COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM081Jun17

In the matter between:

K2014202010 (Proprietary) Limited	**Primary Acquiring Firm**
and	
Noordfed (Proprietary) Limited	**Primary Target Firm**

Case No.: LM191Jan17

And in the matter between:

K2014202010 (Proprietary) Limited	**Primary Acquiring Firm**
and	
AM Alberts (Proprietary) Limited (in business rescue) t/a Progress Milling	**Primary Target Firm**

Panel	:	Enver Daniels (Presiding Member)
	:	Andiswa Ndoni (Panel Member)
	:	Imraan Valodia (Panel Member)
Heard on	:	24 November 2017
Date of last submission	:	30 November 2017
Order issued on	:	30 November 2017
Reasons issued on	:	19 April 2018

REASONS FOR DECISION

Approval

[1] On 30 November 2017, the Competition Tribunal ("Tribunal') conditionally approved two large mergers. The first, between K2014202010 (Pty) Ltd ("Holdco") and Noordfed (Pty) Ltd ("the Noordfed transaction"), and the second, between Holdco and AM Alberts (Pty) Limited (in business rescue) t/a Progress Milling ("the Progress Milling transaction").

[2] Holdco, a holding company controlled by a consortium of firms, was the common acquirer in both transactions. The Progress Milling transaction was notified to the Competition Commission ("Commission") on 15 December 2016 and the Noordfed transaction on 1 June 2017.

[3] On 23 October 2017, the Competition Commission ("Commission"), acting in terms of section 14A(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998) ("the Act") referred both mergers to the Tribunal with the recommendation that the mergers be prohibited.

[4] The Merging parties opposed the Commission's recommendation and sought an expedited combined hearing at which both matters would be considered. The Tribunal acquiesced and, over two pre-hearings, on 23 and 25 October 2017 set both matters down for one day of hearing on 24 November 2017.

[5] After hearing the arguments, the Tribunal conditionally approved both mergers. The conditions in respect of both matters are attached, hereto, marked "NFED: A" and "PROG: B".

[6] The reasons for approving both mergers follow.

Parties to the proposed transaction

Acquiring firms

[7] The primary acquiring firm in both transactions is Styling Viva Milling (Pty) Ltd ("Newco"), a company incorporated in accordance with the company laws of the Republic of South Africa. Newco is confidential owned and controlled by Holdco, a company established with the sole purpose of holding the shares of Newco.

Holdco, in turn, is owned by a consortium consisting of two firms, namely Louis Dreyfus Company Africa (Pty) Ltd ("LDCA") and DH Brothers Industries (Pty) Ltd trading as Willowton ("Willowton"). Willowton holds confidential of the shares in Holdco, with LDCA holding the remaining confidential. In light of the fact that Willowton is defined as a black owned company, its 51 shareholding in Holdco will make Holdco a black owned entity.

[8] Willowton is a firm incorporated in accordance with the company laws of the Republic of South Africa and owned by a number of trusts which are in turn controlled by previously disadvantaged individuals. Willowton is a South African sunflower seed refiner with operations in Pietermaritzburg, Cape Town and Johannesburg. It sells a wide range of fast-moving consumer goods, including edible oils and the products derived therefrom.

[9] Willowton owns a number of silos across the country in which it stores sunflower seeds and soybeans for its own internal operations only. In addition, prior to the proposed transaction Willowton had an existing relationship with LDCA in the form of a confidential share in a joint venture with LDCA called Allsome Brands which operates a rice cleaning and packing firm plant in Pietermaritzburg.

[10] LDCA is a South African firm ultimately controlled by Louis Dreyfus Company B.V ("LDC"), a company incorporated in accordance with the laws of the Netherlands.

[11] LDC is a global trader of commodities such as wheat, white maize, beans, rice, edible oils, oilseeds and sugar. It is also a processor of agricultural goods.

[12] In South Africa, LDCA has the following interests relevant to the transaction:

12.1. A confidential share in Epko Oil Seed Crushing (Pty) Ltd ("Epko Oil") which is active in the market for the crushing of sunflower seed. The remaining confidential shareholding is held by NWK Limited ("NWK");

12.2. A confidential share in Allsome Brands (as mentioned above);

12.3. A confidential share in African Star which is active in the market for the milling of wheat. The remaining shares are held by II Molino; and

12.4. A confidential share in Kromdraai Best Milling (Pty) Ltd ("KBM") which is active in the market for the milling of wheat. The remaining shares are held by VKB Agriculture (Pty) Ltd ("VKB").

Target firms

[13] The primary target firms in these matters are Noordfed (Pty) Ltd ("Noordfed") and AM Alberts (Pty) Ltd trading as Progress Milling ("Progress" or "Progress Milling").

[14] Noordfed is involved in the milling of white maize and the sale of maize meal products. It owns and operates a maize mill in Lichtenburg in the North West. The majority of its products are distributed in the confidential and confidential, although distribution also takes place in confidential. It has a depot in Empangeni which it uses as a distribution center.

[15] Progress is involved in the milling of white maize and the sale of maize meal. It operates a maize mill outside Polokwane and has about confidential throughout Limpopo where about confidential of its products are sold.

[16] As is apparent from the above, Noordfed and Progress operate in different geographical areas.

[17] The primary target firms are both in financially distressed circumstances and, on the submissions of the merging parties, were to be liquidated in the event of the merger being prohibited. The Tribunal was advised that the last date for a decision on the matter was 30 November2017. It was submitted at both

prehearings that if merger approval was not obtained by that date, liquidation proceedings would be commenced against both target firms.

Description of transaction and rationale

[18] In terms of the proposed transactions, Newco and Holdco, controlled by the consortium members, will acquire the business and assets of both Progress Milling and Noordfed. Post transaction, the consortium, through Holdco, will wholly own and control both Noordfed and Progress Milling.

[19] In terms of the rationale, the consortium, in both transactions, submits that the proposed transaction would create the first black-owned, diversified milling company. It was submitted that the newly created firm would have the ability and scale to compete effectively with the big four incumbent mills.[1] In addition, the merging parties submitted that the transaction would facilitate product diversification and strong brand recognition which would improve the ability to negotiate trading terms, necessary to survive in the industry.

[20] Progress Milling submitted that the transaction was a component of a business rescue plan, implemented in a time in which Progress Milling was in severe financial distress. It submitted that the proposed transaction would result in the injection of capital and expertise, the preservation of the company's goodwill, the preservation of jobs for those employees that would previously have faced retrenchment in the face of liquidation of the firm and a far better award to creditors than the counterfactual of liquidation.

[21] Noordfed submitted that it had suffered continuous losses for a period of 10 years prior to the transaction, and that it is currently being funded through a loan offered by NWK. At the time of filing most of the loan was about to be converted into shares in the company in order to take the company out of

[1] The merging parties submitted that Premier Foods, Tiger Brands, Pioneer and RCL (Previously Foodcorp) are the largest incumbent milling firms.

negative equity. This would have led the shareholder to shut down the mill, losing 147 jobs. The transaction was thus required to ensure the continued operation of the firm.

Proceedings before the Tribunal

[22] Pursuant to pre-hearings held on 25 and 31 October 2017 and in order to hold an expedited hearing, the Tribunal issued directions proposed by the merging parties, and agreed to by the Commission. The directions, listed below, curtailed the issues in dispute:

> ***"Issues in dispute***
>
> *22.1. The only issues in dispute in the merger proceedings ("the disputed issues") are:*
>
> *22.1.1. Whether a prohibition of each merger is justified or whether the conditions proposed by the merging parties (or revised and / or supplemented by the Tribunal) adequately address the Commission's coordinated effects concerns as set out in its recommendations; and*
>
> *22.1.2. Whether public interest considerations justify the mergers.*
>
> ***Merger proceedings***
>
> *22.2. Without any admission or concession by the merging parties, the Tribunal may assume for the purposes of its consideration of the mergers that:*
>
> *22.2.1. The mergers are likely to result in coordinated effects in white maize milling and sunflower seed crushing as set out in the recommendations; and*
>
> *22.2.2. The merging parties will not rely on efficiency arguments to justify these effects.*
>
> *22.3. Save at the request or with the leave of the Tribunal, the hearing of the mergers will be limited to the evidence contained in the Commission's current merger records before the Tribunal."*

[23] For the sake of completeness we record that the parties had also agreed to the hearing date which was 24 November 2017 and to a timetable in connection with the conduct of the proceedings.

[24] The merging parties filed their answering submissions on 8 November 2017. In those submissions, the merging parties state that they would not have accepted the assumptions contained in paragraph 2 of the directions above, had there been an alternative means of timeously conducting and concluding these proceedings.

[25] Although the Tribunal exercised its right to regulate and control its own proceedings in order to ensure that they are concluded as expeditiously as possible, as Noordfed and Progress would probably be liquidated if the merger application was not disposed of on or before 30 November 2017, the Tribunal is bound, in the exercise of its right, to observe carefully the principles of natural justice which, in the context of the present matter, requires the Tribunal to act fairly in affording the parties the opportunity of a fair hearing.[2] The necessity for the Tribunal to conclude its proceedings as expeditiously as possible cannot trump this duty to act fairly.

[26] The merging parties were, therefore, at the commencement of the hearing on 24 November 2017, provided with an opportunity of withdrawing from the agreed arrangement as contained in the Tribunal's directions, but elected to proceed on the basis of that arrangement.[3]

[27] Although the issues presented as 'in dispute' were numerically listed in our direction, the Tribunal sought to consider the matters cumulatively, paying equal attention to the considerations of public interest as well as considerations around whether the conditions proposed adequately addressed the Commission's theories of harm regarding the proposed merger which were two-fold. Firstly, that the transaction would result in a greater likelihood of coordinated effects arising in the white maize milling market and secondly that the merger may create a platform to enhance or further entrench co-ordination

[2] Competition Commission of South Africa v Senwes Ltd [2012] ZACC 6; 2012 (7) BCLR 667 (CC) para 50.
[3] Tribunal Transcript of Proceedings 24 November 2017 p3 lines 20-21.

in the adjacent market of sunflower seed crushing where the consortium members are competitors.

Analysis

[28] The crisp questions which the Tribunal needed to thus decide was whether the conditions proposed by the merging parties adequately addressed the Commission's theories of harm related to coordinated effects. We hold that the proposed conditions do adequately address the theories of harm suggested by the Commission. Further, and perhaps more importantly, whether the public interest considerations in approving the merger subject to the proposed conditions would be in the public interest. We hold that it would be.

White maize milling market

[29] The coordinated effects theory of harm advanced by the Commission relating to the white maize milling market in Limpopo, was submitted thus: Pre-merger, LDCA did not have any presence in the white maize milling market. LDCA was however in a joint venture (KBM) with VKB Agri, which does have such a presence in the maize milling market through its subsidiary, NTK Limpopo. Through the proposed transaction, the Commission theorised that LDCA would obtain a presence in the downstream market for white maize milling in Limpopo (a geographic area in which Progress Milling is active). LDCA would, therefore, as a result of the merger, enter the white maize milling market, rendering its pre-merger structural connection with VKB problematic. Post-merger, on the Commission's contention, LDCA would have both the ability and incentive to tacitly coordinate in the market for maize milling in Limpopo.

[30] The Commission's concerns arise from the shareholding structure post-merger. Willowton and LDCA will, through Holdco, own Progress Milling, and Mr Thomas Couteaudier, the managing director of LDCA will sit on the boards of both KBM and Holdco. Through this arrangement, so the Commission argues, the likely exchange of competitively sensitive information may further exacerbate the possibility of tacit coordination arising in the market. In

amplification of that theory, the Commission states that this "new link may act as a platform through which commercially sensitive information is exchanged on the white maize milling activities of Progress Milling and NTK Limpopo." This will result in the softening of competition and increase the risks of tacit coordination in the white maize milling market.

[31] The Commission recommended the prohibition of the mergers. Alternatively, it recommended the structural divestiture of shareholdings in key companies which may be used as platforms for information sharing. In this regard, it required LDCA to divest itself of its confidential share in KBM.

[32] The merging parties take issue with the Commission's theory of harm and contend that the Commission's reasoning is flawed. They submit that although the mergers are vertical in nature, the Commission has incorrectly viewed the mergers as being horizontal in nature and that the new market entrants it considers dubious will build a cartel with unrelated incumbents that have done so before. They also argue that it will not be possible to disseminate competitively sensitive information between the shareholders because LDCA and Willowton do not compete in any market; Holdco will not operate in any market in which its shareholders compete. We did not consider these submissions as going to the *presence* of the harm, but rather, as delimiting the dimensions of such a harm. Our pre-hearing directions clearly indicated that we would assume that the harm, as advanced by the Commission, existed, but we did not view this direction as limiting on our ability to interpret the severity and nature of such a harm.

[33] The merging parties proposed conditions which would regulate that LDCA's director appointed to KBM board must be an independent director, not employed by LDCA who signs a confidentiality agreement pertaining to competitively sensitive information.

[34] LDCA does have the right to appoint a director to the KBM Board. In considering that right we also have to be mindful of the Commission's concerns. Our consideration of this matter suggests that the proposal made by

the merging parties, supplemented with additional monitoring requirements will address the information sharing concerns of the Commission. Directors are aware of their fiduciary duties and responsibilities in terms of South African law and international practice. Should the independent directors appointed breach those duties and responsibilities the consequences for them could be severe.

Sunflower seed crushing market

[35] Turning then to the unilateral effects in the sunflower seed crushing market, the Commission raised similar concerns to those raised in the white maize market. It submitted that pre-merger, LDCA was (and would remain to be post-merger) involved in a confidential Joint venture with NWK in the form of a firm called Epko seed crushing which is active in the market for the sale of crude sunflower oil to third parties. Willowton is also an active participant in this market through a firm called Cape Oils (Pty) Ltd. In light of the fact that Willowton is unable to find an independent director to sit on the board of Holdco, the joint venture would create an additional structural link between the two competitors which may be used to enhance or strengthen the possibility for tacit coordination. The Commission considered its case for this tacit collusion, strengthened by the fact that it has already investigated both members of the consortium in separate instances for cartel conduct relating to the sunflower seed value chain.

[36] The Commission proposed that LDCA either divests itself of its confidential shareholding in Epko or that Willowton divests itself of its entire shareholding in Cape Oils.

[37] In response to this theory of harm, the merging parties contended that there would be no incentive to collude between the entities. It was submitted that Willowton does not sell its crushed seeds on to third parties. It uses those seeds in its refining processes and buys additional quantities of crushed seeds from third parties, including Epko. On the Merging parties' submission it would thus be incorrect to classify Willowton and Epko as competitors, although the possibility exists that they could become competitors in the future.

[38] However, to address the concern, the merging parties proposed conditions which stipulated that LDCA's nominated directors to Epko will not sit on Holdco, LDCA or Allsome boards. And that LDCA would receive only aggregated information on no more than a six monthly or annual basis on the overall performance and strategy of Epko.

[39] We once again find that the conditions proposed by the merging parties adequately address the concerns of the Commission as the conditions provide strict requirements relating to the appointment of directors and cross directorships within the two acquiring groups. This provision should ensure that the directors are not able to use information gleaned in board meetings in a way which will benefit any of the other entities within the two groups of companies.

[40] Our acceptance of the conditions as adequate to address the concerns raised should also be seen in the context of the extensive restrictions on the flow of information, common between the two sets of conditions. Those restrictions, as well as the raft of monitoring obligations, and the obligation to ensure that their respective representatives on the various boards undergo training and/or awareness sessions in competition law will address the dimensions of the concerns raised in this particular merger.

[41] We turn now to consider the public interest considerations in this matter.

Public Interest

[42] It must be noted that along with the conditions proposed above, the merging parties tendered two public interest conditions. One relating to a moratorium on any retrenchments within the target firms and the other pertaining to the development of a skills fund.

[43] The merging parties initially undertook to not retrench any employees for a period of six months from the implementation dates. However, with prompting

from the Tribunal, the parties revisited this period, extending the tendered moratorium period to fifteen (15) months. The merging parties additionally tendered the creation of a skills development fund, for the purpose of upskilling any affected employees that were retrenched after the moratorium period. They also included the condition that any employee retrenched from one of the target firms after that period would have the right of first refusal in relation to other job opportunities within the consortium.

[44] The public interest considerations in this matter are thus of vital importance. In this regard, it is trite that both the Competition Commission and this Tribunal must consider a merger with reference to and in accordance with section 12A of the Act. The initial task which this Tribunal must undertake is to determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively. In performing this exercise, we must take into account many factors which are relevant to competition in the market in question.

[45] This is not the end of the matter, though. If we were to conclude that a merger is likely to substantially prevent or lessen competition, we are required to undertake a fairly complex exercise to determine whether any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition will result directly and only from the merger and also whether the merger can or cannot be justified on substantial public interest grounds. Alternatively, we may determine, as denoted by the use of the word “otherwise” in section 12A(1)(b), whether the merger can or cannot be justified on substantial public interest grounds irrespective as to whether or not the merger is likely to result in a substantial prevention or lessening of competition.

[46] In *Harmony*[4] we reiterated our finding in the *Anglo American Holdings*[5] case that the use of the word "otherwise" in the section compels us to carry out the public interest analysis separately of the competition analysis.[6]

[47] What is abundantly clear from the Act is that even in instances where a merger may in all likelihood substantially prevent or lessen competition, the public interest override may prevail. In other words, a merger may be approved on substantial public interest grounds even though the merger may, on the facts of the matter, be anti-competitive.

[48] This Tribunal must, when assessing the public interest, consider the effect the merger will have on –

48.1. a particular industrial sector or region;

48.2. employment;

48.3. the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

48.4. the ability of national industries to compete in international markets.

[49] Each of the above factors must be considered. The public interest issues raised by the merger cannot be considered in isolation but as part of the overall inquiry into whether or not to approve the merger.

[50] The Commission had evaluated the mergers thoroughly and concluded that the mergers should not be approved. Having come to that conclusion, the Commission also considered the public interest issues raised by the merging parties, more particularly the impact which the non-approval of the mergers will have on jobs and on a firm owned by previously disadvantaged persons. In respect of both Progress Milling and Noordfed, the Commission found that that the parties did not raise sufficient public interest grounds to justify an approval

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[4] Harmony Gold Mining Company Limited and Gold Fields Limited Tribunal Case Number 93/LM/NOV04 judgement dated 18 May 2005.

[5] Anglo American Holdings Ltd and Kumba Resources Ltd with the Industrial Development Corporation intervening 46/LM/Jun02 judgement of 4 September 2003.

[6] Ibid para 138

of the mergers. It argued that a failing firm defence should have been raised to enable the Commission to consider whether the potential job losses and negative impact on the sector and region in which Progress Milling operates apply and justify an approval of the merger.

[51] One of the issues which the Tribunal must consider in terms of sub-section 12(2) (g) is whether the business or part of the business of a party to the merger has failed or is likely to fail. However, the Tribunal can only consider this aspect if a party to a merger has in fact raised specifically that the target firms have failed or are likely to fail.

[52] This defence was not raised by the merging parties because an approval of the mergers in question would lead to the target firms being capacitated to conduct its businesses in a profitable manner and to compete with the big four milling companies. It also appears to be common cause that, despite, their difficulties, the target firms were operating at the time that the merger was heard. Noordfed was described as being in financial distress while Progress was described as being in significant financial distress.

[53] In any event, the merging parties are not bound to raise a failing firm defence in instances where there could be a loss of jobs. The Tribunal has held that in our statute there would be no need to invoke the failing firm doctrine to such a situation when the adjudicator can have regard to the employment effect in terms of the public interest criteria.[7]

[54] The following factors, as submitted by the merging parties are relevant to the mergers:

54.1. Progress Milling is in financial distress and has been placed under business rescue in terms of section 129 of the Companies Act;

54.2. If it is liquidated 330 jobs will be lost;

54.3. If the merger is approved, 250 jobs will be saved;

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[7] *ISCOR Limited and Saldanha Steel (Pty) Ltd* (67/LM/Dec01) [2002] ZACT 17 (4 April 2002) para 110.

54.4. Although the figures appear to be somewhat unreliable, about 14000 subsistence farmers in the Limpopo province and their dependents numbering some 85000 people will be severely affected by the prohibition of the merger.

54.5. Progress Milling sources maize from the subsistence farmers and compensates them through maize milled at its mill. When its financial woes began, Progress Milling continued to collect the maize from these farmers but did not produce enough maize meal for the farmers to draw on. Guided by the business rescue practitioner with post-commencement finance provided by acquirers, Progress Milling delivered maize owed to the farmers. These farmers are concurrent creditors who would be paid 40 cents in the rand if the business is liquidated. The acquirers of the business rescue plan provides for their claims against Progress Milling to be paid in full, if the merger in respect of Progress Milling is approved.

54.6. Noordfed is financially distressed and has suffered continuous losses for the past ten years.

54.7. In the past year and a half it suffered losses of about confidential and received a loan of confidential to keep it afloat.

54.8. If the merger is not approved, Noordfed will be closed down.

54.9. Approximately 147 employees many of whom are unskilled will lose their jobs and a viable maize mill would no longer operate.

[55] South Africa is currently experiencing low economic growth and high levels of unemployment.[8] Where possible, jobs must be saved, particularly in areas where poverty is rife. If Progress and Noordfed are liquidated and 437 jobs are lost, the effects on the workers and their families are likely to be devastating and are likely to cause them hardship. The consequences for the local economy in which the two mills are situated could also be severe, if the mills

[8] "Quaterly Labour force Survey- QLFS Q3:2017" Statistics South Africa, http://www.statssa.gov.za/?p=10658 issued October 31, 2017, accessed December 13, 2017.

close, as the businesses which rely on the custom of the mills and the workers could also be affected by the closure of the mills.

[56] Progress sources maize from approximately 14000 subsistence farmers. Although they may be able to sell their maize to other millers, the closure of the mills could have adverse financial effects on those farmers and their families and dependents totaling, as mentioned above, approximately 85000 men, women and children. The acquiring parties have undertaken to ensure that the farmers are paid in full for the maize already purchased from them. The large number of workers who will be affected by the closure of the mills and also the financial consequences for the subsistence farmers and their families are also compelling reasons why the merger should be approved.

[57] Progress and Noordfed are financially distressed and are heavily indebted. In the past year, Noordfed received a loan of confidential to keep it afloat. Presumably, an approval of the mergers will result in creditors being paid as well.

[58] An approval of the mergers, therefore, balances the interests of the various stakeholders, including the workers, the subsistence farmers and their families, the creditors and the merging parties. The mergers will, according to the merging parties, result in the creation of a black-owned, diversified milling company with experienced shareholders and will be sufficiently capitalised to compete with the big four mills which will also be a positive outcome.

[59] The Department of Trade and Industry had raised concerns regarding the involvement of LDCA which it submitted should be unbundled from the transaction, simply it seems because LDCA is the third largest grain commodity trading house in the world and may through its participation in the two transactions consolidate its market power. Whilst we have taken note of the Department of Trade and Industry's concerns, no submissions were made on behalf of that department. We were, therefore, unable to consider those concerns. South Africa is a market economy and is open for business by

anyone who wants to do business within the country. LDCA should not be unbundled from the transaction simply because it is the third largest grain commodity trading house in the world.

[60] In our view, the industrial policy of the government which encourages the creation of historically black owned businesses to compete with established enterprises warrants serious consideration in these instances. Holdco will, post-merger become a black owned white maize miller which with the financial support and expertise of Willowton and LDCA will compete effectively with the 4 big milling companies. The creation of such an entity will also help to further transform the white maize milling industrial sector and ensure the continued viability of two existing white maize milling facilities in the North West and Mpumalanga provinces. This is an important consideration as the merger will ensure that the two distressed entities remain operational. This fact was not disputed by the Commission which, nevertheless, adopted the view that the public interest considerations raised by the merging parties do not justify the merger. With reference to the *Harmony* matter, this Tribunal noted that where one sound entity merges with another, distressed entity, it could result in the rescuing of the weaker of the two firms and that may well, promote the public interest.[9]

[61] The merging parties contend that even if the conditions cannot eliminate the coordinated effects concerns, the public interest considerations outweigh those concerns. The circumstances of these matters lead us to that conclusion as well. We cannot shut our eyes to the plight of the many workers who will be jobless and whose families may go hungry if the mergers are not approved. We can also not ignore (even though not much evidence was led on the matter) that thousands of subsistence farmers will only be concurrent creditors and will not receive full payment for their maize and that they may suffer hardships as a result. Finally, we must also be mindful (even though in respect of this matter, too, little evidence was led) that the various businesses which

[9] Harmony (note 4 above) para 64.

supply goods from the distressed entities may also find themselves in difficulties if the mergers are not approved. That may aggravate unemployment and poverty in the regions in which the target companies do business. The structure of section 12 compels us to consider these factors and to evaluate them with reference to the alleged coordination which may take place. We have done so.

[62] We are satisfied that the employment conditions protect the workers of the two target firms and will provide those workers with an opportunity of being considered first for any employment opportunities which may arise. A particularly important condition is the one which prevents the merging parties from transferring Noordfed workers based in Empangeni to Pietermaritzburg, some 150 kms away, for a period of 15 months. Such transfers, had the merging parties been afforded that right, would in all probably have resulted in the workers who may have been offered the transfers declining those offers and being unemployed as a result.

[63] Further, in terms of the conditions, the merging parties are required to create a skills development fund which must be used to enhance the skills of those workers who may be retrenched at appropriate training institutions. The work place is becoming more specialised and this condition will equip workers who may be retrenched with an opportunity to compete for vacancies in other sectors of the economy.

[64] In addition to the conditions proposed, the merging parties submitted that LDCA was embarking upon a separate endeavor to establish a fund with an amount of not less than confidential to train small-scale female farmers in Limpopo. Whilst the merging parties indicated that this fund would be established regardless of whether this transaction is approved, we make mention of it in our reasons to indicate that it was considered by us in coming to our decision and that such a fund would have a positive impact on workers who may be retrenched and on small female farmers. It addresses the

concerns which society has about unemployment and the empowerment of women to enable more women to play meaningful roles in the economy.

[65] We have included monitoring and compliance conditions to ensure that the merging parties comply fully with the conditions imposed and also to ensure that the Commission is able to monitor compliance with those conditions.[10]

[66] In conclusion we wish to reiterate that the approval of the two mergers on the conditions imposed by the Tribunal balances the concerns of the Commission with the interests of the merging parties and takes into account the positive public interest issues which will be advanced by the mergers.

19 April 2018

Mr Enver Daniels **Date**

Ms Andiswa Ndoni and Prof. Imraan Valodia concurring.

Tribunal economist	:	Karissa Moothoo-Padayachie
Tribunal case manager	:	Alistair Dey-van Heerden
For the merging parties	:	Adv R Pearse and Adv L Sisilana instructed by Rosalind Lake of Norton Rose Fullbright and Lara Granville of CDH.
For the Commission	:	Mr B Majenge.

[10] After our order and conditions were released, a typographical error in paragraph 3.2.1 of our conditions relating to the Noordfed matter was brought to our attention by the merging parties. Invoking our powers in terms of 66(b) of the act, we amend such, attaching the revised conditions to this merger.