the Western Cape economy.[69] In broad terms the idea is that the merging parties could become a major operator that could attract very large oil and gas work to the port of Cape Town.

[111] Wesgro also submitted to the Commission that the merger is strategically and operationally important, in the sense that it will allow access to bigger projects. Also important – and pointed out by Wesgro – is that the projects that the merged firm will be bidding for would require the use of many of the smaller firms to complete key tasks[70]. It seems therefore that the merged firm will be in a better position to attract large oil and gas projects and that this will also benefit other firms downstream. In short, the merger is an important step in establishing Cape Town as an international Oil and Gas hub and for the further development of the local industry.

[112] Not much evidence was presented during the hearing on efficiency gains. The main expected gains have been summarized in the Commission's competitiveness report (p. 53-56). Although these were not specifically tested during the hearing, the overall effects seem to be positive. The effect of the transaction on employment has been discussed above under the section dealing with the employment condition.

[113] The merging parties in their heads of argument also emphasized that the merger will assist the merged entity to compete effectively in an international market. International oil and gas repairs are large projects that are put out on tender. Allocation of these projects is lumpy, and the projects require significant capacity and resources within strict time limits.

[114] The evidence on DCD's capacity and Globe's complementary skills base and infrastructure did seem to indicate that the merger will provide the merged entity with the necessary critical mass, financial capabilities and skills to become an international player in this highly competitive international market. Accordingly, it is expected that the merger will yield more work for the merged entity in the international market, and that it will bring a considerable amount of work into the Cape Town harbour, benefiting the local industry as a whole.

[69] Commission's competitiveness report, p. 48-49
[70] Commission's competitiveness report, p. 51.

8. Conclusion

[115] In conclusion, this merger has brought about a firm with much potential for future growth, but also certain adverse consequences for competition and employment in the short term. The main issue in terms of anti-competitive effects is the potential foreclosure of competitors. This is adequately addressed by the 50% condition. There seems to be enough evidence on efficiency gains, i.e. infrastructure investment in the port, the merged entity being able to attract more business post-merger, etc.

[116] Although these efficiency gains were not quantified, they seem to be broadly accepted by other interested parties such as the Western Cape Provincial Government and Wesgro. The merger will therefore not substantially prevent or lessen competition if 50% of the A-berth remains available to competitors. The public interest aspects such as investment, long term job creation, stimulating local industry, becoming internationally competitive, etc. are all positive. The short term job loss is not and hence the temporary employment condition which we have imposed on the merged firm.

30 April 2009

M Mokuena and N Theron Date

N Manoim concurring.

Tribunal Researcher : I Selaledi

For the merging parties : M van der Nest SC and SW Burger instructed by Werksmans Attorneys

For the Commission : R Buckas and L Khumalo