



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM090Aug15

In the matter between:

DIAGEO SOUTH AFRICA (PTY) LTD

Acquiring Firms

HEINEKEN INTERNATIONAL B.V.

NAMIBIA BREWERIES LIMITED

And

BRANDHOUSE BEVERAGES (PTY) LTD

Target Firms

DHN DRINKS (PTY) LTD

SEDIBENG BREWERY (PTY) LTD

Panel	: Andreas Wessels (Presiding Member)
	: Prof. Imraan Valodia (Tribunal Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 25 November 2015
Order Issued on	: 25 November 2015
Reasons Issued on	: 18 December 2015

Reasons for Decision

Approval

[1] On 25 November 2015, the Competition Tribunal ("Tribunal") conditionally approved the proposed transactions involving Diageo South Africa (Pty) Ltd ("Diageo SA"), Heineken International B.V. ("Heineken"), Namibia Breweries Ltd ("NBL") and Brandhouse Beverages (Pty) Ltd ("Brandhouse"), DHN Drinks (Pty) Ltd ("DHN") and Sedibeng Brewery (Pty) Ltd ("Sedibeng").

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

Parties to transactions and their activities

Background

[3] There are currently three joint ventures in South Africa involving Diageo plc ("Diageo"), Heineken and NBL. The proposed transactions entail the restructuring of these joint ventures, namely the (i) Brandhouse; (ii) DHN; and (iii) Sedibeng joint ventures (as explained below).

[4] Currently the shareholders in these three joint ventures are as follows:

- Brandhouse: Diageo currently holds 50% and DHN also holds 50%.

NBL holds 15.5%.
- Sedibeng: Heineken has a 75% interest and Diageo holds a 25% interest.

Primary acquiring firms

[5] The primary acquiring firms are Diageo SA, Heineken and NBL which are each involved in different legs of the overall transaction.

[6] In the Brandhouse leg of the transaction, the primary acquiring firm is Diageo SA. Diageo SA is a company incorporated in accordance with the laws of the Republic of South Africa and is an indirect wholly owned subsidiary of Diageo. Diageo is a public company listed on both the London Stock Exchange and the New York Stock Exchange and is accordingly not controlled by any one shareholder.

[7] Diageo is a global drinks company. It brews, markets and distributes beer and a variety of other alcoholic beverages in a number of countries throughout the world, including in South Africa. Currently Diageo's activities in South Africa in respect of the marketing, sales and distribution functions of alcoholic beverages are conducted through Brandhouse.

[8] In the DHN leg of the transaction, the primary acquiring firm is Heineken, a company incorporated in accordance with the laws of the Netherlands. Heineken is a public company listed on the Euronext Stock Exchange.

Non-confidential version

- [9] The Heineken Group is active on a world-wide basis in relation to the brewing, commercialisation and distribution of beer. In South Africa, the Heineken brands are currently brewed by the Sedibeng brewery in Johannesburg. Its products are distributed throughout South Africa by Brandhouse.
- [10] In the Sedibeng leg of the transaction, the primary acquiring firm is NBL, a company incorporated in accordance with the laws of Namibia. NBL is a public company listed on the Namibian Stock Exchange.
- [11] NBL brews, sells and distributes a number of beer brands. In South Africa the NBL brands are currently brewed by Sedibeng. Its products are distributed throughout South Africa by Brandhouse.

Primary target firms

- [12] In the Brandhouse leg of the transaction, the primary target firm is Brandhouse, a company incorporated in accordance with the laws of the Republic of South Africa. Brandhouse does not directly or indirectly control any firm in South Africa.
- [13] Brandhouse is a cost sharing joint venture company which was established for the purposes of consolidating the marketing, sales and distribution functions of Diageo, Heineken and NBL in South Africa.
- [14] Post-transaction Brandhouse will continue to distribute, market and sell Diageo's alcoholic beverage products in South Africa, albeit on the basis that Diageo will exercise sole control over Brandhouse. In time DHN will sell and distribute the Heineken and NBL products directly to customers and this will no longer take place through Brandhouse.
- [15] In the DHN leg of the transaction, the primary target firm is DHN, a company incorporated in accordance with the laws of the Republic of South Africa. DHN currently has a 50% interest in Brandhouse.
- [16] DHN is a profit sharing joint venture company which holds the rights to market, sell and distribute a number of alcoholic beverage brands in South Africa.

- [17] In the Sedibeng leg of the transaction, the primary target firm is Sedibeng, a company incorporated in accordance with the laws of the Republic of South Africa. Sedibeng does not directly or indirectly control any firm in South Africa.
- [18] Sedibeng manufactures beer, cider and ready-to-drink (RTD) alcoholic products on behalf of DHN.

Proposed transactions and rationale

- [19] The proposed transactions contemplate the restructuring of the existing joint venture arrangements between Diageo, Heineken and NBL in South Africa. The restructuring will take place through the following three transactions which, according to the merging parties, are interrelated and together form one indivisible transaction:
- In the Brandhouse transaction, Diageo will acquire sole control over Brandhouse by increasing its current 50% shareholding in Brandhouse to 100%.
 - In the DHN transaction, Heineken and NBL will acquire Diageo's 42.25% equity interest in DHN. Post-transaction, Heineken's shareholding will be 75% and NBL's interest will be 25%. DHN will be jointly controlled by Heineken and NBL post-transaction.¹
 - In the Sedibeng transaction, NBL will acquire Diageo's 25% shareholding in Sedibeng. Post-transaction, Sedibeng will be controlled by NBL and Heineken post-transaction.²

- [20] By way of rationale, the merging parties submitted that the respective businesses of Diageo, Heineken and NBL have grown to a sufficient scale and no longer require a cost-sharing arrangement between all the parties.

Impact on competition

- [21] The Competition Commission ("Commission") assessed the impact of the proposed transactions on the following three markets: (i) the market for the supply of beer in South Africa; (ii) the market for the supply of spirits in South Africa; and (iii) the

¹ Certain minority protections are afforded to the minority shareholders which confer joint control over this entity in terms of section 12(2)(g) of the Competition Act 89 of 1998.

² Certain minority protections are afforded to the minority shareholders which confer joint control over this entity in terms of section 12(2)(g) of the Competition Act 89 of 1998.

market for the supply of RTD products / flavoured alcoholic beverages in South Africa.

- [22] In the market for the supply of beer in South Africa, the Commission found that the merging parties have a market share of less than [...]% (based on volume) and will continue to be constrained after the proposed transactions by SABMiller Plc, which is the dominant player in this market. The Commission further noted that the proposed restructuring will have no material impact on competition in this market.
- [23] In relation to the market for the supply of spirits in South Africa, the Commission found that the proposed transactions are unlikely to alter the existing competitive structure of this market. Diageo currently supplies spirits through Brandhouse and this will continue after the proposed transactions. Furthermore, neither Heineken nor NBL supply spirit products in South Africa.
- [24] In the market for the supply of RTD products / flavoured alcoholic beverages in South Africa, the Commission found that the merging parties have a market share of less than [...]% and will continue to face competition after the proposed transactions from Distell Group Limited, which is the dominant player in this market. In the Commission's view the proposed restructuring will not lead to any significant change in competition in this market.
- [25] The Commission accordingly concluded that the proposed transactions were unlikely to substantially prevent or lessen competition in any of the affected markets.
- [26] Since the proposed transactions are essentially a shareholder restructuring of the abovementioned three joint ventures, we concur with the Commission's finding that the proposed transactions will not substantially prevent or lessen competition in any relevant market. We note that, given the nature of the proposed transactions, there is no need for us to conclude on the precise market delineation since this does not alter our ultimate conclusion on competition.

Public interest

- [27] The proposed transactions raise employment concerns but do not raise any other public interest concern. We deal with the employment concerns below.

Employment

Commission's findings

- [28] According to the Commission's Report, the merging parties submitted that on completion of the restructuring, certain assets and contracts will transfer to DHN, as the entity under which Heineken and NBL will continue to carry on their joint business. As a result, it is envisaged that Brandhouse will need to carry out a retrenchment exercise pursuant to Section 189 of the Labour Relations Act, No. 66 of 1995 as amended ("LRA") in respect of certain of its functions and staff in order to right-size its operations.
- [29] Furthermore both DHN and Brandhouse plan to relocate their operational head offices from Cape Town to Johannesburg, which may result in retrenchments should employees be unable or unwilling to relocate.
- [30] The merging parties however submitted that the proposed restructuring will give rise to a significant increase in employment at DHN and Sedibeng.³ In addition to employees of Brandhouse who are currently exclusively servicing the NBL and Heineken brands, who will transfer to DHN, the merging parties envisage that certain additional functions will be created at DHN.⁴
- [31] The Commission and the merging parties engaged extensively in relation to the number of employees that would be affected by the proposed transactions. The ultimate number that was submitted by the merging parties and accepted by the Commission was 451 (Brandhouse) employees. The Commission concluded that this represents a substantial number of "merger-specific" job losses and that the proposed transactions therefore raise significant employment concerns. Given its concerns, the Commission engaged with the merging parties with the view to agree on a set of conditions to address its concerns. Essentially, the Commission wanted to ensure that for every job that was lost at Brandhouse, a new job would be created at DHN to offset the retrenchments. The Commission therefore recommended that Brandhouse shall not retrench more than 451 employees as a result of the proposed restructuring for a period of 18 (eighteen) months from the implementation date of the proposed transactions. The Commission further recommended that for the same time period DHN will ensure that at least 451 employment positions will be created in its

³ See *inter alia* page 29 of the Commission's Report.

⁴ See page 36 of the Commission's Report.

operations post-implementation to accommodate the affected employees likely to be retrenched at Brandhouse.

- [32] The merging parties agreed to a set of conditions to address the employment concerns, which was provided to the Tribunal for consideration.
- [33] Taken as a whole, based on the figures submitted by the merging parties and the proposed conditions, the Commission concluded that the proposed transactions will have a net positive effect on employment. At the hearing, the merging parties submitted that overall, because DHN will be employing more people, the transactions will be net positive. *"We think approximately 100 jobs net positive, conservatively."*⁵

Hearing and assessment

- [34] We concur with the Commission's finding that the number of employees affected by proposed transactions (i.e. 451 employees) is substantial, that the anticipated job losses are "merger-specific" and that this raises a significant employment concern.
- [35] At the hearing, the Food and Allied Workers Union (FAWU), representing employees at Sedibeng, requested an opportunity to make oral submissions. In its oral submissions it raised the concern that it was not consulted in relation to potential employment effects at Sedibeng.
- [36] However, the Commission in its recommendation to the Tribunal highlighted that there will be no job losses at Sedibeng.⁶ This was confirmed by the merging parties at the hearing. They stated that *"Sedibeng is entirely unaffected by this process. And there will be no job losses at the Sedibeng Brewery, ..."*⁷ Furthermore, the merging parties agreed that the proposed transactions can be approved subject to the condition that there will be no retrenchments at the Sedibeng Brewery facility pursuant to the proposed transactions (see paragraph 39.3 below). This in our view takes care of the concern raised by FAWU and we do not deal with it any further.
- [37] Mr. Norton, counsel for the merging parties, brought to the Tribunal's attention an agreement, signed on 07 October 2015, between Brandhouse, DHN and the "Employees' Representative Group". He explained that through the auspices of the CCMA, a very detailed consultation process took place between the affected

⁵ Transcript, page 6.

⁶ See page 27 of the Commission's Report.

⁷ Transcript, page 19.

employees and the relevant parties and this culminated in the conclusion of this agreement.⁸ More specifically, we were referred to paragraph 5 of the agreement that deals with the “*New Organisational Design*” of Brandhouse. During the consultation process that took place, the Employee Representative Group and Brandhouse reached agreement on Brandhouse’s new organisational design. The agreement stipulates a series of phases of how employees will be offered positions within the new Brandhouse group and the merging parties highlighted that they have to act in accordance with this.⁹ This was also included in the conditions that were proposed and ultimately imposed by us (see paragraph 39.4 below).

[38] At the hearing the Tribunal requested clarity regarding the number of employees that will be affected by the proposed transactions. The Tribunal further requested the

to the proposed conditions, including that it must be made clear that the anticipated retrenchments would only relate to skilled and semi-skilled employees. We further requested that skilled and semi-skilled employees be defined in the proposed conditions. We also requested that the proposed monitoring conditions be enhanced to ensure proper feedback by the merging parties to the Commission. The Commission and the merging parties subsequently made the necessary changes to the set of proposed conditions. We were satisfied with this.

[39] We ultimately approved the proposed transactions subject to the following employment-related conditions.

[39.1] Brandhouse must not retrench¹⁰ more than 451 employees (which will consist of both skilled and semi-skilled employees as defined) as a result of the proposed transactions for a period of 18 (eighteen) months from the date on which the transactions are implemented.

[39.2] DHN must ensure that the number of employment positions that will be created in DHN post-implementation will be a minimum of 451 employment positions (which will consist of both skilled and semi-skilled employees as defined) as a result of the proposed transactions for a period of 18 (eighteen) months calculated from the implementation date.

⁸ Transcript, page 5.

⁹ Transcript, pages 7 and 8.

¹⁰ Retrenchments do not include voluntary separation arrangements, voluntary early retirement packages and unreasonable refusals to be redeployed in accordance with the provisions of the LRA.

[39.3] DHN undertakes that there will be no retrenchments at the Sedibeng Brewery facility pursuant to the proposed transactions.

[39.4] The merging parties confirm that they will act in accordance with clause 5 of the agreement concluded between Brandhouse, DHN and the Employees' Representative Group and signed on 7 October 2015.

[40] We are satisfied that the abovementioned set of imposed conditions, including the monitoring conditions, adequately addresses the employment concerns resulting from the proposed transactions since it ensures that the proposed transactions would have a neutral effect on employment in South Africa.

Conclusion

[41] In light of the above, we conclude that the proposed transactions are unlikely to substantially prevent or lessen competition in any relevant market. However, the proposed transactions raise significant employment concerns and we therefore approved them subject to the employment-related conditions as explained above. The full set of imposed conditions is attached hereto marked as "Annexure A" (to be read with "Annexure B").



Andreas Wessels

18 December 2015
DATE

Medi Mokuena and Prof. Imraan Valodia concurring

Tribunal Researcher: Ammara Cachalia and Aneesa Ravat
For the merging parties: Anthony Norton of Nortons Inc.
For the Commission: Thelani Luthuli

