

SOUTH AFRICA / JUDGMENT

Sanlam Emerging Markets Proprietary Limited and Another v SAN JV (RF) Proprietary Limited (LM100Aug22) [2023] ZACT 40; [2023] 3 CPLR 44 (CT) (17 August 2023)

[2023] ZACT 40

COURT

Competition Tribunal

BEFORE

J Wilson, F Tregenna, I Valodia

CASE / FILE NUMBER

LM100Aug22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM100Aug22

In the matter between:

Sanlam Emerging Markets Proprietary

Limited and Allianz Europe B.V. Primary

Acquiring Firms

and

SAN JV (RF) Proprietary Limited Primary

Target Firm

Panel : J

Wilson (Presiding Member)

: F

Tregenna (Tribunal Member)

: I

Valodia (Tribunal Member)

Heard on: 22

February, 9 May, 14 August 2023

Last date of submission: 10 August 2023

Order issued on: 15 August 2023

Reasons

issued on: 17 August 2023

REASONS

FOR DECISION

- [1] On 15 August 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger whereby Sanlam Emerging Markets Proprietary Limited (“SEM”) and Allianz Europe B.V. (“Allianz Europe”) intend to jointly acquire control of SAN JV (RF) Proprietary Limited (“SAN JV”).

The parties and their activities

- [2] The primary acquiring firms are SEM and Allianz Europe.
- [3] SEM is a South African company which is wholly owned by Sanlam Life Insurance Limited (“Sanlam Life”). Sanlam Life is, in turn, wholly owned by Sanlam Limited (“Sanlam”). Sanlam is a public company listed on the JSE Limited, the Namibian Stock Exchange and the A2X, and is not controlled by any firms. Sanlam and its subsidiaries are referred to below as the “Sanlam Group”.
- [4] The Sanlam Group is an international financial services group comprising several insurers, financial services providers and other financial institutions in and outside South Africa. SEM is Sanlam’s financial services offering in emerging markets outside of South Africa, and its focus areas include retail and group life insurance and related business, credit, general insurance and investment management.
- [5] Allianz Europe is a corporation registered in the Netherlands and is controlled by Allianz SE (“Allianz”), a public company incorporated in Germany. Allianz does not have any controlling shareholders. Allianz and its subsidiaries are referred to below as the “Allianz Group”
- [6] The Allianz Group is a global integrated financial services group which offers a wide range of life and non-life insurance products to both retail and corporate customers.
- [7] The primary target firm is SAN JV, a company registered in South Africa. SAN JV is currently controlled by SEM, which has a shareholding of 90% in SAN JV. The remaining 10% shareholding in SAN JV is currently held by Santam Limited (“Santam”), a provider of short-term insurance products in the Sanlam Group.

- [8] SAN JV is a holding company for the Sanlam Group's strategic investments in Africa, and does not carry out any direct commercial activities in South Africa.

Proposed transaction and rationale

The transaction

- [9] Pursuant to the proposed transaction, the Sanlam Group and Allianz Group will contribute certain of their respective African operations to a South African incorporated joint venture holding company called Sanlam Allianz Africa. The merging parties submitted in their merger filing that Sanlam Allianz Africa will operate as a pan-African life and general insurance joint venture across the African continent, but excluding South Africa. They stated that Sanlam Allianz Africa will not have any activities in South Africa, and that the merging parties' existing operations in South Africa will be excluded from the joint venture.
- [10] As discussed further below, it turned out that Sanlam Allianz Africa will in fact have activities (albeit limited) in South Africa. The merging parties' failure to indicate this in their merger filing or during the course of the Commission's initial merger investigation led to an unnecessary delay in the consideration and determination of this merger.
- [11] The companies that the Sanlam Group (through SEM) and the Allianz Group (through Allianz Europe) will contribute to Sanlam Allianz Africa, in exchange for shares in Sanlam Allianz Africa, are listed in the Contribution Agreement between the parties.
- [12] Insofar as the Sanlam Group is concerned, the companies that it will contribute to Sanlam Allianz Africa are those entities through which the Sanlam Group carries out its insurance and asset management businesses in the following African jurisdictions: Angola, Benin, Botswana, Burkina Faso, Cameroon, Congo, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Tanzania, Togo, Uganda and Zambia (collectively the "Sanlam Transaction Assets"). The shares of SEM and Santam in SAN JV will also be contributed to Sanlam Allianz Africa.
- [13] Insofar as the Allianz Group is concerned, the companies that it will contribute to Sanlam Allianz Africa are those entities through which the Allianz Group carries out insurance business in the following African jurisdictions: Burundi, Cameroon, Egypt, Ghana, Ivory Coast, Kenya, Madagascar, Mauritius, Morocco, Nigeria, Senegal, Tanzania, and Uganda (collectively the "Allianz Transaction Assets"). The Allianz Group will not contribute any of its assets in South Africa to the joint venture.
- [14] Sanlam Allianz Africa is a South African company that has been established as a holding company for the purposes of the Proposed

Transaction, and is currently a wholly-owned subsidiary of SEM. In exchange for the sale of the Sanlam Transaction Assets, including SAN JV, SEM will receive "A" shares in Sanlam Allianz Africa; and, in exchange for the sale of the Allianz Transaction Assets, Allianz Europe will receive

"B" shares in Sanlam Allianz Africa. SEM will hold "A" shares granting it a 51%-60% interest in Sanlam Allianz Africa; and Allianz Europe will hold "B" shares granting it a 40%-49% interest in Sanlam Allianz Africa. The precise shareholdings of the parties in Sanlam Allianz Africa will depend on the value of their respective assets after post-closing adjustments to the valuations are made.

[15] However, irrespective of the precise level of the parties' shareholding in Sanlam Allianz Africa, the "A" shares will grant SEM control rights substantially equivalent to that of a shareholder that owns 51% of the shares in Sanlam Allianz Africa; and the "B" shares will grant Allianz Europe control rights substantially equivalent to that of a shareholder that owns 49% of the shares in Sanlam Allianz Africa (for so long as Allianz Europe holds "B" shares that constitute more than 35% of Sanlam Allianz Africa's issued share capital).

[16] Pursuant to the proposed transaction, Sanlam Allianz Africa, and the assets it acquires, will be jointly controlled by the Sanlam Group and the Allianz Group through their respective shareholding of "A" shares and "B" shares and associated rights.

Rationale

[17] The merging parties submitted that the proposed transaction will enable them to enhance their capabilities in existing markets where they are present, and to expand their footprints to compete more effectively in certain key jurisdictions on the African continent.

[18] The merging parties foresee the strategic benefits of entering into the Proposed Transaction as including the following:

- a. Enabling a strategic partnership between a pan-African insurance group and an established international financial services group and insurer;
- b. Leveraging the Sanlam Group's experience, expertise, and footprint in Africa and the Allianz Group's broad international expertise and capabilities;
- c. Achieving benefits associated with economies of scale, as well as improved geographical and product diversification;
- d. Offering a tailored range of products to suit the needs of local customers across the African continent at competitive prices which reflect the scale benefits derived from the proposed transaction;
- e. Maximising value creation for both the Sanlam Group and the Allianz Group and their respective stakeholders; and
- f. Benefiting from knowledge sharing, a combined platform and other potential synergies for Sanlam Allianz Africa.

The Commission's initial competition assessment

- [19] In its initial investigation, the Commission found that, in South Africa, the Sanlam Group and the Allianz Group are both active in the provision of short- term insurance products.
- [20] However, based on the merger filing, the Commission found that the proposed transaction did not involve any of the businesses of the Sanlam Group and the Allianz Group in South Africa, and accordingly that the merger would not create any horizontal overlap between these groups in the provision of short-term insurance products in South Africa. The Commission also did not identify any vertical relationship between the Sanlam Group and the Allianz Group in South Africa.
- [21] The Commission considered whether the multi-market contact that the Sanlam Group and the Allianz Group would have as a result of the proposed transaction might impact on competition between them in South Africa in relation to short- term insurance products. The Commission found that the market shares of the Sanlam Group and the Allianz Group in the provision of short-term insurance products in South Africa is relatively low, ranging between 15 – 25% and below 5% respectively, and that there are numerous other providers of short-term insurance in South Africa. The Commission concluded that, given these features of the market, the proposed merger is unlikely to result in coordination between the groups in South Africa.
- [22] The Commission was however concerned that, given the ongoing competitive relationship between the Sanlam Group and the Allianz

Group in South Africa, the joint venture could potentially be used as a vehicle to exchange competitively sensitive information between the Groups in South Africa. In order to alleviate these concerns, the Commission agreed with the merging parties that the approval of the proposed merger should be subject to conditions that limit the flow of competitively-sensitive information between the Sanlam Group and the Allianz Group.

- [23] These conditions provide that, for as long as the Sanlam Group and the Allianz Group can appoint or nominate individuals to the board of Sanlam Allianz Africa as directors, they will ensure that their nominees are not directly involved in the day-to-day management of the Groups' competing businesses in South Africa. In addition, the representatives appointed by the Groups to the board of Sanlam Allianz Africa will sign confidentiality undertakings confirming that they will not disclose to each other competitively sensitive information relating to their competing businesses in South Africa.

The Commission's public interest assessment

Effect on employment

- [24] The merging parties submitted that the proposed transaction will not have any negative effect on employment in South Africa as it will not result in any retrenchments in South Africa.

[25] The Commission noted that the merging parties will not be active in South Africa, and also confirmed that the employees of the Sanlam Group had not raised any concerns regarding the proposed transaction.

[26] The Commission therefore concluded that the proposed transaction does not raise any employment concerns.

Effect on the spread of ownership

[27] The Commission found that in terms of Sanlam's Broad Based Black Economic Empowerment Certificate, black ownership in Sanlam is as follows:

27.1 voting rights: 55.36% on a flow-through basis, and 55.75% on a modified flow-through basis; and

27.2 economic interest: 49.00% on a flow-through basis, and 49.04% on a modified flow-through basis.

[28] The Commission found that Allianz Europe does not have any ownership by historically disadvantaged persons.

[29] Having regard to these percentages, and the fact that, post-merger, SEM will hold 51-59% of the shares in Sanlam Allianz Africa, the Commission concluded that the proposed transaction does not raise any public interest concerns from a transfer of ownership perspective.

[30] The Commission also found that the proposed merger does not raise any other public interest concerns.

Tribunal's assessment and further merger investigation

[31] The Tribunal was satisfied with the Commission's conclusions regarding the competition and public interest effects of the proposed merger based on the merging parties' statement in the merger filing that Sanlam Allianz Africa will not have any activities in South Africa.

[32] However, at the merger hearing on 28 February 2023, the Tribunal noted that, based on the merging parties' statement in their merger filing that Sanlam Allianz Africa would not have any activities in South Africa, the Commission's analysis had been premised on that assumption. However, there was no limitation on Sanlam Allianz Africa deciding, post-merger, to conduct activities in South Africa, in which event the competitive consequences of such entry would not have been investigated by the Commission or considered by the Tribunal. The Tribunal therefore requested the Commission and the merging parties to propose a condition to address this concern.

[33] The proposals made by the merging parties subsequent to the merger hearing did not appear to the Tribunal to address this concern

adequately, and the Tribunal therefore afforded the merging parties and the Commission an opportunity to comment on a proposed condition that Sanlam Allianz Africa would not sell any insurance, financial or other products or services in South Africa.

[34] This proposal elicited a response from the merging parties that the condition should be amended to cater for the activities in South Africa that may relate to SEM's 50% shareholding in aYo Holdings Limited ("aYo"), a Mauritian company, which shareholding is part of the Sanlam Transaction Assets being contributed to Sanlam Allianz Africa. aYo is a joint venture between SEM and MTN (Dubai) Limited, a subsidiary of MTN Group Limited.

[35] The Tribunal then queried how these proposed activities were consistent with the statement in the merger filing that Sanlam

Allianz Africa would not conduct any activities in South Africa. The merging parties responded that, at the time the merger notification

was filed on 22 August 2022, the aYo's joint venture had not yet been implemented, and was still subject to merger approval in various jurisdictions. In addition, aYo's South African operation had not, to date, commenced business. The merging parties

also stated that aYo's would only conduct distribution (and not underwriting) activities in South Africa.

[36] The Tribunal did not regard this as a satisfactory explanation given the clear intent of aYo to launch distribution operations in South Africa in the near term future. Furthermore, the merging parties' failure to notify the Commission of these proposed activities meant that the Commission had not had the opportunity to investigate their potential competitive effects in South Africa, including their potential effect on the incentives of the Sanlam Group and the Allianz Group to compete in the South African market.

[37] In the circumstances, and in an attempt to progress matters, the Tribunal reconvened the merger hearing on 9 May 2023 in order to hear further submissions from the Commission and the merging parties on the conditions that should be attached to the merger. At that hearing, the Commission confirmed that it had not investigated the potential effects of the proposed entry of aYo into the South African market. The Tribunal therefore suggested various potential options to the merging parties, including staying the Tribunal proceedings until the Commission had carried out its further investigation, or excluding SEM's shareholding in the aYo joint venture from the proposed transaction.

[38] The merging parties subsequently chose the first option, and the Commission proceeded to conduct its further merger investigation.

[39] On 3 August 2023, the Commission submitted its supplementary recommendation to the Tribunal. The Commission reported that Sanlam

Allianz Africa will conduct business in South Africa through aYo Intermediaries Proprietary Limited (“aYo SA”), a South

African subsidiary of aYo. aYo SA holds short-term and long-term insurance licences that permit it to market and distribute (but not underwrite) short-term and long-term insurance products in South Africa. aYo SA will distribute Sanlam and Santam insurance products exclusively to MTN customers via the MTN network. The short-term insurance products it will distribute are device insurance, motor vehicle comprehensive insurance and liability cover. The long-term insurance products include life insurance, funeral insurance as well as protection against contract liability and life insurance offered on an employee benefit basis.

Vertical assessment

- [40] Given the proposed activities of aYo SA, the Commission found that the proposed transaction gives rise to a vertical overlap in South Africa as Sanlam and Allianz are both active in the upstream market for underwriting of insurance products, whilst aYo SA will be active in the downstream market for the distribution of those insurance products.
- [41] The Commission assessed input foreclosure separately for the short-term and long-term insurance markets.
- [42] As regards the short-term insurance market, the Commission found that the Sanlam Group and the Allianz Group have market shares ranging between 20 – 30% and below 5% respectively, in the upstream market for underwriting short-term insurance products. It found that there are also various other notable upstream players in this market, including Guardrisk, Hollard, Old Mutual, OUTsurance, and Bryte.
- [43] The Commission also noted that, in 2022, Santam acquired the MTN portfolio comprising the device insurance policies marketed and distributed by MTN and underwritten by Guardrisk. As a result of that transaction MTN will cease writing new business on behalf of Santam.
- [44] The Commission concluded that there are no other downstream insurance distributors that will be foreclosed as a result of the entry of aYo SA into the insurance distribution market since the device insurance distribution to be performed by aYo SA was previously performed by MTN and was therefore not available in any contestable market.
- [45] As regards the long-term insurance market, the Commission found that Sanlam has shares of less than 15% in the provision of different life insurance policies (funeral assistance policies, disability policies, life policies and total life policies), whilst Allianz does not provide any life insurance products in South Africa. The Commission found that Sanlam competes against numerous players in the long-term insurance market, including Old Mutual, Liberty Life, Clientele, 1Life, Assupol, and Budget Life, amongst others.

- [46] The Commission considered whether the merged entity will have the ability to foreclose the downstream competitors of aYo SA from accessing underwriting of long-term insurance products from Sanlam post the implementation of the proposed transaction.
- [47] The Commission noted in this regard that aYo SA is a new entrant into the downstream market and will be distributing Sanlam life products exclusively to MTN customers via the MTN network, in circumstances where MTN was previously performing the same function in-house. The Commission therefore found that there are no other downstream distributors that will be foreclosed from access to Sanlam life insurance products as a result of the entry of aYo SA.
- [48] The Commission also assessed customer foreclosure in both the life and non-life insurance markets – in particular, whether the merged entity will have the ability to foreclose upstream competitors of Sanlam and Allianz from accessing aYo SA as a distributor of insurance products post-merger.
- [49] The Commission concluded that there will not be any foreclosure effect because aYo SA has only recently entered the market, and will not be distributing the insurance products of any insurers other than Sanlam and Santam. Furthermore, aYo SA will be distributing insurance products exclusively to MTN subscribers via the MTN network, and will not have any corporate customers in South Africa. As a result, no upstream insurance companies will be foreclosed by the entry of aYo in the downstream market.
- [50] In conclusion, the Commission found that the entry of aYo SA into the South African market is unlikely to give rise to anti-competitive

input or customer foreclosure effects.

Change in incentives

- [51] The Commission also considered whether the entry of aYo SA into the South African market might affect the incentive of the Allianz Group (as a partner in the Sanlam Allianz Africa joint venture) to enter into the South African individual insurance distribution market in the future.
- [52] The Commission found that the Allianz Group had historically explored entering this market, but had decided not to do so for legitimate commercial reasons. The Commission did not find any evidence that Allianz has considered any such entry in the last 3 years. The Commission therefore concluded that the entry of aYo SA into the South Africa market is unlikely to affect the incentives of the Allianz Group to compete with the Sanlam Group in South Africa.

- [53] The Commission was nevertheless of the view that, in order to guard against the introduction of any activities by Sanlam Allianz Africa in South Africa other than those investigated in relation to aYo SA, an express condition should be imposed limiting Sanlam Allianz Africa's activities in South Africa to the distribution of insurance products on behalf of the Sanlam Group through aYo SA. The merging parties agreed to the imposition of this condition.
- [54] The Tribunal agrees, based on the further investigation conducted by the Commission and the further condition agreed by the Commission and the merging parties, that the proposed merger is unlikely to raise any significant competition concerns.

Conclusion

- [55] Subject to the conditions referred to above, the Tribunal concludes that the proposed transaction is unlikely to lessen or prevent competition in any relevant market and does not raise any public interest concerns.
- [56] The Tribunal accordingly approves the proposed merger subject to the conditions annexed hereto as Annexure A

Presiding Member

Adv. Jerome Wilson SC

Concurring: Professor Fiona Tregenna and Professor Imraan Valodia

Date: 7 August 2023

Tribunal Case Managers: Sinethemba Mbeki, Baneng Naape, T eodora

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For the Competition

Commission:

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