



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM103Jul17

In the matter between:

The Government Employees Pension Fund,
Unemployment Insurance Fund and Compensation
Fund, duly represented by Public Investment Corporation
SOC Limited

Primary Acquiring Firm

and

AFGRI Poultry (Pty) Ltd t/a Daybreak Farms

Primary Target Firm

Panel : E Daniels (Presiding Member)
M Mokuena (Tribunal Member)
F Tregenna (Tribunal Member)

Heard on : 04 October 2017

Decided on : 09 October 2017

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that -

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).


Presiding Member
Mr Enver Daniels

09 October 2017
Date

Concurring: Mrs Medi Mokuena and Prof Fiona Tregenna

CONFIDENTIAL

ANNEXURE A

**The Government Employees Pension Fund, Unemployment Insurance Fund, and
Compensation Fund, duly represented by Public Investment Corporation SOC Limited**

and

Afgri Poultry (Pty) Ltd t/a Daybreak Farms

CASE NUMBER: 2017Jun0046

CONFIDENTIAL CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1 **"Acquiring Firms"** means GEPF, UIF and CF, duly represented by the PIC;
- 1.2 **"AFPO Consortium"** means AFPO Consortium Proprietary Limited;
- 1.3 **"Approval Date"** means the date referred to in the Competition Tribunal Order;
- 1.4 []
- 1.5 **"B-BBEE Act"** means the Broad-Based Economic Empowerment Act, 53 of 2003, as amended, and the Codes of Good Practice 2013, as amended;
- 1.6 **"B-BBEE Equity"** means a certain percentage of the shares that the PIC holds in Daybreak Farms, as the PIC deems fit, bearing in mind the financial position of Daybreak at the time and the need to introduce further investors with the necessary skills;
- 1.7 **"B-BBEE"** means broad-based black empowerment as defined in the B-BBEE Act;
- 1.8 **"BEE Third Party"** means any natural Black person or persons or B-BBEE Controlled Company or B-BBEE Owned Company as defined in the B-BBEE Act, which is willing and able to purchase the B-BBEE Equity;
- 1.9 **"Black"** means Black People as defined in the B-BBEE Act;
- 1.10 **"CF"** means Compensation Fund;
- 1.11 **"Commission"** means the Competition Commission of South Africa;

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- 1.12 **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.13 **"Competing Firms"** mean [] and any other competitor to the Target Firm;
- 1.14 **"Competitively Sensitive Information"** includes, but is not limited to, trade, business or industrial information which has a particular economic value to a firm and its business strategy and is generally not available or known by others including any trade secrets, prices, discounts, rebates, margins, financial data including non-public sales volume, and sales value, marketing, promotional and advertising strategies, distribution methods, budgets, business plans and strategies, and customer information;
- 1.15 **"Conditions"** mean these conditions;
- 1.16 **"Divest"** means the divestiture of the B-BBEE Equity ;
- 1.17 **"Divestiture Period"** means [] years after the Implementation date;
- 1.18 **"GEPF"** means Government Employee Pension Fund;
- 1.19 **"HDIs"** means Historically Disadvantaged Individuals or entities owned by Historically Disadvantaged Individuals;
- 1.20 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.21 **"Merger"** means the acquisition of control by the Acquiring Firms over the Target Firm;
- 1.22 **"Merging Parties"** means the Acquiring Firms and the Target Firm;
- 1.23 **"PIC"** means Public Investment Corporation SOC Limited, (as a representative of GEPF, CF, and UIF);
- 1.24 []
- 1.25 []
- 1.26 **"Target Firm"** means Afgri Poultry (Pty) Ltd t/a Daybreak Farms;
- 1.27 **"UIF"** means Unemployment Insurance Fund.

2. RECORDAL

- 2.1 On 22 June 2017, the Merger was filed with the Commission. The Commission found that the PIC has interest in firms that compete with Daybreak throughout the poultry value chain. Specifically, the PIC has non-controlling interests in [] being the Competing Firms. The Commission found that although the PIC currently does not nominate directors to the board of the Competing Firms, there are circumstances under which they may be able to do so in future.
- 2.2 The Commission is concerned about the potential information sharing that will flow through the PIC should the PIC in future be in a position to nominate directors on the board of the Competing Firms. The Commission is concerned that the above structure could allow for the sharing of Competitively Sensitive Information. The Commission therefore seeks to impose a condition to deal with the risk of cross-directorships and information sharing as between the various portfolio companies of the PIC that could increase the likelihood of anti-competitive coordination between them.
- 2.3 The Commission is also concerned about the negative effect of the proposed transaction on the participation of HDIs as the transaction will result in AFPO Consortium, a black empowerment consortium, exiting from the market. The Commission seeks to impose a condition to ensure that the PIC should divest a portion of its shareholding in Daybreak to a BEE Third Party once operations at Daybreak have stabilized and/or turned around.
- 2.4 In order to address the above concerns, the Commission recommends that the Merger be approved subject to the following conditions.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

INFORMATION EXCHANGE CONDITION

- 3.1 For as long as the Acquiring Firms can nominate individuals to the board of the Target Firm as directors, they shall ensure that their nominees to the board of the Target Firm:

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- 3.1.1 Are not the same individuals serving, nominated and/or appointed on any board or management committees or sub-committee of either of the Competing Firms;
- 3.1.2 Decline any and all invitation(s) to attend any meeting(s) of the board of directors and/or management committees or discussions at any sub-committee meetings of either the Competing Firms;
- 3.1.3 Shall not receive any board documents pertaining to the businesses of the Competing Firms, to the extent that they contain Competitively Sensitive Information;
- 3.1.4 Will not have served on the board of directors and/or management committees of either of the Competing Firms for a period of 6 (six) months prior to being nominated to the board of the Target Firm.
- 3.2 The Acquiring Firms shall ensure that they do not nominate or appoint common directors, officers or employees to the board of [] or otherwise appoint any common directors, officers or employees to be members of the [] executive management team.
- 3.3 The PIC shall ensure that the unlisted investment in the Target Firm is housed in a different division/department to the listed investments in the Competing Firms, with adequate security and confidentiality safeguards preventing the sharing of Competitively Sensitive Information.
- 3.4 The PIC shall ensure that Competitively Sensitive Information in respect of the Target Firm and the Competing Firms is not shared among the different management teams within the PIC managing the listed and unlisted equities, respectively.
- 3.5 The PIC shall ensure that any of the Target Firm, [] Competitively Sensitive Information is only reported to the respective investment committee in closed door sessions and such information is aggregated.

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- 3.6 Clause 3 of these Conditions shall apply for as long as the Acquiring Firms hold an interest in the Target Firm and the Competing Firms.

DIVESTITURE CONDITION

- 3.7 The PIC shall Divest the B-BBEE Equity to a BEE Third Party within the Divestiture Period subject to the provisions of these Conditions.
- 3.8 Notwithstanding the provision of 3.7 above, the PIC may approach the Commission prior to the expiry of the Divestiture Period for an extension of the Divestiture Period based on the following reasons:
- 3.9 The PIC shall inform the Commission of the proposed BEE Third Party purchaser of the B-BBEE Equity in writing within ten (10) business days of concluding a draft sale agreement.
- 3.10 The Commission shall within fifteen (15) business days of receiving such notification of the proposed BEE Third Party from the PIC provide the PIC with written approval or rejection of the proposed BEE Third Party with detailed reasons for such rejection, the approval of which may not be unreasonably withheld or delayed.
- 3.11 In the event that the Commission rejects the proposed BEE Third Party as envisaged in paragraph 3.10 above, the PIC shall inform the Commission of another proposed BEE Third Party in writing as soon as reasonably possible from the day on which the Commission rejects the first proposed BEE Third Party.

3.12 Once the Commission has granted its approval of the proposed BEE Third Party as envisaged in these Conditions, the PIC shall finalise the conclusion of the draft sale of shares agreement with the BEE Third Party during the Divestiture Period in respect of the B-BBEE Equity. The terms of the sale of shares agreement shall be determined by agreement between the PIC and the BEE Third Party and shall be to the satisfaction of the PIC and the BEE Third Party. Should the PIC be successful in concluding the sale of shares agreement, the PIC shall provide a copy of the final signed sale of shares agreement concluded between the PIC and the BEE Third Party together with proof that the Divestiture has taken place within ten (10) business days of signing the final sale of shares agreement to the Commission.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1 The Acquiring Firms shall inform the Commission in writing of the Implementation Date, within 5 (five) Days of it becoming effective.
- 4.2 The Acquiring Firms shall implement the undertakings contained in clause 3.1. to 3.5 within 10 (ten) business days of the Approval of the merger and submit an affidavit deposed to by the Chief Executive Officer of the Acquiring Firm confirming compliance with the Conditions.
- 4.3 In the event that the Commission receives any complaint in relation to non-compliance with the Conditions, or otherwise determines that there has been a breach by the Merging Parties of the Conditions, the breach will be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.
- 4.4 All correspondence in relation to the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.
- 4.5 The Merging Parties may at any time, on good cause shown, apply to the Competition Tribunal for the Conditions to be lifted, revised or amended



competitiontribunal
south africa

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunhyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date: 09 October 2017

To: Cliffe Dekker Attorneys

Case Number: LM103Jul17

Government Employees Pension Fund, Unemployment Insurance Fund and Compensation Fund, duly Represented by Public Investment Corporation SOC Limited

You applied to the Competition Commission on **22 June 2017** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

☐ no conditions.

☒ the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The registrar, Competition Tribunal: