

SOUTH AFRICA / JUDGMENT

KLL Group (Pty) Ltd v Starch, Glucose and Animal Feed Ingredients Business of Tongaat Hulett Ltd (LM173Mar20) [2020] ZACT 10 (15 July 2020)

[2020] ZACT 10

COURT

Competition Tribunal

BEFORE

E Daniels, Y Carrim, H Cheadle

CASE / FILE NUMBER

LM173Mar20

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM173Mar20

In the matter between

KLL Group (Pty) Ltd

Primary Acquiring Firm

And

The Starch, Glucose and Animal Feed Ingredients

Business of Tongaat Hulett Ltd

Primary Target Firm

Panel: E Daniels (Presiding Member)

: Y Carrim (Tribunal Member)

: Prof. H Cheadle (Tribunal Member)

Heard on: 6 July 2020

Order Issued on: 6 July 2020

Reasons

Issued on : 15 July 2020

REASONS

FOR DECISION

Approval

- [1] On 6 July 2020, the Competition Tribunal (“Tribunal”) unconditionally approved the proposed transaction in terms of which KLL Group (Pty) Ltd (“KLL”) is acquiring the starch, glucose and animal feed ingredients business of Tongaat Hulett Ltd (“Target Business”).
- [2] The reasons for the approval of the proposed transaction follow.

Parties to the transaction

- [3] The acquiring firm is KLL, a firm which is ultimately controlled by Barloworld Limited Group (“Barloworld Limited”), a public company listed on the JSE and which has secondary listings on the London and Namibian Stock Exchanges. Both KLL and Barloworld Limited control several firms in South Africa (“SA”). Barloworld Limited, all the firms it controls, all the firms controlling it and all the firms controlled by those firms will be referred to as the “Barloworld Group”.
- [4] Barloworld is a distributor of leading international brands, providing integrated rental fleet management, product support and

logistics solutions. Barloworld Group’s core divisions are comprised of equipment (earth moving equipment and power systems),

automotive (car rental, motor retail, fleet services, used vehicles and disposal solutions) and logistics services.

- [5] The Target Business is owned by Tongaat Hulett, a public company incorporated in accordance with the company laws of SA. The Target Business includes various assets and liabilities and includes 100% of the issued share capital of two firms owned by Tongaat Hulett, namely Tongaat Hulett Starch (Pty) Ltd and Tongaat Hulett Starch (Australia) (Pty) Ltd.
- [6] The Target Business produces starch, glucose and other related maize products processed through four wet milling plants, with three located in Gauteng and one in the Western Cape. Starch and glucose are key inputs across several sectors, inter alia, FMCG and alcoholic beverages. The Target Business converts non-genetically modified maize (non-GMO maize) into starch, starch-based and glucose. The co-products produced during the starch and glucose manufacturing process is supplied to the animal feeds industry.
- [7] The Target Business is a sole producer of unmodified and modified starches in SA and is only one of two starch producers in Africa (the other being in Egypt). The Target Business is also the sole supplier of glucose to SA and Namibia among other southern African countries.

Proposed transaction and rationale

- [8] The proposed transaction entails the acquisition of the Target Business in its entirety by KLL. Post-merger, KLL will solely own and control the Target Business.

Impact on competition

- [9] The Competition Commission (“Commission”) found that the proposed transaction does not result in a horizontal overlap because no firm within the Barloworld Group conducts business activities/has an interest in businesses that conduct activities that can be considered as substitutable/competing with the Target Business’ activities. Although the Commission found a business relationship between the activities of the merging parties, the Commission found that the proposed transaction does not result in a vertical overlap because the merging parties do not operate within the same production vertical/value chain.

Third party concerns

- [10] There were concerns raised by two of the merging parties’ customers (“complainants”). One’s concern is that post-merger, the merged entity will price glucose and starch at import parity levels, thus increasing its costs due to there being no viable alternative suppliers of glucose and starch to turn to. To assuage its concerns, the complainant proposed that the merger be approved subject to a condition precluding the merged entity from implementing an import parity pricing model for the supply of starch and glucose.

- [11] The other complainant’s concerns were predicated on the complainant not having been able to conclude a long-term supply

agreement with the Target Business. The complainant was concerned that the absence of a long-term supply agreement with the Target

Business/merged entity leaves it vulnerable to post-merger changes to the terms of supply, inter alia, through price increases, bundling of products and services, switching to GMO maize and refusal to supply. The complainant submitted that this could have a detrimental impact on the ongoing viability of its business. To guard against those concerns, the complainant proposed that the merger be approved subject to the condition that requires the merged entity to conclude a supply agreement with the complainant.

- [12] The Commission found that none of the concerns raised by the complainants are merger specific as they existed pre-merger. Further,

where existing supply agreements have expired, it is common cause that the Target Business has continued to supply its customers with glucose and starch on the same terms and conditions as the expired agreements whilst new supply agreements are being renegotiated. The Commission further found that the latter complainant’s proposed remedies to address its concerns includes terms and conditions it did not enjoy under the previous supply terms. The Commission is, therefore, of the view that the complainant is attempting to use the merger process to negotiate new contractual terms.

[13] The Commission also found that the complainant, as one of the Target Business' largest customers, would probably be able to exercise countervailing power against the merged entity. The merging parties also indicated that its customers will be supplied on existing terms and conditions until new contract negotiations are finalised. Notwithstanding the above, the Commission notes that the merged entity will be a monopoly in the relevant markets and will, therefore, continue to monitor and assess the competition dynamics in the relevant markets, post-merger, in order to ensure that the merged entity does not abuse its dominance by engaging in exclusionary/exploitative conduct. The complainants were informed of the Commission's recommendation and they did not persist with their concerns.

[14] Due to the above, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any market. We found no reason to disagree with the Commission.

Public interest

[15] The proposed transaction raises no public interest concerns. The employees of the Target Business will be transferred to the

Barloworld Group in terms of section 197 of the Labour Relations Act 66 of 1995.

Conclusion

[16] In the light of the above, we concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction unconditionally.

15 July 2020

Date

Mr Enver Daniels

Ms Yasmin Carrim and Prof. Halton Cheadle concurring.

Tribunal Case Manager: Kgothatso Kgobe

For the Merging Parties: J Simpson and C Kipa of DLA Piper

M Versfeld and S van der Meulen of Webber Wentzel

For the Commission: Z Hadebe and W Gumbie

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