

## **Investec's position regarding the JCI, Randgold and Western Areas matter**

### **September 2015**

Numerous articles and some books have been written about the circumstances leading up to the death of Mr Brett Keble and the unravelling of his business empire. As one of the banks that lent JCI money when the company was in financial difficulty, Investec's name has come up in different accounts of what transpired during that period. Several damaging allegations against the bank have been made. Below is Investec's position regarding these matters.

Investec lent money to JCI in 2005 which assisted the company to continue to operate. The loan agreement was concluded with the full knowledge and consent of the majority of JCI shareholders including Allan Gray, JCI's major shareholder at the time. This loan transaction essentially facilitated the preservation of the value of assets in JCI, Randgold and Western Areas with shareholders and creditors in all three companies benefitting substantially. The alternate route for JCI at the time was liquidation as JCI had run out of cash. This situation was resolved by way of the loan advanced by Investec.

After Investec provided funding to JCI and Mr Keble was removed as Chief Executive, forensic audits undertaken by the newly constituted boards of JCI and Randgold uncovered the misconduct by Mr Keble and his close associates. Investec was never a party to, nor did it have any knowledge of, any underhand dealings that Mr Keble may have been involved in during his time at JCI, Randgold and Western Areas; through its actions the bank facilitated the uncovering of inappropriate governance and untoward dealings.

Throughout this process, Investec acted professionally and transparently at all times and the bank's actions were disclosed to all interested parties.

### **Background to Investec's involvement with JCI, Randgold and Western Areas**

- In 2004/2005 Investec had a hedging exposure to Western Areas for about R1bn. The exposure was fully secured and ultimately repaid.
- At the same time it transpired that JCI, Randgold and Western Areas (companies all managed by Brett Keble and his associates) were in financial difficulty.
- Mr Keble who was the Chief Executive of both JCI and Randgold, approached Investec to provide financial assistance to JCI as it was about to run out of cash. In addition, if JCI did not contribute additional funding to Western Areas, Western Areas would have to dilute its stake in South Deep Mines thereby losing substantial value.
- Investec consulted Allan Gray at the time the largest independent shareholder of JCI, Randgold and Western Areas and it was agreed that a loan from Investec was the best route to follow.
- In terms of the "Investec Loan" Investec ultimately lent c.R1bn to JCI via an SPV structure, which was collateralised by a range of assets.
- The Investec Loan allowed JCI to follow its rights in terms of the Western Areas planned rights issue.

- In terms of the Investec Loan, Investec was entitled to a raising fee, lending margin, and a profit participation depending on the value created in terms of the loan agreement.
- The Investec Loan essentially achieved two objectives:
  - 1) The assets of JCI, Randgold and Western Areas were secured and preserved i.e. the companies were able to continue to operate
    - a. The assets that were pledged as security for the Investec Loan were sold at extremely high values. For example, Letseng Diamond Mines was sold for R1bn to Gem Diamonds and Western Areas was eventually sold to Gold Fields at R50 per share (the shares were trading at R18 prior to the Investec Loan)
    - b. Through this process over R8bn of assets were preserved for JCI, Randgold and Western Areas shareholders. Randgold shareholders alone realised an increase in share value of at least 3 times what the shares were worth prior to the date of the Investec Loan
  - 2) The boards of the three companies were reconstituted and several forensic audits (at a cost of millions of rands) were initiated into the affairs of JCI, Randgold and Western Areas. Through this process the misconduct of Mr Kebble and his closest associates was uncovered. Prior to this date, this misconduct was not known to Investec.

### **Summary of court actions that followed the “loan agreement”**

- In 2006 Trinity (a minority shareholder in JCI) and Monty Koppel (via a company controlled by him) (a 20% shareholder in JCI) instituted actions against Investec and JCI which in essence tried to set aside the Investec Loan agreement.
- Trinity withdrew as a party to these actions two years later with an amount roughly equal to their legal fees settled by JCI.
- A number of court actions followed between JCI and Randgold, Randgold and Investec, JCI and Investec and Monty Koppel.
- In an all-encompassing settlement between the parties – and overwhelmingly approved by JCI and Randgold shareholders:
  - Randgold received assets of c.R1bn in settlement of all its claims against JCI;
  - Monty Koppel received R40mn settlement paid by JCI;
  - Investec received income of R267mn paid by JCI.
- It is very important to note that the amount of R26bn referred to in a number of articles is factually inaccurate. The amount received by Randgold represented the value of amounts actually received by JCI from the sale of Randgold’s assets during the ‘Kebble era’. The R26bn is completely fictitious and represents the hypothetical value of those assets today had they not been misappropriated by Mr Kebble and his associates. It does not represent what JCI actually received from the sale of those assets.

### **Other issues of relevance**

- Investec, both in the UK and South Africa, facilitated scrip lending transactions on behalf of JCI and Randgold prior to 2005.
- These transactions were carried out in the ordinary course of business.

- All instructions received by Investec from JCI and Randgold to facilitate these transactions, were to the best of our knowledge, legitimate and authentic.
- Investec was sued by Randgold (as part of the actions referred to above) in relation to the alleged misappropriation of these shares.
- This matter was settled as part of the overall settlement referred to above with no compensation paid by Investec to Randgold in this regard.

#### **The reconstituted boards of JCI and Randgold at the time of the “loan agreement”**

- It has been alleged that these boards were reconstituted with “Investec people”.
- While Investec representatives were appointed to the boards, these directors never represented a majority on the boards and exercised their fiduciary responsibilities to act in the interests of JCI and Randgold at all times.
- At the time the final legal settlement was reached none of these directors were on the Randgold board and the number of candidates on the JCI board had been reduced to one.

#### **Court action by Palmer and Smythe (minority shareholders in Randgold) instituted against Investec in 2011**

- The abovementioned shareholders instituted a claim against Investec for what was deemed oppression of minority rights and have alleged that Randgold was manipulated into accepting the final legal settlement (referred to above).
- Investec is contesting this claim vigorously and we believe the case has no merit whatsoever.
- The quantum of the claim, which has previously been described as R26bn, is completely inaccurate (see above). The actual value of the claim (which is still subject to legal proceedings) is not material as highlighted in the context of our audited financial statements which requires any material litigation to be disclosed.
- This case has also raised the issue of who is deemed to be a “member” of a company in terms of South African law. In both the new and old Companies Acts the right to bring an “oppression of minorities” claim vests only with a “member”. In respect of publicly listed companies the question is whether the registered shareholder or beneficial shareholder is regarded as the “member” for the purposes of the Companies Act. All existing authority, both locally and internationally, has ruled that the registered shareholder is to be regarded as the “member” and therefore, only the registered shareholder has the right/capacity to launch the oppression of minorities claim.
- Investec challenged the locus standi of the beneficial shareholders who were the original applicants in order to determine which of the Randgold minority shareholders had a legally valid claim against it. The issue of locus standi was argued before Judge Rabie in the North Gauteng High Court in 2014.
- The main question that Judge Rabie decided was whether the seven minority applicants who had instituted an application against Investec claiming that they had been oppressed as shareholders had legal standing to do so.

- In a recent judgement, Judge Rabie ruled in favour of Investec that only registered shareholders have the locus standi to launch an oppression of minority claim under the Companies Act.
- Investec thus received confirmation that its approach to the litigation was correct in law. The High Court upheld Investec's argument in its entirety.
- Having accepted Investec's argument in its entirety the High Court:
  - removed all seven of the applicants from the main application. The High Court also ordered them to pay Investec's costs;
  - refused the applications for intervention of twenty-seven would-be applicants whose shares were registered in the name of nominee companies and not in their own names;
  - granted the intervention applications of three nominee companies as well as shareholders who had registered shares in Randgold in their own names (and which shares had previously been registered in the name of nominees).
- The minorities have sought leave to appeal the judgement.