

SOUTH AFRICA / JUDGMENT

Pioneer Foods (Pty) Ltd v Heinz Foods South Africa (Pty) Ltd (LM255Dec17) [2018] ZACT 67; [2018] 1 CPLR 293 (CT) (2 July 2018) [2018] ZACT 67

COURT
Competition Tribunal

BEFORE
AW Wessels, E Daniels, F Tregenna

CASE / FILE NUMBER
LM255Dec17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM255Dec17

In the matter between:

Pioneer Foods (Pty) Ltd

Primary Acquiring Firm

And

Heinz Foods South Africa (Pty) Ltd

Primary Target Firm

Panel

: AW Wessels (Presiding Member)

: E Daniels (Tribunal Member)

: F Tregenna (Tribunal Member)

Heard on

: 09 May 2018

Last submission received : 14 May 2018

Order issued on : 14 May 2018

Reasons

issued on : 2 July 2018

REASONS

FOR DECISION

CONDITIONAL APPROVAL

- [1] On 14 May 2018, the Competition Tribunal ("Tribunal") conditionally approved the large merger involving Pioneer Foods (Pty) Ltd ("Pioneer Foods") and Heinz Foods South Africa (Pty) Ltd ("HFSA"), hereinafter collectively referred to as "the merging parties".
- [2] The reasons for approving the proposed transaction follow.

PARTIES TO THE PROPOSED TRANSACTION

Primary acquiring firm

- [3] The primary acquiring firm is Pioneer Foods, a South African firm. Pioneer Foods is wholly owned by Pioneer Foods Holdings Limited which is controlled by Pioneer Food Group Limited ("PFG"), a company listed on the Johannesburg Stock Exchange. Pioneer Foods directly or indirectly controls a number of firms.[1]
- [4] Pioneer Foods produces a wide range of essential foods, groceries and beverages.

Primary target firm

- [5] The primary target firm is HFSA, a South African firm. HFSA is a joint venture between Pioneer Foods (49.9%) and Heinz South Africa (Pty) Ltd ("Heinz SA") (50.1%), hereinafter also referred to as "the JV". Heinz SA is a wholly owned subsidiary of The Kraft Heinz Company ("Kraft Heinz").
- [6] HFSA markets the Heinz range of ketchup, soups and baked beans in South Africa and also manufactures and markets the Wellington's range of sauces and condiments. It also distributes the John West range, which includes canned seafood products and the Today and Mama's ranges of meals, pies and pastries.

PROPOSED TRANSACTION

- [7] The proposed transaction entails the acquisition by Pioneer Foods of 50.1% of the issued share capital of HFSA from Heinz SA. As indicated above, Pioneer Foods already beneficially owns 49.9% of the issued share capital of HFSA.

COMPETITION

ANALYSIS

[8] The Competition Commission ("Commission") considered the activities of the merging parties and found no horizontal product

overlap since Pioneer Foods is not active in the products produced by HFSA.

[9] The Commission however identified vertical relationships between the merging parties relating to the supply of flour and dried fruit. HFSA currently procures flour from Pioneer Foods which it uses as an input to manufacture several products including pies, pastries, sausage rolls, pizza bases and sauces. The Commission also found that HFSA procures dried fruit from Pioneer Foods for use in the manufacture of chutneys.

[10] In relation to flour, the Commission found that Pioneer Foods' current sales of flour to the JV constitutes a small percentage of its total flour sales. Furthermore, Pioneer Foods is not and will not be restrained from selling flour to any third parties post-merger. The Commission also found that there are alternative suppliers of flour in South Africa. The Commission therefore was of the view that any post-merger foreclosure strategy in relation to flour is unlikely to be successful.

[11] The abovementioned sale of dried fruit is done on an ad hoc basis between the merging parties and there is no contract. The Commission found that the dried fruit supplied by Pioneer Foods amounts to less than 10% of HFSA's requirements. Furthermore, Pioneer Foods is not restrained from supplying dried fruits to any third parties including HFSA's competitors. Similarly, HFSA is not restrained from obtaining dried fruit from any third parties. The Commission further stated that the procurement of dried fruit is a pre-existing commercial arrangement between the merging parties and is unlikely to result in any substantial foreclosure concerns.

[12] The Commission furthermore assessed the potential impact on competition resulting from the dissolution of the JV. We discuss this next.

[13] The Commission found that Kraft Heinz is active in South Africa only through the JV. The JV currently sells 29 products that include

products belonging to Kraft Heinz and Pioneer Foods. Post-transaction Pioneer Foods will be taking over only 23 out of the 29 products

currently manufactured I distributed by HFSA. Thus, six of the JV's current products will not to be taken over by Pioneer Foods. These six products are:

(i) Heinz Baked Beans; (ii) Heinz Soups; (iii) Heinz Salad Cream; (iv) Kraft Mayonnaise; (v) Kraft Cheese; (vi) Planters Nuts.

[14] We note that the merging parties submitted that the abovementioned six products will not exit South Africa as a result of the proposed

transaction.

[15] The Commission found that there are various alternative competing suppliers in South Africa for each of these six products. Moreover,

based on the relative size of these competitors for each product, the Commission accepted that these six products are unlikely to be category leading products and that HFSA is a relatively small player in each of these markets. The Commission thus concluded that the potential exit of these products is unlikely to have a negative impact on competition in any relevant market in South Africa. Notwithstanding this, as indicated above, the merging parties advised the Commission that these products are unlikely to exit the South African market.

[16] Furthermore, customers contacted by the Commission during its investigation did not raise any concerns with the proposed transaction.

[17] In light of the above, the Commission concluded that the proposed transaction is unlikely to result in a substantial prevention or lessening of competition in any relevant market from either a horizontal or vertical perspective. We have no reason to disagree

with this conclusion.

PUBLIC INTEREST

Effect on a particular industrial sector

[18] The Commission considered the likely impact of the dissolution of the JV on the public interest, specifically on local manufacturing. This is because, as indicated above, although post-merger the acquiring firm will continue to sell the majority of the JV's products it will not sell six of the JV's current products.

[19] With regards to the 23 products that Pioneer Foods will be taking over from the JV (see paragraph 13 above), the Commission found that only one Kraft Heinz proprietary product i.e. Heinz Ketchup is manufactured in South Africa. The Commission indicated that in accordance with the Manufacturing and Licence Agreement Kraft Heinz intends to give Pioneer Foods a licence to manufacture and distribute Heinz Ketchup for a period of two years. The merging parties submitted that this two year period is to ascertain if Pioneer Foods can promote and grow the Heinz Ketchup brand. The merging parties however indicated that in the event that the agreement is not renewed, Heinz Ketchup will not be discontinued in South Africa since it will then be distributed by a third party distributor.

[20] As stated above, the Commission found that the remaining six products, which are Kraft Heinz proprietary products, are not category leading products. The Commission further found that only one of the six products i.e. Heinz baked beans is manufactured in South Africa through a third party.

[21] The remaining five products are imported into South Africa and distributed by HFSA. The merging parties indicated that the intention

is for Kraft Heinz to continue to sell these five products in South Africa post-merger. The products will be distributed by a third party agent or distributor in South Africa and the intention is to not have any interruption in the supply, sale or distribution of these products in South Africa. The Commission concluded that these five products are unlikely to have any impact on local manufacturing since they are not manufactured locally, but imported into and distributed by HFSA in South Africa.

- [22] In relation to the manufacturing of baked beans, the Commission investigated the likely impact on the South African industry as a result of a possible loss of local manufacturing activities. As stated above, the Heinz baked beans are currently manufactured by a third party on behalf of the JV. The merging parties submitted that the manufacturing contract with this third party will continue unaffected post-merger, i.e. the manufacturing of Heinz baked beans will remain in South Africa post-merger. It is only that a different distributor will be appointed in South Africa to distribute the products - HFSA being the distributor of these products pre-merger.
- [23] Given the above, the Commission concluded that the proposed transaction is unlikely to have a negative impact on a particular industrial sector in South Africa insofar as it concerns post-merger local manufacturing. We have no reason to disagree with this conclusion.

Employment

- [24] The merging parties indicated in their merger filing that they anticipate that the proposed transaction may result in the retrenchment of approximately 27 skilled and semi-skilled employees. This is because of the duplication of certain positions in the operations of Pioneer Foods and HFSA - in particular in respect of management and administrative positions.[2] They furthermore indicated that no employees with roles in factories will face retrenchment as a result of the proposed transaction.[3]
- [25] Two trade unions i.e. SACTWU (the target firm's trade union) and FAWU (the acquiring firm's trade union), expressed job-related concerns with regards to the proposed merger. FAWU wanted confirmation inter alia that none of the employees, mainly factory workers, will be retrenched post-merger. SACTWU similarly required that the merging parties confirm that none of the factory workers will be retrenched and that the terms of their contracts of employment will remain unchanged post-merger. SACTWU was further concerned that if the Heinz Ketchup Manufacturing and Licence Agreement is not renewed after the two year period, this will result in retrenchments of staff that are dedicated to the manufacture of the Heinz Ketchup brand of tomato sauce.
- [26] The Commission submitted that through engagements between it and the merging parties the general concerns regarding the retrenchment of factory workers were addressed since the merging parties agreed to a condition that no factory workers will be retrenched as result of the proposed merger for a period of two years. However, the Commission was concerned that if Kraft Heinz does not renew its manufacturing contract with Pioneer Foods in April 2020, 10 employees dedicated to the manufacture of Heinz Ketchup are likely to be

retrenched at the end of that contract period.

[27] In order to remedy this, the merging parties agreed to absorb all of the factory workers post-merger while at the same time ensuring that those factory workers employed through the Manufacturing and Licence Agreement of the Heinz Ketchup remain employed for a period of three years irrespective of whether the agreement is terminated within two years post-merger. SACTWU submitted that their members are supportive of the employment-related remedies in this regard.

[28] We note that the Commission found that there is unlikely to be direct or indirect job losses with respect to the Heinz baked beans currently manufactured by a third party since the status quo remains post-merger in relation to the this contract.

[29] In relation to factory workers the Commission concluded that, given the merging parties undertakings, the proposed transaction is unlikely to have a substantial negative impact on the employment of "blue-collar" workers.

[30] However, as indicated above, the merging parties submitted that the proposed transaction may result in approximately 27 skilled and semi-skilled employees being retrenched at management, management support and administrative levels because of the duplication of positions in the operations of Pioneer Foods and HFSA.[4] The merging parties indicated that the 27 affected employees comprise four executives, one executive secretary, five quality, procurement

and logistics personnel, two human resources personnel, six head office finance personnel, two sales supervisors and seven sales

marketing personnel. In order for the Commission to conduct a detailed analysis of the likely impact of the proposed transaction on employment, the Commission requested the merging parties to provide further specific details of the likely retrenchments including the positions, qualifications and years of experience of the employees likely to be retrenched post-merger.

[31] The Commission further requested the merging parties to minimise the negative effects of the planned retrenchments by not retrenching

employees that have a qualification of Grade 12 and less. The Commission argued that the employees that hold a qualification of

Grade 12 or less are unlikely to find employment within a short-period of time post-retrenchment given their skills level. The

acquiring firm however rejected this request.

[32] The acquiring firm however did agree to ensure that any retrenchments of the 27 affected employees will not take effect before six months from the closing date of the proposed transaction, which is likely to be in May 2018.

- [33] The acquiring firm further, in relation to future vacancies, gave an undertaking that for a period of 12 months post-retrenchments Pioneer Foods will give preference to the affected 27 employees when positions become vacant at Pioneer Foods.
- [34] The Commission recommended that the proposed transaction should be approved subject to a set of conditions agreed with the merging parties.
- [35] The Tribunal requested the merging parties to consider not retrenching any employees with a qualification of Grade 12 and less. The merging parties accepted this and we included this in the set of conditions that we imposed. We also suggested certain other enhancements of the proposed conditions, which the merging parties accepted.
- [36] In summary, we have approved the proposed transaction subject to a number of employment-related conditions relating to two categories of employees, i.e. "the Affected Employees" (as defined below) and "the Unskilled Heinz Ketchup Employees"[5], as described below.
- [37] In terms of the imposed conditions, the acquiring firm may retrench a maximum of 27 skilled and semi-skilled employees who are likely to be retrenched due to duplications arising as a result of the proposed transaction ("the Affected Employees"). However, these potential retrenchments are further limited as follows:
- a. No Affected Employee may be retrenched within six months from the implementation date of the proposed transaction; and
 - b. The acquiring firm may not retrench any Affected Employee with a qualification of a Grade 12 or less within two years of the implementation date of the proposed transaction.[6]
- [38] Apart from the above, the acquiring firm shall not retrench any other employees as result of the proposed transaction for a period of two years from the implementation date of the proposed transaction.
- [39] The acquiring firm is further required to offer any available, suitable and reasonable alternative employment to the Affected Employees who may be retrenched during the retrenchment consultation process and prior to retrenching the Affected Employees.
- [40] In respect of the Unskilled Heinz Ketchup Employees, the acquiring firm shall inform these employees, SACTWU and any trade union representing any of these employees whether the term of the Licence an Manufacturing Agreement will be extended or not. The acquiring firm will do so within two business days of receiving such notification from Kraft Heinz and undertakes to take reasonable steps to seek such notification from Kraft Heinz by no later than six months prior to the stated termination date of the Licence and Manufacturing Agreement.

- [41] In the event that the term of Licence and Manufacturing Agreement is not extended, the acquiring firm must continue to employ the Unskilled Heinz Ketchup Employees at its Wellington, Malmesbury or Worcester factories. This obligation will persist for a 12 month period from the date of the termination of the Licence and Manufacturing Agreement.
- [42] The acquiring firm must further after the conclusion of the abovementioned twelve month period and if the positions of the Unskilled Heinz Ketchup Employees become redundant, offer the Unskilled Heinz Ketchup Employees any vacant suitable, available alternative employment at the acquiring firm's Wellington, Malmesbury or Worcester factories for a further six month period.
- [43] In terms of its monitoring obligations, the acquiring firm must inter alia circulate a copy of the conditions to the Affected Employees, Unskilled Heinz Ketchup Employees and their relevant trade unions or employee representatives within five business days of the approval date of the proposed transaction. The other monitoring requirements are set out in the imposed set of conditions.

Other public interest issues

- [44] The proposed transaction does not raise any other public interest concerns.

CONCLUSION

- [45] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any

relevant market. We approve the proposed transaction subject to a detailed set of employment-related conditions, attached hereto marked as 'Annexure A'.

Mr AW Wessels

Mr Enver Daniels and Prof. Fiona Tregenna concurring

2 July 2018

Date

Tribunal Case Manager : Ndumiso Ndlovu

For the Merging Parties : Nick Altini of Baker McKenzie

For the Commission

: Nolubabalo Myoli and Thabelo Masithulela

[1] See Merger Record, inter alia page 14.

[2] Merger Record, page 8.

[3] Merger Record, page 8.

[4] We note that Pioneer Foods currently employs 8 624 permanent employees in total and 296 contract employees. HFSA employs 458

employees and 20 contract employees

[5] "Unskilled Heinz Ketchup Employees" means the 10 employees who service the Licence and Manufacturing Agreement at HFSA who may be classified as blue-collar and for factory employees to be transferred to Pioneer Foods as a result of the proposed

transaction.

[6] For the avoidance of doubt, only Affected Employees that hold a formal qualification from a tertiary educational institution

(including universities, technicons and vocational colleges) whether a degree, diploma or a certificate (for a completed certificate

course) may be retrenched as a result of the proposed transaction.

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