



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM215Feb17/VAR037Apr18

In the matter between:

Government Employees Pension Fund
(represented by the Public Investment
Corporation SOC Limited)

Applicant

And

The Competition Commission

Respondent

Panel	: Mr Andreas Wessels (Presiding Member)
	: Mr Enver Daniels (Tribunal Member)
	: Prof. Fiona Tregenna (Tribunal Member)
Heard on	: 9 May 2018
Last submission received on	: 10 May 2018
Order Issued on	: 15 May 2018
Reasons Issued on	: 9 July 2018

REASONS FOR DECISION

Approval of variation of merger conditions

- [1] On 15 May 2018, the Competition Tribunal ("Tribunal") approved an application brought by the Government Employees Pension Fund ("GEPF") represented by the Public Investment Corporation SOC Limited ("the PIC") to vary the merger conditions imposed by the Tribunal in a transaction involving the GEPF (represented by the PIC) and Distell Group Limited ("Distell"), hereinafter

referred to as “the GEPF / Distell transaction”.¹ The Tribunal conditionally approved the latter transaction on 29 March 2017.

[2] Our reasons for approving the variation application follow.

Background

[3] In the GEPF / Distell transaction the Tribunal approved the PIC's acquisition of a 26.5% stake in Distell - provided that the PIC divests of [REDACTED] of its 26.5% stake in Distell [REDACTED] to a Black Economic Empowerment (“BEE”) purchaser by a certain date (“Divestiture Conditions”).

[4] As indicated above, the PIC's application to vary the Divestiture Conditions was heard by the Tribunal on 9 May 2018. On the same day the Tribunal heard a matter concerning a proposed transaction involving Remgro International Holdings (Pty) Ltd (“RIH”) and Capevin Holdings Limited (“Capevin”), hereinafter referred to as “the RIH / Capevin transaction”. All parties concerned had requested that we hear these matters concurrently since they impact one another, as explained below.

[5] In relation to the RIH / Capevin transaction, we note that RIH is controlled by Remgro Limited (“Remgro”) and RIH jointly controls Remgro-Capevin Investments (Pty) Ltd (“RCI”). RCI controls Distell. This transaction entails the restructuring of Distell's multi-tiered ownership structure. The proposed transaction takes place through a series of interrelated steps. Business Venture Investments No. 1997 Limited (“New Distell”), a special purpose vehicle, will be created and listed, and will hold shares directly and indirectly in Distell.² Through the proposed transaction, Remgro, through New Distell, will increase its shareholding in Capevin from 19% to 100%, thereby increasing its shares in RCI from 50% to 100%. Pursuant to the implementation of the proposed transaction, Remgro, through New Distell, will have sole control over Capevin

¹ Tribunal case no.: LM215Feb17.

² Upon implementation of the proposed transaction, New Distell will be renamed Distell Group Holdings Limited.

and RCI and will thereby attain control over Distell. Distell will be controlled by RCI (52.8%) and New Distell (47.2%).

[6] The Tribunal conditionally approved the RIH / Capevin transaction on 11 May 2018. In our reasons³ we explain that the Competition Commission ("Commission") was concerned that the RIH / Capevin transaction could negatively impact the Divestiture Conditions imposed on the GEPF / Distell transaction (see paragraph 3 above). The Commission, more specifically, was concerned that the RIH / Capevin transaction could undermine the Divestiture Conditions' original intention to promote the participation of firms controlled by historically disadvantaged persons in the South African economy. The Commission's investigation found that the Divestiture Conditions would, for the following reasons, not be implementable upon the implementation of the RIH / Capevin transaction:

- a. The PIC would no longer hold shares in Distell, but in New Distell. The Divestiture Conditions pertain specifically to the PIC's shareholding in Distell and not New Distell. Moreover, the PIC [REDACTED]
[REDACTED]
implementation of the RIH / Capevin transaction;
- b. That the RIH / Capevin transaction may result [REDACTED]
[REDACTED] New Distell, and consequently [REDACTED]
[REDACTED] upon fulfilment of the Divestiture Conditions, post the implementation of the RIH / Capevin transaction; and
- c. That the BEE purchaser would no longer hold shares directly in Distell, but indirectly through New Distell, thus affecting the Divestiture Conditions' original intention to promote the participation of firms controlled by historically disadvantaged persons in the South African economy.

[7] In light of the above, and in order to facilitate the expeditious implementation of the proposed transaction, the merging parties and the Commission agreed that the RIH / Capevin transaction should be approved subject to certain conditions.

³ Tribunal case no.: LM177Sep17.

We approved that transaction subject to the agreed remedy between the Commission and the merging parties.

- [8] The above necessitated certain variations to the Divestiture Conditions, including that:
- a. the Divestiture Conditions shall [REDACTED] and
 - b. the BEE Equity will mean such number of ordinary shares as may constitute [REDACTED] in New Distell, pursuant to the implementation of the RIH / Capevin transaction, which the PIC will sell to one or more BEE purchaser(s).
- [9] The PIC further requested that the period in which it must divest of part of its stake to be held in New Distell, be extended.

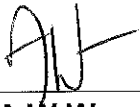
Assessment

- [10] The Commission and the PIC reached agreement on the amendments to the Divestiture Conditions and proposed this to the Tribunal. As noted above, these amendments were largely triggered by the RIH / Capevin transaction. The proposed amendments included extending the divestiture period contained in the Divestiture Conditions.
- [11] We have accepted the PIC's and Commission's proposed amendments to the Divestiture Conditions given the explanations provided in motivation thereof.
- [12] In relation to the extension of the divestiture period contained in the Divestiture Conditions we note that this matter is different to a divestiture of a business or part of a business as a remedy to a competition concern which, for various reasons, must take place in a short period of time. The divestiture at issue here was an undertaking given by the PIC in the GEPP / Distell transaction to promote the public interest, i.e. BEE shareholding. The Commission explained that the condition offered at the time was aimed at facilitating the entry and participation by BEE participants in the broader alcoholic beverages sector. In

the circumstances of this specific matter we were willing to extend the divestiture period based on the explanations provided.

Conclusion

- [13] The merger conditions imposed by the Tribunal in Case No: LM215Feb17 on 29 March 2017 are varied as agreed between the PIC and the Commission. The amendments to the merger conditions are contained in '**Annexure A**' attached hereto.



Mr A W Wessels

9 July 2018

Date

Mr Enver Daniels and Prof. Fiona Tregenna concurring

Tribunal Researcher: Kgothatso Kgobe

For the Applicants: N Moshimane and N Khumalo of DM5 Inc

For the Commission: W Gumbie and L Mabidikane

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ANNEXURE A:

AMENDED CONDITIONS

Case No.: LM215Feb17/VAR037Apr18

In the application for variation of merger conditions:

Government Employees Pension Fund represented by

Applicant

The Public Investment Corporation SOC Limited

And

Competition Commission

Respondent

In re: the merger between:

Government Employees Pension Fund represented by

Primary Acquiring Firm

The Public Investment Corporation SOC Limited

and

Distell Group Limited

Primary Target Firm

AMENDED CONDITIONS

1. DEFINITIONS AND INTERPRETATION

- 1.1 The headings to the clauses of these Amended Conditions are for reference purposes only and shall in no way govern or affect the interpretation of or modify or amplify the terms of these Amended Conditions or any clause hereof.
- 1.2 Unless inconsistent with the context, the words and expressions set forth below shall bear the following meanings assigned to them and cognate expressions shall bear corresponding meanings -
- 1.2.1 **“AB InBev”** means Anheuser-Busch InBev SA/NV, a public limited company incorporated in the Kingdom of Belgium;

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- 1.2.2 **"Amended Conditions"** means the conditions set out herein, agreed to by the Parties and the Commission;
- 1.2.3 **"Approval Date"** means the date on which the Tribunal approves of these Amended Conditions;
- 1.2.4 **"BEE"** means black economic empowerment;
- 1.2.5 **"BEE Equity"** means such number of ordinary shares as may constitute [REDACTED] in New Distell, pursuant to the implementation of the RIH / Capevin Transaction, and which will be sold to one or more Purchaser(s) in terms of these Amended Conditions;
- 1.2.6 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.2.7 **"Competition Act"** means the Competition Act 89 of 1998;
- 1.2.8 **"Distell"** means Distell Group Limited, an investment holding company listed on the JSE Limited securities exchange;
- 1.2.9 **"Distell Shareholding"** means the 26.5% shareholding interest in Distell held by OBI which was acquired by the GEPF subject to the Original Conditions;
- 1.2.10 **"Divestiture"** means the transfer of the BEE Equity to one or more Purchaser(s);
- 1.2.11 **"GEPF"** means the Government Employees Pension Fund, represented by the PIC;
- 1.2.12 **"OBI"** means Other Beverage Interests Proprietary Limited, an indirect subsidiary of AB InBev and current owner of the Distell Shareholding;
- 1.2.13 **"Merging Parties"** mean the GEPF and Distell;
- 1.2.14 **"New Distell"** means Business Venture Investments No. 1997 Limited, a special purpose vehicle created and controlled by RIH in terms of the proposed transaction filed under case number 2017Sep0023;
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- 1.2.15 **"New Distell Shareholding"** means the [REDACTED] shareholding interest in New Distell to be acquired by the GEPPF pursuant to the RIH / Capevin Transaction;
- 1.2.16 **"Original Conditions"** means the conditions imposed by the Tribunal on 29 March 2017, in the Proposed Transaction, a copy of which is attached hereto as Annexure 1, and which required the GEPPF to divest of [REDACTED] of its erstwhile 26.5% shareholding in Distell;
- 1.2.17 **"Parties"** means the parties to the Amended Conditions, namely, GEPPF and New Distell;
- 1.2.18 **"Proposed Transaction"** means the GEPPF's acquisition of 26.5% of the shareholding in Distell, which was approved by the Tribunal on 29 March 2017, subject to the Original Conditions;
- 1.2.19 **"PIC"** means The Public Investment Corporation SOC Limited, as a duly authorised representative of the GEPPF;
- 1.2.20 **"Purchaser"** means a purchaser of the BEE Equity in terms of these Amended Conditions;
- 1.2.21 **"Remgro"** means Remgro Limited;
- 1.2.22 **"Remgro Beverages"** means Remgro Beverages Proprietary Limited;
- 1.2.23 **"RCI"** means Remgro Capevin Investments Proprietary Limited;
- 1.2.24 **"RIH"** means Remgro International Holdings Proprietary Limited;
- 1.2.25 **"RIH / Capevin Transaction"** means the series of inter-related steps as defined in the circular to shareholders and accompanying prospectus issued by Distell on 20 September 2017, which includes the acquisition of the sole control by Remgro Beverages in RCI and Capevin and ultimately control Distell. This transaction was approved by the Tribunal on 11 May 2018 under case number LM177SEP17;
- 1.2.26 **"SABMiller"** means SABMiller plc (now SABMiller Limited);
- 1.2.27 **"South Africa"** means the Republic of South Africa; and
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- 1.2.28 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.
- 1.3 In these Amended Conditions and its interpretation:
- 1.3.1 references to a statute or statutory provision include any subordinate legislation made from time to time thereunder and include that statute or statutory provision as modified, amended or re-enacted from time to time;
- 1.3.2 where any number of days is prescribed, those days shall include only ordinary business days (i.e. excluding Saturdays, Sundays and prescribed public holidays in South Africa). The number of days shall be reckoned exclusively of the first and inclusively of the last day;
- 1.3.3 where reference to the GEPP is made it simultaneously refers to the PIC;
- 1.3.4 unless inconsistent with the context, the *eiusdem generis* rule shall not apply, and whenever the word "including" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given; and
- 1.3.5 account shall be taken of the purpose of these Amended Conditions and the objectives listed in the Recordal.

2. RECORDAL

- 2.1 The Merging Parties notified the Proposed Transaction to the Commission on 31 January 2017.
- 2.2 The Proposed Transaction was approved by the Tribunal on 29 March 2017, subject to the Original Conditions.
- 2.2.1 In approving the GEPP as the purchaser of the Distell Shareholding in terms of the Tribunal conditions imposed in the AB InBev / SABMiller merger, and in view of the Commission's objectives to promote the participation of firms controlled by historically disadvantaged persons in the South African economy, the Commission and the GEPP agreed that a portion of the Distell Shareholding should be divested to a BEE-

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controlled entity/ies in terms of the Original Conditions. The GEPF accepted such Original Conditions and the Tribunal approved the Proposed Transaction subject to the GEPF disposing of approximately [REDACTED] of the acquired shares to a Purchaser.

- 2.3 However, subsequent to the Tribunal's approval of the Proposed Transaction, the Commission was notified of the RIH / Capevin Transaction, a large merger, on 11 September 2017. In its assessment, the Commission had particular regard to the impact that the implementation of the RIH / Capevin Transaction would have on the GEPF's ability to fulfil its obligations under the Original Conditions.
- 2.4 The Commission's investigation found that the Original Conditions would not be implementable because, *inter alia*, GEPF would no longer hold shares in Distell, but in New Distell. In addition, the PIC [REDACTED] RIH / Capevin Transaction.
- 2.5 In order to facilitate the fulfilment of the Divestiture [REDACTED]
[REDACTED]
[REDACTED] In addition, [REDACTED]
[REDACTED] PIC's application to the Tribunal to amend the Original Conditions such that the Divestiture [REDACTED] as envisaged in these Amended Conditions.
- 2.6 In light of the above, the Commission and the PIC have agreed to these Amended Conditions to ensure that the GEPF remains in a position to fulfil the obligations required of it under the Original Conditions.

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3. DIVESTITURE OF THE BEE EQUITY

- 3.1 The GEPP shall divest of the BEE Equity within [REDACTED] (the "**Divestiture Period**") to one or more BEE-controlled entity/ies.
- 3.2 The PIC and the GEPP shall [REDACTED].
- 3.3 The purchase consideration to be paid by the Purchaser/s shall be determined with [REDACTED].
- 3.4 The PIC shall inform the Commission in writing within 5 (five) days after implementation of the Divestiture, being the point in time at which the securities register of New Distell is updated to reflect the BEE Equity in the name of one or more Purchaser(s).

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1 The PIC shall furnish the Commission with an initial progress report on or before 31 December 2018, and thereafter quarterly progress reports (i.e. every three months) during the Divestiture Period, concerning the Parties' efforts to identify a suitable Purchaser/s for the BEE Equity and progress made in concluding the Divestiture.
- 4.2 The Commission may request any additional information from the PIC which the Commission from time to time deems necessary for the monitoring of compliance with these Amended Conditions.
- 4.3 In the event that the Commission receives a complaint regarding non-compliance by the GEPP with these Amended Conditions, or otherwise determines that there has been an apparent breach by the GEPP or New Distell of the Amended Conditions, the matter shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.
- 4.4 All correspondence in relation to these conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

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5. VARIATION

- 5.1 The Merging Parties and/or the Commission shall be entitled, upon good cause shown, to apply to the Tribunal for a waiver, relaxation, modification and/or substitution of one or more of the Amended Conditions.