COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM123Aug17

In the matter between:

South Africa Distilleries & Wine (SA) Limited Primary Acquiring Firm

and

Lusan Holdings (Pty) Ltd Primary Target Firm

Panel	: Enver Daniels (Presiding Member) : Fiona Tregenna (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	: 11 October 2017
Order Issued on	: 12 October 2017
Reasons Issued on	: 18 October 2017
Non-Confidential Reasons Issued on	: 02 November 2017

Reasons for Decision (Non-Confidential)

Approval

[1] On 11 October 2017, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between South African Distilleries & Wine (SA) Limited ("SADW") and Lusan Holdings (Pty) Ltd ("Lusan").

[2] The reasons for approving the proposed transaction follow.

Parties to proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is SADW, which is controlled by Distell Group Limited ("Distell"). Distell is controlled by Remgro-Capevin Investments (Pty) Ltd which is in turn controlled by Capevin Holdings Limited ("Capevin") and Remgro International Holdings (Pty) Ltd ("Remgro International").

[4] Capevin is a public company listed on the Johannesburg Securities Exchange and is not controlled by any firm. Remgro International is controlled by Remgro Limited ("Remgro"). Remgro's shares are widely held and are not controlled by any firm.

[5] Distell is a marketer of wines, spirits (i.e. brandy, white spirits, whiskey and rum), ciders, and other ready-to-drink beverages.

Primary target firm

[6] The primary target firm is Lusan, a joint venture established in the year 2000. Lusan is jointly controlled by SADW and Hygrace Holdings PTE Limited ("Hygrace")[1] each holding 50% of the shares. Lusan wholly controls a number of firms.[2]

[7] In terms of the joint venture, Hygrace and SADW amalgamated their farming operations into Lusan, with Hygrace contributing the Hillandale wine farm, Stellenzicht wine farm, Olives wine farm and Neethlingshof wine farm. SADW contributed the Alto wine farm, the Uitkyk wine farm and the Le Bonheur wine farm.

[8] It should be noted that prior to the proposed transaction, the Lusan joint venture has already sold the Hillandale, Stellenzicht and Le Bonheur wine farms to other third parties. Further, there is an agreement to sell the Olives and Neethlingshof wine farms to Sino-African Properties (Pty) Ltd ("SAPPL"), which forms part of the same group as Hygrace. These were not notifiable transactions.

[1] Hygrace is controlled by the Schreiber family who reside in Germany. Hygrace does not control any firms in South Africa.

[2] Including: Lusan Premium Wines; Evergrace Farm; Hyfarm Investors – Hyfarm, in turn controls: Alto Wynlandgoed; The farming assets of Alto wine estate; Uitkyk Farm Estate; and the farming assets of Uitkyk wine farm.

[9] The farms that are the target firms in this transaction are therefore the Alto and Uitkyk wine farms, which produce wine sold under the Alto, Uitkyk and Flat Roof Manor brands.

Proposed transaction and rationale

[10] SADW provides that Lusan has not performed to expectations. SADW and Hygrace decided that the wine brands under Lusan would perform better with dedicated marketing and sales efforts. SADW has agreed to take back the wine farms it originally contributed to the JV (except Le Bonheur which was sold to a third party). Hygrace has agreed to take back the wine farms it originally contributed to the JV (except Stellenzicht and Hillandale which have already been sold to third parties). Reducing the brands in its portfolio will allow SADW to focus its human resources on fewer wine brands.

[11] Lusan submits that the financial performance of Lusan has been unsatisfactory. The Lusan wine brands do not receive the attention required from Distell marketers, hence they underperform. It was agreed that the brands would perform better with dedicated marketing and sales efforts. This is the rationale for the sale and splitting of the farms.

[12] Post the transactions to SAPPL taking place, SADW will acquire the 50% in Lusan not already owned by it, which will give it sole control over the remaining wine farms owned by Lusan (Alto wine farm and Uitkyk wine farm). Further, SADW will acquire the Hygrace loan account which comprises of the amounts owing to Hygrace by Lusan.

Impact on competition

Market Analysis

[13] The activities of the merging parties overlap in the supply of wine. The Commission considered the broad national market for the supply of wine as well as the narrower market for the supply of still wine, where Lusan is active.

[14] In the broad market, the Commission found that Distell has 41% of the market and Lusan 0.22%. This is a minimal market share accretion and the Commission found this not to be a substantial prevention or lessening of competition.

[15] In the narrow still wine market, Distell has 39% of the market and Lusan, 0.149% of the market. Again there is a minimal market share accretion and the Commission found this not to be a substantial prevention or lessening of competition. Further, there are a

number of competitors in this market such as Namaqua, Douglas Green Bellingham, Meridian, Mooiuitsig, and Vinimark.

[16] The Commission notes that there will be no market structure change as a result of the merger. Distell as a 50% shareholder in Lusan is already able to exercise joint control over Lusan.

Public interest

[17] The Commission found that the transaction will have a negative impact on employment. When notifying the Commission of the transaction, the merging parties anticipated retrenching 6 (six) employees from the Lusan head office. The head office currently employs 12 (twelve) employees, and SAPPL will take over 6 (six) from the joint venture.

[18] However, the merging parties did manage to reduce the number of affected employees from 6 (six) to three (3) through identifying other placement opportunities. The remaining three employees consist of one skilled, one semi-skilled, and one unskilled employee.

[19] There were concerns for the semi-skilled and unskilled employees and as such the Commission recommended that the parties set up a fund to finance courses for the affected employees to up-skill and improve their chances of finding alternate employment.

[20] With this in mind, the Commission recommended, and the merging parties agreed, that the merger be approved with a condition that limits the number of retrenchments to the three affected employees. As well as a fund for each of the semi-skilled and unskilled employees of R[redacted] for them to up-skill themselves in a field of their choosing.

[21] At the hearing the merging parties updated the Tribunal on the status of the transaction, and stated that there will only be 2 (two) retrenchments as the semi-skilled employee had taken up alternate employment.[3] The Tribunal, thereafter, questioned the merging parties on possibly enhancing the condition, in that the unskilled employee remain in Distell's employ for a period of two years to give Distell the opportunity to

[3] Transcript page 14, lines 8 – 11.

find a place to permanently accommodate the employee should the opportunity arise. The employee will still have the chance to up-skill as per the fund.[4]

[22] The merging parties confirmed that they were amenable to this enhancement of the condition regarding the unskilled employee.[5] Therefore the retrenchments would be reduced to 1 (one) employee.

[23] There are no other public interest concerns that arise from the proposed transaction.

Conclusion

[24] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Due to the public interest issues arising from the proposed transaction the above mentioned set of conditions have been imposed. Accordingly, we approve the proposed transaction subject to conditions. For convenience the set of conditions are attached, marked as "**Annexure A**".

Mr Enver Daniels

02 November 2017
DATE

Prof Fiona Tregenna and Mrs Medi Mokuena concurring

Case Manager:	Kameel Pancham
For the merging parties:	Graeme Wickins from Werksmans Attorneys
For the Commission:	Portia Bele

[4] Transcript page 15, lines 1 – 7.
[5] Transcript page 15, line 22.

NON-CONFIDENTIAL

ANNEXURE A

South African Distilleries & Wine (SA) Limited

and

Lusan Holdings (Pty) Ltd

CC Case Number: 2017Jul0035

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:-

1.1.1. "Acquiring Firm" means South African Distilleries & Wine (SA) Limited, its subsidiaries and controlling firms;

1.1.2. "Affected Employee" means the unskilled employee of the Target Firm, being the [redacted] identified in Annexure A1 hereto;

1.1.3. "ABANTU" means the Agricultural Broad based & Allied National Trade Union, being the employee union representing the employees of the Acquiring Firm;

1.1.4. "Allowance" means the amount of up to [redacted] that the Merged Entity shall provide to the Unskilled employee for training or re-skilling purposes;

1.1.5. "Approval Date" means the date referred to in the Competition Tribunal Order;

1.1.6. "Commission" means the Competition Commission of South Africa;

1.1.7. "Conditions" means the conditions set out herein, agreed to by the Merging Parties and the Commission;

1.1.8. "Days" means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.1.9. "FAWU" means Food and Allied Workers Union being employee union representing the employees of Acquiring Firm;

1.1.10. **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.1.11. **"Merger"** means the acquisition of control by the Acquiring Firm over the Target Firm;

1.1.12. **"Merging Parties"** means the Acquiring Firm and the Target Firm;

1.1.13. **"Merging Parties' Wine Farm Operations"** means Nederburg Wine Farms Limited, a subsidiary within Distell Group Limited, and Lusan Holdings Proprietary Limited, being the entities within the Merging Parties that engage in the business activity of operating a wine farm;

1.1.14. **"Merged Entity"** means the Acquiring Firm and the Target Firm following the Merger;

1.1.15. **"NUFBWSAW"** means the National Union Food Beverage Wine Spirits and Allied Workers, being employee union representing some of the employees of the Acquiring Firm and the Target Firm;

1.1.16. **"Skilled Employee"** means the [redacted] identified in annexure A1 hereto;

1.1.17. **"Target Firm"** means Lusan Holdings (Pty) Ltd, which at the Implementation Date will control the Uitkyk and Alto wine farms; and

1.1.18. **"Tribunal"** means the Competition Tribunal of South Africa.

2. RECORDAL

2.1. On 13 July 2017, a merger was notified in terms of which the Acquiring Firm would acquire sole control over the Target Firm.

2.2. In order to minimise the negative impact on employment presented by this transaction, the Commission recommends that the Merger be approved subject to the Conditions set out in paragraphs 3 and 4 below.

2.3. The Merging Parties have agreed to these Conditions.

3. CONDITIONS

3.1. Save for the Skilled Employee, the Merging Parties shall not retrench any employees as a result of the Merger for a period of 2 (two) years from the Implementation Date of the Merger.

3.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act of 1995, as amended; and (iv) resignations or retirements in the ordinary course of business.

3.3. During the 2 (two) year period contemplated in paragraph 3.1 above, the Merged Entity shall provide the Affected Employee with an Allowance for use in order to attend a skills development course of the Affected Employee's choice.

3.4. The Affected Employee shall indicate in writing to the Merged Entity a training course they wish to enrol for at any time within the period of 2 (two) years from the Implementation Date of the Merger. Failure to do so will result in the Affected Employee losing the entitlement to the Allowance.

3.5. All reasonable costs relating to the administration of the assistance detailed in paragraph 3.3 above, shall be borne by the Merged Entity and shall not form part of the payment of any other benefit that is due to the Affected Employee in terms of the Labour Relations Act of 1995, as amended.

3.6. The Allowance shall be administered in accordance with paragraph 4 below.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.

4.2. The Merging Parties shall circulate a copy of the Conditions within 5 (five) Days of the Approval Date to all employees of the Merging Parties' Wine Farm Operations in South Africa and to FAWU, NUFBWSAW, ABANTU and the employee representatives of the Target Firm in South Africa.

4.3. As proof of compliance herewith, the Merged Entity shall within 5 (five) Days of circulating the Conditions, provide the Commission with an affidavit by the Head Legal Advisor of the Merged Entity attesting to the circulation of the Conditions and attach a copy of the said notice.

4.4. The Merged Entity shall provide the Commission with a report detailing the extent of its compliance with clause 3.1 of the Conditions on each anniversary of the Implementation Date for a period of 2 (two) years. This report shall be accompanied by an affidavit, duly disposed by the Head Legal Advisor of the Merged Entity, attesting to the contents of the report.

4.5. The Merged Entity shall deposit the Allowance for the Affected Employee as envisaged in paragraphs 3.3 and 3.4 above into a nominated bank account of a training institution of the Affected Employee's choice upon presentation of an invoice or registration form from a training institution which is accredited or otherwise reputable education or skills-training institution.

4.6. On the second anniversary of the Implementation Date, the Merged Entity shall provide the Commission with a report detailing whether or not the Affected Employee has been retrenched, if the Affected Employee has applied for the training and up-skilling course, confirmation that the Allowance has been disbursed, details of whether the training was completed and shall be accompanied by documentary evidence of completion such as copies of the certificate achieved. This report shall be accompanied by an affidavit, duly deposed by the Head Legal Advisor of the Merged Entity, attesting to the contents of the report.

4.7. Should the Affected Employee fail to complete the skills development course, the Merged Entity

shall use its best endeavours to determine and explain reasons for the non-completion.

5. GENERAL

5.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

5.2. In the event that the Commission discovers that there has been an apparent breach by the Merging Parties of these Conditions, this shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Competition Tribunal read together with Rule 39 of the Rules for the Conduct of Proceedings in the Competition Commission.

5.3. The Merging Parties 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 Conditions.

ANNEXURE A1

Name	Job function	Skill Level	Highest qualification Level	Years of service	Monthly package	Age
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]