



competitiontribunal south africa

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
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Pretoria 0132
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Merger Clearance Certificate

Date: 30 November 2017

To: Norton Rose Fulbright

Case Number: LM191Jan17

K2014202010 (Pty) Ltd And AM Alberts (Pty) Ltd (in business rescue) t/a Progress Milling.

You applied to the Competition Commission on 15 December 2016 for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

☐

no conditions.

☒

the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal:



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM191Jan17

In the matter between:

K2014202010 (Proprietary) Limited

Primary Acquiring Firm

And

AM Alberts (Proprietary) Limited (in business recue) t/a
Progress Milling

Primary Target Firm

Panel : E Daniels (Presiding Member)
: A Ndoni (Tribunal Member)
: I Valodia (Tribunal Member)

Heard on : 24 November 2017
Last submission received : 29 November 2017
Decided on : 30 November 2017

Order

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that -

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Presiding Member
Mr Enver Daniels

30 November 2017
Date

Concurring: Ms Andiswa Ndoni and Prof. Imraan Valodia

ANNEXURE A

K2014202010 (PTY) LTD (HOLDCO)

And

AM Alberts (Proprietary) Limited (in business rescue) t/a Progress Milling

CASE NUMBER: LM191JAN17

CONDITIONS

1. DEFINITIONS

The following terms shall have the meaning assigned to them below and cognate expressions have corresponding meanings –

- 1.1 **"Acquiring Firm" or "Holdco"** means K2014202010 (Pty) Ltd, to be held as to [REDACTED] by LDCA and as to [REDACTED] % by Willowton;
- 1.2 **"Affected Employees"** means any employees that may be retrenched after the Moratorium Period;
- 1.3 **"African Star"** means African Star Grain and Milling (Pty) Ltd;
- 1.4 **"Allsome"** means Allsome Brands (Pty) Ltd;
- 1.5 **"Approval Date"** means the date referred to in the Tribunal's merger Clearance Certificate (Form CT10);
- 1.6 **"Board"** means a Board of Directors;
- 1.7 **"Commission"** means the Competition Commission of South Africa;
- 1.8 **"Competition Act"** means the Competition Act No. 89 of 1998, as amended;
- 1.9 **"Competitively Sensitive Information"** includes but is not limited to:
 - 1.9.1 Pricing – including, but not limited to, pricing of specific products within those overlapping relevant markets, prices/ discounts / rebates offered to specific clients and planned reductions or increases;
 - 1.9.2 Margin information by product or client;
 - 1.9.3 Cost Information;
 - 1.9.4 Information on specific clients and client strategy, including information with respect to the sales volume of clients;

- 1.9.5 Marketing strategies;
- 1.9.6 Budgets and business plans; and
- 1.9.7 Agreements and other (non-standard) terms and conditions relating to the supply and distribution of the relevant product.
- 1.10 **"Conditions"** mean these conditions;
- 1.11 **"Consortium"** comprises Louis Dreyfus Company Africa (Pty) Ltd and DH Brothers Industries (Pty) Ltd t/a the Willowton Group which respectively hold [REDACTED] and [REDACTED] of the shares in Holdco;
- 1.12 **"Days"** mean business days, being any day other than a Saturday, Sunday or official public holiday;
- 1.13 **"Epko"** means Epko Oil Seed Crushing (Pty) Ltd;
- 1.14 **"Fund"** means the skills development fund referred to in paragraph 5;
- 1.15 **"Implementation Date"** means the date following the Approval Date on which the Proposed Transaction is implemented by the Merging Parties;
- 1.16 **"KBM"** means Kromdaai Best Milling (Pty) Limited;
- 1.17 **"LDCA"** means Louis Dreyfus Company Africa (Pty) Ltd;
- 1.18 **"Merger"** means the acquisition of control of the Target Firm by the Acquiring Firm;
- 1.19 **"Merging Parties"** mean the Acquiring Firm and the Target Firm;
- 1.20 **"Moratorium Period"** means a 15 (fifteen) month period from the Implementation Date;
- 1.21 **"Newco"** means Viva Milling (Pty) Ltd, a wholly owned subsidiary of Holdco, established for the purpose of acquiring the business and assets of Progress Milling;
- 1.22 **"Noordfed"** means Noordfed (Pty) Ltd;
- 1.23 **"Noordfed Transaction"** means the Transaction in terms of which Holdco acquires Noordfed, which merger has been conditionally approved by the Tribunal under case number LM081JUN17;
- 1.24 **"Ordinary Course of Business"** means in respect of any transaction involving such entity, in the ordinary course of such entity's business, as conducted by such entity in a *bona fide* manner in accordance with applicable law, best practice and undertaking by such entity in good faith;

- 1.25 "Progress Milling" or "Target Firm" means AM Alberts (Pty) Ltd trading as Progress Milling;
- 1.26 "Proposed Transaction" means the acquisition of the business and assets of Progress Milling by Holdco through Newco;
- 1.27 "Tribunal" means the Competition Tribunal of South Africa;
- 1.28 "Tribunal Rules" means the Rules for the Conduct of Proceedings in the Tribunal; and
- 1.29 "Willowton" means DH Brothers Industries (Pty) Ltd trading as Willowton Group.

2. RECORDAL

- 2.1 On 15 December 2016, the Commission was notified of a large merger in terms of which Holdco would through Newco acquire and hold the business of Progress Milling. Post-merger, Progress Milling would be controlled by Holdco.
- 2.2 Following its investigation, the Commission determined that the Proposed Transaction resulted in a substantial lessening or prevention of competition in the sunflower seed crushing market and white maize market and that there were no conditions capable of remedying the anti-competitive harm. The Commission thus recommended the prohibition of the Proposed Transaction on 23 October 2017.
- 2.3 The Commission's basis for the prohibition was that the Proposed Transaction would give rise to co-ordinated effects arising from the prospect of information sharing between competitors. The Commission's concern arises from its determinations that:
 - 2.3.1 the Proposed Transaction introduces a new structural link between LDCA and Willowton in the maize market; and
 - 2.3.2 the Proposed Transaction will give rise to co-ordinated effects since LDCA (through Epko) and Willowton both have activities in the sunflower seed crushing market and post-merger the Consortium members may exchange Competitively Sensitive Information due to their respective nominees to the Holdco Board.
- 2.4 In relation to public interest consequences of the Merger, the Commission found that Progress Milling employs 274 employees. Absent the Merger, the Target Firm is likely to fail and all 274 employees will therefore lose their jobs. Accordingly, the Merger will save jobs.
- 2.5 However, because of the financial distress of the Target Firm, the Merging Parties

advised that a certain number of retrenchments are required to ensure that the Target Firm can remain afloat for long enough to facilitate its ability to be sustainable in future. The Merging Parties advised the Commission that all other cost-cutting measures available have been taken, and reductions in labour costs and closure of loss-making activities are the only remaining levers available to reduce the operational costs at Progress Milling against an inability to increase revenue. Thus retrenchments would not be aimed at a profit yield but at getting the Target Firm to reach break-even point so that sustainability could be facilitated thereafter.

- 2.6 Despite the need for such retrenchments, in order to mitigate the Merger's impact on employment, the Merging Parties subsequently agreed to the imposition by the Tribunal of a moratorium on retrenchments for the Moratorium Period.
- 2.7 The Tribunal has approved the Proposed Transaction subject to the Conditions set out below.

3. CONDITIONS ON INFORMATION SHARING

3.1 Board seats and management

3.1.1 LDCA shall procure that at all times with effect from the Implementation Date –

3.1.1.1 [REDACTED]

3.1.1.2 [REDACTED]

3.1.1.3 [REDACTED]

3.1.1.4 [REDACTED]

3.1.1.5 [REDACTED]

3.1.1.6 [REDACTED] and

3.1.1.7 [REDACTED]

[REDACTED]

3.1.2 Willowton shall procure that at all times with effect from the Implementation Date:

3.1.2.1 [REDACTED]
[REDACTED]
[REDACTED]

3.2 Information flow restrictions

3.2.1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.2.2 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.2.3 The confidentiality agreements referred to in paragraphs 3.2.1 and 3.2.2 and will collectively be referred to as the "Confidentiality Agreements".

3.2.4 Each of LDCA and Willowton (as the case may be), shall procure (as the case may be) that each Confidentiality Agreement includes an undertaking that:

3.2.4.1 [REDACTED]
[REDACTED]
[REDACTED]
and

3.2.4.2 [REDACTED]
[REDACTED]
[REDACTED]

3.2.5 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3.2.6 [REDACTED]

[REDACTED]

3.2.7

[REDACTED]

3.2.8

[REDACTED]

3.2.9

[REDACTED]

3.3 Competition law awareness

3.3.1

[REDACTED]

3.3.2

[REDACTED]

3.3.3

3.3.4

3.3.5

4. CONDITIONS ON EMPLOYMENT

- 4.1 For the Moratorium Period, the Merging Parties shall not retrench any employees of Progress Milling.
- 4.2 For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.
- 4.3 LDCA shall procure that for a period of two years after the Moratorium Period, and on the basis set out in clause 4.6, Epko (a "Relevant Firm") gives first right for an interview to the Affected Employees should any employment opportunity arise at Epko.
- 4.4 Willowton shall procure that for a period of two years after the Moratorium Period,

and on the basis set out in clause 4.6, Willowton (also, a "**Relevant Firm**") gives first right for an interview to the Affected Employees should any employment opportunity arise at Willowton.

4.5 LDCA and Willowton collectively shall procure that for a period of two years after the Moratorium Period, and on the basis set out in clause 4.6, each of Holdco, Newco, Noordfed and Allsome (also, each a "**Relevant Firm**") gives first right for an interview to the Affected Employees should any employment opportunity arise at any such firm.

4.6 Right of interview provisions:

4.6.1 The Consortium and each Relevant Firm shall keep a list of retrenched Affected Employees' contact details and each time a job opportunity arises at a Relevant Firm, the Relevant Firm shall send to the retrenched Affected Employees an SMS and email communication to inform them of the opportunity. This communication shall be sent out before any position is advertised externally. It shall remain the responsibility of any retrenched Affected Employee to notify the Consortium jointly in writing of any change in their contact details.

4.6.2 The communication shall include information and details of the position as well as contact details as to whom to contact to enable the retrenched Affected Employees to apply should they wish to do so.

4.6.3 Under all circumstances the onus shall rest on the retrenched Affected Employee to apply for a vacant position.

4.6.4 Should an Affected Employee meet the relevant criteria and job requirements in terms of qualification, experience, and skills required, the application shall be processed by the HR department of the Relevant Firm which is recruiting. In the event that two qualified and skilled individuals apply for a position, one being an Affected Employee and one being an external applicant, the Relevant Firm shall give preference to the Affected Employee, subject to employment legislation and the existing labour law practices of that firm. In the event that there are two Affected Employees who apply for the same position, the Relevant Firm may select one of them in its sole discretion, subject to employment legislation and the existing labour law practices of that firm.

5. **CONDITIONS ON SKILLS DEVELOPMENT FUND**

5.1 The Consortium shall collectively establish a fund for the purposes of up-skilling Affected Employees.

6.1.4

[REDACTED]

6.1.5

[REDACTED]

6.1.6

Within one (1) month of the Implementation Date, a senior representative of LDCA shall depose to and submit an affidavit confirming the implementation of the IT information barriers established pursuant to clause 3.2.6 of the Conditions.

6.1.7

Within one (1) month of the Implementation Date, a senior representative of LDCA shall depose to and submit an affidavit confirming compliance with clause 3.1.1.7.

6.1.8

A senior representative of each Consortium member shall depose to and submit an affidavit on each anniversary of the Implementation Date and for a period of 3 (three) years following the Implementation Date confirming compliance with clause 3.3 of these Conditions insofar as it relates to any entity addressed under such clause and in which it holds shares.

6.1.9

A senior representative of LDCA shall depose to and submit an affidavit on each anniversary of the Implementation Date and for a period of 3 (three) years following the Implementation Date confirming compliance with clauses 3.2.5 to 3.2.9 of the Conditions.

6.2 Employment

6.2.1

The Merging Parties shall collectively circulate a copy of the Conditions to all the employees and the relevant trade unions of the Consortium members and Target Firm within 10 (ten) business days of the Approval Date and must satisfy

themselves that the employees and the relevant trade unions have received the Conditions.

6.2.2 As proof of compliance herewith, each Merging Party shall within 10 (ten) business days of so circulating the Conditions, submit an affidavit by a senior official employed by that Merging Party attesting to the circulation and the receipt by the employees and the relevant trade unions of the Conditions and provide written evidence of such circulation and receipt.

6.2.3 For 2 (two) years after the Moratorium Period, the Consortium shall collectively on the anniversary of the end of the Moratorium Period, submit a joint report to the Commission indicating: (1) the number of Affected Employees that have taken up employment at Willowton, Holdco, Newco, Noordfed, Epko and Allsome in terms of clauses 4.3, 4.4, 4.5 and 4.6; (2) the skills level and position of the employment taken up; and (3) the location of that employment taken up. The report shall be accompanied by an affidavit from a senior official of each of the Consortium members attesting to the accuracy of the report.

6.2.4 Any employee who believes that his/her employment with the Merging Parties has been terminated in contravention of the Conditions may approach the Commission with his/her complaint to be dealt with by the Commission in terms of Rule 39 of the Rules.

6.3 Skills Development Fund

6.3.1 For 2 (two) years after the Moratorium Period, the Consortium shall collectively on each anniversary of the end of the Moratorium Period, submit a joint report to the Commission indicating the number of Affected Employees that have made use of the Fund and the type of training they undertook.

6.4 In the event that the Commission receives any complaint in relation to non-compliance with the above conditions, or otherwise determines that there has been an apparent breach of the conditions, the matter shall be dealt with in terms of Rule 39 of the Rules.

6.5 The Merging Parties must ensure that the claims of all of the subsistence farmers who provided Progress Milling with maize prior to the Implementation Date will be settled in full.

6.6 The Merging Parties must ensure that the Global Louis Dreyfus Foundation establishes a fund with not less than [REDACTED] within a period of one year from the Implementation Date, to train small-scale female farmers in Limpopo. This fund must be established in consultation with representatives of the

female farmers who will benefit from the training.

- 6.7 Any Merging Party may at any time, on good cause shown, apply to the Commission for the Conditions or any part thereof to be lifted, revised or amended. Should a dispute arise in relation to the variation of the Conditions or any part thereof, the relevant Merging Party shall apply to the Tribunal, on good cause shown, for the Conditions or any part thereof to be lifted, revised or amended.
- 6.8 All correspondence in relation this Condition should be forwarded to: mergerconditions@compcom.co.za