

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 55/LM/Oct03

In the large merger between:

Main Street 150 (Pty) Ltd

and

Profert (Pty) Ltd and Rowan Tree 16 (Pty) Ltd

Reasons for Decision

Approval

1. On 19 November 2003 the Competition Tribunal conditionally approved the merger between Main Street 150 (Pty) Ltd and Profert (Pty) Ltd and Rowan Tree 16 (Pty) Ltd. The reasons for this decision follow.

The Parties

2. The primary acquiring firm is Main Street 150 (Pty) Ltd ("Main Street"), a special purpose vehicle created for the present transaction. Main Street was jointly established by the senior management of Profert (Pty) Ltd ("Profert") and Genbel Securities Ltd ("Gensec").
3. Senior management of Profert comprises the following individuals: Abraham van der Walt, Hubert Jarlet and Anton van Rooyen. Gensec is a wholly owned subsidiary of Sanlam Limited. Sanlam Limited is a public listed company, with a number of shareholders, none of which have a controlling interest. Gensec is an investment holding company with a 100% interest in Gensec Bank Limited, a financial engineering and capital markets group.
4. The primary target firms are Profert and Rowan Tree 16 (Pty) Ltd ("Rowan Tree 16"). Profert is currently controlled by HA Holdings (Pty) Ltd (30%) and by Senwes Limited (70%). Profert currently holds a 29% shareholding in Profert Laeveld (Pty) Ltd, and a controlling interest in Zeply 1949 (Pty) Ltd (50%).
5. The second target firm is Rowan Tree 16, a special purpose vehicle created for the transaction, which is currently inactive, as it has not yet begun trading.

The Merger Transaction

6. The transaction involves two legs. The first leg of involves a management buy out by senior management of Profert, in terms of which Main Street will acquire a portion of Senwes Limited's shareholding in Profert, as well as HA Holdings share in Profert. Main Street, through Rowan Tree 16 will also acquire from Senwes Limited, the Profert fertilizer facilities letting business, including the warehouses and blending plants. Rowan Tree 16 will then undergo a name change to "Profert Property Holdings (Pty) Ltd" and in terms of the Sale of Business Agreement control the business as a going concern. Post Merger, Main Street will own 100% of issued share capital in Profert together with Profert land and will be renamed "Profert Holdings".
7. In the second leg, HA Holdings will sell its shareholding in Profert Laeveld to Profert. Accordingly, Profert will increase its shareholding in Profert Laeveld.
8. Post merger, Gensec will control a majority of the shareholding in Main Street. Rowan Tree 39 (Pty) Ltd, a company, which has been established by senior management of Profert for the purposes of the present transaction, will post merger hold the remaining shareholding in Main Street.
9. In due course, it is envisaged that management will acquire a majority shareholding in Profert in terms of an agreement with the acquiring firm.

Rationale for the Transaction

10. According to the Parties, Senwes Limited is re-focusing on its core activities and accordingly wishes to exit its current investment in Profert. With its financial backing for the transaction, Gensec hopes to obtain an attractive return on its investment. In addition Gensec has identified various trade finance opportunities which are likely to arise from its involvement in the transaction such as the provision of currency/commodity structured solutions, capitalizing on Profert's distribution capabilities and provision of other banking facilities to Profert.

The Relevant Market

11. Sanlam Limited is a provider of life insurance, retirement annuities, savings products, unit trusts and trust services to individuals. In addition Sanlam Limited provides investment and risk products to group funds and schemes in South Africa, as well as administration, actuarial and consulting services to the group retirement industry and money transfer services.
12. Gensec is an investment holding company. Its major assets are cash and a 100% interest in Gensec Bank Limited. Gensec Bank is a financial

engineering and capital markets group, whose business is aimed at creating wealth for the mutual benefit of its clients (the savings industry, public sector enterprises and corporates) and its shareholder (Sanlam Limited), through the management of financial risk.

13. Main Street is a special purpose vehicle and therefore inactive.
14. As a newly formed company Rowan Tree 16 has not yet begun trading and therefore is not active in any market.
15. Profert is a marketer and trader of fertilizer, servicing the local farming community with prescription bulk blended fertilizers and related products. Profert does not manufacture any raw materials used in the production of fertilizer, but blends and bags granular fertilizer products.
16. There is no vertical or horizontal overlap between the products or services provided by the acquiring firm, Gensec or Sanlam Limited and the products or services provided by the target firms.

Impact on competition

17. Since there is neither product overlap nor any vertical relationship between the parties, the Commission concluded that the merger would not inhibit competition in any market. Indeed, if anything, the separation of Profert and Senwes would result in a decrease in vertical integration. However, certain of the documents filed by the parties, in particular, Gensec's investment memorandum,¹ suggest the existence of widespread anti-competitive practices in the fertilizer market. It is incumbent on us to take due note of these allegations.
18. The fertilizer industry is a classic commodity business and, as such, construed by anti-trust commentators as particularly susceptible to cartelisation.² The South African fertilizer industry started around the turn of the 20th century. Up until the 1930's, South Africa was dependent on imported fertilizer products, which were mixed and blended with the local products. However import supplies dried up during the Second World War. Price control was introduced as a war measure during the early 1940's and was abolished on 1 January 1984. During the era of price control, annual fertilizer price increases were fixed by government and formal market sharing agreements were permitted between the major producers. Imports were disallowed and shortfalls imported only when permission to do so was granted by the fertilizer industry itself.³
19. In an internal memorandum Profert notes that, "*the South African fertilizer industry has succeeded for many years to keep the business within a privileged few and accordingly effectively resisted "Globalisation". There the entrance of Profert has been seen as a major threat and for that*

¹ Gensec Bank's Buy-out Portfolio Investment Memorandum, Dated 23 May 2003.

² George Stigler, The Organization of Industry. Homewood, Ill.: R. D. Irwin, 1968, chapter 6.

³ Investment memorandum Annexure B at page 1

reason has since its inauguration been bombarded with many threats and rumours. Noticeably shortly after the announcement of the establishment of Profert and commencing with activities, local fertilizer prices has fallen by ten percent (10%), a saving of R500 million to the farming industry.”⁴.

20. In the same memorandum Profert further notes that, “...three main competitors ha[ve] positioned themselves to jointly and severely taking Profert out of business during the current financial year. They were restructuring themselves, [to] cut down costs and enter into product swap arrangements, but yet under estimated the effect of infra structure limitations to import large quantities of product with disastrous effect.”⁵
21. In summary then, Profert has, it seems, emerged as the industry maverick. In Gensec’s investment memorandum, it refers to farmers’ perception of Profert as being, “...independent of the cartel (i.e. acts as the watch dog for fertilizer prices)”⁶.
22. It has prospered despite attempts by the bigger players to push it out of the market. Now, avers Gensec, Profert’s majority shareholder post-merger, ‘after initially trying to suffocate Profert, the latest efforts from its competitors have been aimed towards incorporation, merger or buy-out’.⁷
23. Nor, it seems, is Gensec averse to the alleged change in heart on the part of Profert’s competitors. The advantages of the more accommodating stance of Profert’s competitors accords with Gensec’s strategy for exiting its investment in the target company. Gensec has indicated that “sale to another player in the industry... or to a large customer...could provide Gensec Bank with an attractive exit”⁸.
24. Further, “both Afgri (customer) and Kynoch (competitor) have shown interest in acquiring an equity stake in Profert. Accordingly, a strategic sale of Gensec Bank’s equity interest in Profert would appear to be the most likely exit mechanism.”⁹
25. Gensec’s short-term view of its presence in the fertilizer market and the fact that it appears to have already discussed this in the industry, suggest that Profert, under its new owners, is incentivised to accept accommodation and forswear its history of robust competition.
26. Moreover, this tendency is undoubtedly strengthened by Profert’s stated desire to consolidate its position in the market and its financial position. There is an indication that a period of higher prices and lower discount levels is inevitable.¹⁰ Profert will also use its pricelist’ in order to ‘pass(ing)

⁴ Investment memorandum Annexure A at page 3

⁵ *ibid.*

⁶ Investment memorandum at Page 3

⁷ *ibid* at page 10

⁸ *ibid* at Page 5 Para 8

⁹ *ibid* at Page 7 Para 11

¹⁰ Investment memorandum Annexure A at page 8 Para. 5.1.2

on a message to competitors'.¹¹ This preference for consolidation will, be reflected in a *'containing [of] market share aspirations'*.¹²

27. Under the circumstances, we believe that we are obliged to ensure that Profert and its new shareholder understand their obligations under the Competition Act. Hence we have devised a condition that obliges the merged entity to develop a suitable compliance programme.

Public interest issues

28. The parties submit that there will not be any job losses as a result of the proposed merger. Accordingly, the transaction will not impact negatively on employment.

Accordingly we approve the merger subject to the condition set out in the attached order.

D Lewis

02 December 2003

Concurring: N Manoim and F Fourie

For the Parties:	Anton Roets and Nikki Bitter (Webber Wentzel Bowens) Instructed by Geert Lampen (Lampen and Pieters)
For Senwes:	Marlene Botha (Hofmeyr, Herbstein & Gihwala Inc)
For the Commission:	Veronica Modubu and Lizél Blignaut (Mergers and Acquisitions Division)

¹¹ *ibid.* at Para. 5.1.1

¹² *ibid.* at Para. 5.1.3