

SOUTH AFRICA / JUDGMENT

Pioneer Foods (Pty) Ltd v Future Life Health Products (Pty) Ltd (LM200Mar23) [2023] ZACT 56 (3 July 2023)

[2023] ZACT 56

COURT

Competition Tribunal

BEFORE

Tembeka Ngcukaitobi, Fiona Tregenna, Thando
Vilakazi

CASE / FILE NUMBER

LM200Mar23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM200Mar23

In the matter between:

Pioneer Foods (Pty) Ltd

Acquiring Firm

and

Future Life Health Products (Pty) Ltd

Target Firm

Panel: Tembeka

Ngcukaitobi (Presiding Member)

Fiona Tregenna (Tribunal Member)

Thando Vilakazi (Tribunal Member)

Heard on: 29

May 2023

Order issued on: 29 May 2023

Reasons

issued on: 03 July 2023

REASONS

FOR DECISION

Approval

- [1] On 29 May 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger whereby Pioneer Foods (Pty) Ltd (“Pioneer Foods”) intends to acquire the remaining 50% of the issued shares in Future Life Health Products (Pty) Ltd (“Future Life”). Post-merger, Pioneer Foods will be the sole shareholder of Future Life.

Parties to the transaction and their activities

Primary acquiring firm

- [2] Pioneer Foods is a South African firm and a wholly owned subsidiary of Pioneer Foods Holdings (Pty) Ltd, which is a wholly owned subsidiary of Pioneer Food Group (Pty) Ltd (“PFG”). PFG is wholly owned by Simba (Pty) Ltd (“Simba”), which is in turn, wholly owned by PepsiCo Inc (“PepsiCo”), a listed company incorporated in accordance with the laws of the state of New York, United States of America.
- [3] Prior to the proposed transaction, Pioneer Foods held a 50% shareholding in Future Life. In addition to this, Pioneer Foods holds interests in several other firms in South Africa that include Ceres Fruit Juices (Pty) Ltd, Pioneer Foods Groceries (Pty) Ltd, Pioneer Foods Wellingtons (Pty) Ltd, Alpen Food Company South Africa (Pty) Ltd, Bowman Ingredients SA (Pty) Ltd, ButtaNutt (Pty) Ltd, and Two Green Lemons (Pty) Ltd trading as Barker & Quin.
- [4] Pioneer Foods is a producer and distributor of an extensive range of branded food and beverage products, marketed under the Sasko, Bokomo, Spekko, White Star, Safari, Moirs, LiquiFruit, Ceres, Nature's Source, and Wellingtons brands. Relevant to the proposed transaction is Pioneer Foods’ business unit, “Foods”, which houses its breakfast cereals, rusks, baking aids and desserts, as well as its portfolio of condiments and spreads.

Primary target firm

- [5] Future Life is a South African firm, jointly controlled by Pioneer Foods and Mr Paul Anthony Saad (“Mr Saad”).
- [6] Future Life wholly controls one other firm, ISO Foods (Pty) Ltd,[details in relation to the activities of ISO Foods (Pty) Ltd] [....]

patented blend of natural plant sterols and sterolins, and used in the production of Future Life.[1]

- [7] Future Life produces and distributes a range of products under its Future Life brand throughout South Africa and other surrounding African countries. Mr Saad developed the original Future Life Smart Food as a healthy, convenient food that contains Moducare.

Proposed transaction and rationale

Transaction

- [8] In terms of the proposed transaction, Pioneer Foods will purchase 50% of the issued shares in Future Life. Post-merger, Pioneer Foods will own and control 100% of the shares in Future Life.
- [9] [Description of the respective parties post-merger intellectual property rights] [...].
- [10] This current transaction follows from a prior merger in 2015, where Pioneer Foods acquired its initial 50% stake in Future Life.[2] This merger was approved subject to conditions which stipulated that, for a period of five years post said transaction, the competitive

interactions between Future Life's cereal products and those of Pioneer Foods would be maintained. Once these conditions fell away (in 2020), Pioneer Foods became entitled to exercise the full extent of its joint control over Future Life. This is important to keep in mind for the context of the structure of the market which is assessed further below.

Rationale

- [11] According to Pioneer Foods, the proposed transaction would allow Future Life to fully integrate into Pioneer Foods and PepsiCo's operational systems and structures. [Details of post-merger strategy] [...].
- [12] [Future Life's rationale]

Relevant market and impact on competition

- [13] The Competition Commission ("Commission") found a horizontal overlap between the activities of the merging parties in the production and sale of ready-to-eat cereal ("RTEC") products and cereal bars.
- [14] The Commission also considered the vertical overlap between Pioneer Foods and Future Life in that Pioneer Foods produces certain products for Future Life. This will be expanded on further below.

Horizontal assessment

Product market

- [15] The Commission considered the approach taken by the Tribunal in the 2015 Pioneer Foods/Future Life merger, where the Tribunal considered submissions from the merging parties, the Commission, and the intervenor, Kellogg. The data placed before the Tribunal indicated that Future Life's entry into the breakfast cereals market not only affected porridge cereals

like ProNutro, but also took market share from other RTEC brands such as Kellogg's Corn Flakes and others.[3] The Tribunal therefore assessed a broad market for RTEC that included bran flakes, corn flakes, porridges, biscuits, pre- sweetened cereals (usually children's cereals), rice puffs, muesli, instant oats, instant porridge products (including maize and sorghum/maltabela

instant porridges) and cereal bars.

Geographic market

- [16] The Commission found that the RTEC market is national in geographic scope, as the merging parties can supply their customers nationally from their packing facilities, irrespective of the distance between the plant and the end destination given the long shelf-life and non-perishable nature of RTECs.
- [17] Having regard to the above and without concluding on a relevant market, the Commission therefore assessed the competitive effects of the proposed transaction in the national RTEC market.

Horizontal impact

- [18] The Commission found that, in isolation, Future Life is a relatively small player, with a market share of [1-10%] [...] sales value. Pioneer Foods is the market leader with a market share of [25-35%] [...] and Kellogg and Tiger Brands follow with market shares of approximately [15-25%] [...] [10-20%] [...]. [4]
- [19] The merging parties therefore have a combined market share of [30-40%] Pioneer Foods already enjoys this market share by virtue of its 50% joint shareholding in Future Life. As such, the Commission found that the proposed transaction is therefore unlikely to alter the structure of the market in the national RTEC market post- merger as Pioneer Foods already currently

enjoys joint control over Future Life.

- [20] The Commission found that there are several players active in the RTEC market which include Kellogg and Jungle (amongst others) that will continue to constrain the merged entity post-merger.

Vertical assessment

- [21] As mentioned above, the Commission found that Pioneer Foods supplied Future Life with manufactured products. [manufactured products listed] [...] [5].
- [22] In addition, Pioneer Foods supplies Future Life with inputs and raw materials that include [list of specific inputs and raw materials] [...] integration was one of the features of the initial (2015) Pioneer Foods/Future Life merger. [6]

- [23] The merging parties submitted in this regard that Pioneer Foods will continue to supply Future Life with inputs and raw materials, as well as manufactured products post- merger.
- [24] Furthermore, the merging parties have stated that [statement in relation to Pioneer Foods post-merger procurement agreements] [....]. [7]
- [25] The Commission took into account the fact that this relationship predates the proposed merger, and therefore, a change in incentives which could result in foreclosure of RTEC manufacturers is unlikely.
- [26] As regards customer foreclosure, the merging parties submitted that Future Life is not a substantial purchaser of the inputs that will be supplied or procured by Pioneer Foods and its current suppliers serve a broad range of customers whose demand for and purchase of those inputs will not be affected by the transaction.
- [27] Having regard to the above, the Tribunal concurs with the Commission's conclusion that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest

Employment

- [28] The merging parties have provided an unequivocal undertaking that the proposed transaction will not result in any negative employment effects.
- [29] Concerns were raised by the Agricultural Food and Allied Democratic Workers Union ("AFADWU") who represent employees of Pioneer Foods that included inter alia, whether the proposed transaction of Future Life is intended to be as a going concern in terms of section 197 of the Labour Relations Act, 66 of 1995 ("LRA"), as well as whether there would be a moratorium on retrenchments.
- [30] The Commission noted that Pioneer Foods is acquiring the remaining 50% shareholding in Future Life, and the proposed transaction does not entail a transfer of business and therefore, section 197 of the LRA does not apply.
- [31] The Commission considered the evidence that the proposed transaction does not change the underlying business or lead to negative employment effects, and as such, a moratorium on retrenchments may not be warranted.
- [32] Furthermore, employees at Pioneer Foods that are not represented by a trade union stated that they do not have any concerns with the proposed transaction.[8]
- [33] Employees at Future Life are not represented by a trade union. The employee representatives of the head office and the factory have not raised any concerns with the proposed transaction.[9]

- [34] The Commission stated that it has not found any evidence that the proposed transaction is likely to result in a negative effect on employment.
- [35] Considering the above, and that the merging parties have provided an unequivocal statement that no job losses will arise as a result of the proposed transaction, the Tribunal agrees with the Commission's findings that the proposed merger is unlikely to have an adverse effect on employment.

Spread of ownership

- [36] Pioneer Foods and Future Life do not have any shareholding by historically disadvantaged persons ("HDPs").
- [37] In the Simba/Pioneer Foods[10] merger, the merging parties agreed to implement a Broad-Based Black Economic Empowerment ("B-BBEE") ownership plan through the introduction of a workers trust with the trustees of the trust being selected from employees, with HDPs and women being prioritised in the selection process.
- [38] PepsiCo thus established the Bašumi Trust (Bašumi Employee Share Scheme ("BESS")). All qualifying permanent employees of Pioneer Foods and Simba, including the employees of wholly owned subsidiaries of these firms, are entitled to participate in BESS.
- [39] BESS has the right to exercise the equivalent of 12.9% of the voting rights in Pioneer Foods, the primary acquiring firm in the instant transaction.
- [40] Qualifying employees of Future Life will become entitled to participate in the BESS trust. Based on Future Life's current employee numbers,[figure] [...] permanent employees of Future Life will qualify to participate in the Workers Trust once they meet the 12 consecutive month employment duration criterion.[11] This has been made a condition to the approval of the proposed transaction as follows:

"The Acquiring Firm will ensure that all Workers of Future Life who meet the Workers Trust Qualification Criteria will be invited to participate in the Workers Trust within 3 (three) months of the relevant Worker meeting the Workers Trust Qualification Criteria."

- [41] The Commission found that the proposed transaction does not raise any other public interest concerns, and the Tribunal concurs.

Conclusion

- [42] Considering the above, the Tribunal concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. The proposed transaction has been approved subject to the abovementioned public interest conditions. The imposed conditions are annexed hereto as Annexure "A".

Date: 03 July 2023

Tembeka Ngcukaitobi SC

Concurring: Prof. Fiona Tregenna and Dr Thando Vilakazi

Tribunal case manager: Leila Raffee

For the merging parties: Leana Engelbrecht and Nick Altini of Herbert Smith

Freehills South Africa LLP

For the Commission: Nolubabalo Myoli and Grashum Mutizwa

- [1] Merger Record, p98
- [2] Pioneer Foods (Pty) Ltd and Future Life Health Products (Pty) Ltd (Tribunal Case Number: LM017May15)
- [3] Market shares based on Nielsen June 2022 Total Cereal and Bars Market Review, by brand, on a 24-month average from 2020-2022.
- [4] Market shares based on Nielsen June 2022 Total Cereal and Bars Market Review, by brand, on a 24-month average from 2020-2022.
- [5] [Additional details in relation to Future Life's procurement of products from Pioneer Foods] [....] (Merger Record, p96 footnote 108)
- [6] Merger Record p95 paras 21.17-21.18
- [7] Merger Record p96 para 21.20
- [8] Merger Record p1236 and p1228
- [9] Merger Record p1239-1240
- [10] Simba (Pty) Ltd and Pioneer Food Group Limited (Tribunal Case Number: LM108Sep19)
- [11] Letter from the merging parties to the Commission dated 19 April 2023 (Merger Record p1208-11)

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