

SOUTH AFRICA / JUDGMENT

Louis Dreyfus Commodities Africa (Pty) Ltd and Another v Best Milling (Pty) Ltd and Others (LM050Jun15) [2015] ZACT 88; [2015] 2 CPLR 653 (CT) (30 July 2015) [2015] ZACT 88

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andiswa Ndoni, Yasmin Carrim

CASE / FILE NUMBER

LM050Jun15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:LM050Jun15

In the matter between:

LOUIS DREYFUS COMMODITIES AFRICA (PTY) LTD

VKB AGRICULTURE (PTY) LTD

Acquiring Firms

And

BEST MILLING (PTY) LTD

IXIA TRADING 177 (PTY) LTD MOLIBLOX (PTY) LTD Target Firms

Panel

: Norman Manoim (Presiding Member)

: Andiswa Ndoni (Tribunal Member)

: Yasmin Carrim (Tribunal Member)

Heard on

: 8 July 2015

Order Issued on : 8 July 2015

Reasons

Issued on : 30 July 2015

Reasons

for Decision

Approval

[1] On 8 July 2015, the Competition Tribunal ("Tribunal") conditionally approved the merger between Louis Dreyfus Commodities Africa (Pty) Ltd ("LDCA") and VKB Agriculture (Pty) Ltd ("VKB") and Best Milling (Pty) Ltd, Ixia Trading 177 (Pty) Ltd and Moliblox (Pty) Ltd ("Kromdraai Group of Companies").

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

Parties to transaction and their Activities

Primary acquiring firms

[3] The primary acquiring firms are LDCA and VKB. LDCA is controlled by Louis Dreyfus Commodities MEA Trading DMCC, which in turn is controlled by Louis Dreyfus Commodities B.V ("LDCn"). VKB is not controlled by any firm. Its subsidiary, Nu-Pro Commodities (pty) Ltd ("Nu-Pro") is relevant to the proposed transaction.

[4] LDC is a global commodities trader. Relevant to this transaction are its activities in trading agricultural commodities, wheat in particular, through its South African subsidiary, LDCA. An important aspect of LDCA's business is that it procures and sells wheat globally and does not confine itself to the local market.

[5] VKB is engaged in the business of the storage and trading of grain. In particular relevant to this transaction it purchases wheat from farmers in the Eastern Free State, which it then sells to customers throughout South Africa.[1]

Primary target firm

[6] The primary target firm is the Kromdraai Group of Companies, which comprises of Best Milling (Pty) Ltd ("KBMn"}, Ixia Trading 177 (pty) Ltd ("Ixian") and Moliblox (pty) Ltd ("Molibloxn"). KBM is controlled by the JI Trust, Ixia is controlled by Suoer Sure Bakery Trust, whilst Moliblox is controlled by the KS Trust.

[7] The Kromdraai Group is a vertically integrated business specialising in the production of wheat flour and bread. The Kromdraai Group consists of its wheat milling plant operation (KBM), storage silos used for the storage of wheat for the mill (Moliblox) and a bakery (Ixian) which uses the wheat flour to produce bread that is then sold to retailers.

Proposed transaction and rationale:

[8] The proposed transaction takes place in two steps. In the first, KBM will acquire all of the shares in Ixia and Moliblox. In the second step, the acquiring firms will acquire shares in KBM. Post-merger, KBM's shareholding will be as follows: VKB (59.5%),

LDCA (25.5%).[2] Upon implementation of the proposed transaction, the Kromdraai Group will be jointly controlled by the acquiring firms.

[9] By way of rationale, it appears that the proposed transaction is primarily motivated by the target firm's financial distress and ensuing risk of closure and the fact that the Kromdraai Group is substantially indebted to LDCA. Further, as was explained in the hearing, the proposed transaction is structured as a joint venture because VKB has substantial experience which would benefit LDCA's strategic plan to integrate into the agricultural value chain and more specifically in the market for wheat milling.[3]

Relevant

Issues:

[10] Upon considering the activities of the merging parties, the Competition Commission ("Commission") found that both VKB and the Kromdraai Group own grain storage silos. VKB owns commercial grain silos which it hires to third parties whilst the Kromdraai Group owns storage silos but which are used exclusively by KBM.

[11] The Commission further assessed the impact of the proposed transaction on the trading market in which both LDCA and VKB are active. In South Africa, both parties trade in the following commodities: wheat, maize, sunflower seeds and soyabeans.[4] However, since Kromdraai is only active in the wheat market the Commission limited

its investigation to the wheat market. LDCA procures wheat locally and internationally and supplies it to purchasers (including milling companies) whilst VKB procures wheat exclusively from farmers in the Eastern Free State.

[12] The Commission accordingly considered the impact of the proposed transaction on the following three issues

- The market for the storage and handling of grain in commercially owned silos within a 60km radius of the Moliblox silo complex where the overlap is between VKB and the Kromdraai Group;
- Vertical effects as Kromdraai exists in a vertical relationship in the wheat supply chain in respect of the trading activities of the two acquiring firms; and
- The national market for wheat trading in which the two acquiring firms, LDCA and VKB, are active. However since the acquiring firms are not merging their trading interests the Commission did not examine the effects of the merger as increasing concentration in this market

- since it does not - but rather whether having two competitors involved in the control of a downstream company in the wheat supply chain might give rise to co-ordinated effects which but for the merger might not have been possible.

Impact on competition:

Horizontal

analysis:

- [13] In relation to the market for the storage and handling of grain, the Commission found that the merged entity would own all of the silos in the region post-merger. However, the target firm, unlike VKB, does not store any grain for third parties. It uses its' silos purely for its own capacity, a position that will remain unchanged post-merger. Hence the target firm's storage capacity is not at present nor has it ever been part of the competitive market for storage. Thus the merger does not lead to an increase in concentration.

Vertical

analysis:

- [14] The Commission found that there is a vertical relationship between LDCA and VKB's wheat trading activities and KBM's milling activities {purchasing of wheat grain). The Commission further found that a vertical relationship exists as KBM could use VKB's storage facilities to store its wheat.
- [15] In its analysis, the Commission found that none of these vertical relationships raised any foreclosure concerns as there are alternative wheat suppliers and buyers in the market. Further, the target firm would not be able to use all of VKB's silo capacity meaning that VKB would not have an incentive to foreclose its competitors. The Commission also found that although VKB has used Kromdraai's silos in the past, it does not currently use any third party storage for its services.

Co-ordinated effects:

- [16] The merger gives rise to control over the target firm by two competitors in the wheat trading market. Thus the question arises as to whether the merger can create an opportunity for co-ordination between these two firms even though they are not merging their

trading businesses. There is a prior history of co-ordination in these markets as VKB was found to have contravened section 4 (1)(b)(i) of the Competition Act in relation to the market for silo storage.

- [17] The Commission considered this aspect and came to the

conclusion

that further co-ordination was unlikely. It gave the following reasons for coming to this conclusion: the structure of the market has changed since the time of these prohibited practices as grain is now traded on SAFEX where prices are set on an exchange related basis making co-ordination difficult, there are many more players in the market including global players, the market shares of the two acquiring firms do not exceed 22% in any given market.[5]

Public interest:

- [18] In terms of employment, the merging parties' submitted that at least 252 out of 313 jobs will be saved as a result of the merger, failing which the firm will be forced to close down which will inevitably result in all of the current employees losing their jobs. The merging parties however submitted that it may be necessary to retrench 61 semi-skilled and unskilled employees at the target firm post-merger.
- [19] The Commission accepted that the merging parties followed a rational process in determining this figure. However, as the affected staff complement is comprised of unskilled workers with little or no formal education, the Commission was of the view that conditions were warranted in this instance and recommended that the merger be approved subject to the condition that the merged entity may not retrench more than 61 employees at the target firm. Further, it should be noted that the Food and Allied Workers Union is in support of this condition.

Conclusion:

- [20] In light of the above, we agree with the Commission's analysis and conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market and that the merger should be approved subject to the conditions attached hereto, marked "Annexure N.

3 August 2015

DATE

Norman Manoim

Yasmin Carrim and Andiswa Ndoni concurring

Tribunal Researcher: Ammara Cachalia

For the merging parties: Lara Granville, Norton Rose Fullbright

For the Commission: Gilberto Biacuana

ANNEXURE A:

VKB Agriculture (Pty) Ltd And

Louis Dreyfus Commodities Africa (Pty) Ltd And

Kromdraal Best Miiing (Pty) Ltd,lxla Trading 177 (Pty) Ltd and Moliblox (Pty)

Ltd

("The Kromdraal Group of Companies")

CASE NUMBER: 2015Jun0312

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below -

1.1 "Acquiring Firms" mean VKB and LDCA, as defined below;

1.2 "Affected Employees" mean the 61 employees that may be retrenched as a result of the Merger;

1.3 "Approval Date" means the date referred to in the Tribunal's merger clearance certificate;

1.4 "Commission" means the Competition Commission of South Africa;

1.5 "Competition Act" means the Competition Act 89 of 1998, as amended;

1.6 "Conditions" means these conditions;

1.7 "Kromdraal Group" means, together, Kromdraai Best Milling Proprietary Limited, lxia Trading 177 Proprietary Limited and Moliblox Proprietary Limited;

1.8 "LDCA" means Louis Dreyfus Commodities Africa Proprietary Limited;

1.9 "Merger" means the acquisition of joint control over the Kromdraai Group by VKB and LDCA;

1.10 "Merged Entity" for the purposes of these Conditions mean the combined businesses of The Kromdraai Group of Companies, VKB Agriculture (Pty) Ltd and Louis Dreyfus Commodities Africa (Pty) Ltd;

1.11 "Merging Parties" for the purposes of these Conditions mean the Kromdraai Group; VKB and LDCA;

1.12 "Rules" mean the Rules for the Conduct of Proceedings in the Competition Commission;

1.13 "Tribunal" means the Competition Tribunal of South Africa; and

1.14 "VKB" means VKB Agriculture Proprietary Limited.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1 Save for the 61 Affected Employees, the Merging Parties shall not retrench any employees at the Merged Entity as a result of the Merger.

2.2 VKB shall give first preference to the Affected Employees should positions arise at VKB for a period of 12 (twelve) months after the Approval Date of the Merger, in the following manner:

2.2.1 When a position arises within the VKB group of companies to be filled by an external candidate, VKB shall, at the same time that the position is advertised externally, forward a batch communique via SMS and email to all Affected Employees who have been retrenched from the Kromdraai Group as a result of the Merger. The communique will include information and details of the position as well as contact details as to whom to contact to enable the Affected Employees to apply should they wish to do so.

2.2.2 Under all circumstances the onus will rest on the Affected Employee to apply for a vacant position.

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

2.2.4 Within the context of paragraph 2.1 above, retrenchments do not include voluntary separation arrangements, voluntary early retirement packages and unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, No. 66 of 1995, as amended;

2.2.5 Within six

(6) months of the Approval Date of the Merger, the Acquiring Firms shall submit plans outlining the potential investments that the Acquiring Firms are likely to make at the Kromdraai Group.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Merging Parties shall circulate a copy of the Conditions to all the employees of the Merged Entity within 10 (ten) business days of receipt of the merger clearance.

3.2 As proof of compliance herewith, the Merging Parties shall within 10 (ten) business days of circulating the Conditions, submit an affidavit by a senior

official attesting to the circulation of the Conditions and provide a copy of the Notice that was sent to the employees.

3.3 Any employee who believes that his/her employment with the Merging Parties has been terminated in contravention of these Conditions may approach the Commission with his/her complaint.

3.4 The Merging Parties shall on an annual basis for 3 (three) years after the Approval Date, submit a report to the Commission indicating

the number of retrenchments undertaken as a result of the Merger, the skills level and position of employees retrenched and the reasons for such retrenchments.

3.5 The report shall be accompanied by an affidavit from a senior official of the Merged Entity attesting to the accuracy of the report.

3.6 The report shall be submitted on each anniversary of the Approval Date of the Merger, for three years after the Approval Date.

3.7 The documents referred to in paragraphs 3.2 to 3.4 above must be submitted to the following e-mail address: merqerconditions@compcom.co.za.

3.8 An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules.

3.9 The Merged Entity may, for so long as any of the above Conditions remain in force, approach the Tribunal to revise the above Conditions on the basis of changes in market, economic or regulatory conditions justifying such revision.

[1] VKB, through Nu-Pro, trades in grain (including wheat} in the South African market.

[2] The JI Trust will retain the remaining 15%.

[3] See page 6 of the transcript.

[4] The market shares in each of the trading markets are as follows: wheat (7.5%), maize (14.0%), sunflower seeds (16.3%} and

soyabean (21.6%).

[5] At the hearing Mr Cook of VKB confirmed this position and that the individuals involved in the prohibited practices have left the firm. See page 10 of the transcript.

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Prepared on 11 October 2026 · Esheria