

## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM171Dec20

In the matter between:

Afrique Pet Food (Pty) Ltd

**Primary Acquiring Firms**

And

Part of the Dry Pet Food Business of Martin and  
Martin (Pty) Ltd

**Primary Target Firms**

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Panel:	E Daniels (Presiding Member) Y Carrim (Tribunal Panel Member) H Cheadle (Tribunal Panel Member)
Heard on:	24 March 2021
Order Issued on:	24 March 2021
Reasons Issued on:	24 March 2021

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### 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 as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).

*Enver Daniels*

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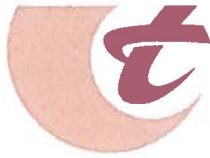
Presiding Member  
Mr Enver Daniels

24 March 2021

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Date

Concurring: Ms Yasmin Carrim and Mr Halton Cheadle



**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  
Sunnyside  
Pretoria 0132  
Republic of South Africa  
tel: 27 12 394 3300  
fax: 27 12 394 0169  
e-mail: [ctsa@comptrib.co.za](mailto:ctsa@comptrib.co.za)

# Merger Clearance Certificate

Date : 24 March 2021

To : Webber Wentzel Attorneys

Case Number: LM171Dec20

Afrique Pet Food (Pty) Ltd and Part of the Dry Pet Food Business of Martin and Martin (Pty) Ltd

You applied to the Competition Commission on **20 October 2020** 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**

*Tebofo H. Mphahlele*

CONFIDENTIAL

ANNEXURE A

IN THE LARGE MERGER BETWEEN

AFRIQUE PET FOOD (PTY) LTD

AND

PART OF THE DRY PET FOOD BUSINESS OF MARTIN & MARTIN (PTY) LTD

CT CASE NUMBER: LM171Dec20

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CONDITIONS

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1. DEFINITIONS AND INTERPRETATION

- 1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings —
- 1.1.1 "**Accredited Institution**" means a provider of education and training that has received the necessary accreditation from an Education and Training Quality Assurance Body under the South Africa Qualifications Authority and that is registered with the Department of Education;
- 1.1.2 "**Acquiring Firm**" means Afrique Pet Food Proprietary Limited;
- 1.1.3 "**Affected Employees**" means no more than 35 employees of the Merged Entity who will be retrenched following the Implementation Date;
- 1.1.4 "**Afrique**" means the Acquiring Firm;
- 1.1.5 "**Approval Date**" means the date referred to in the Tribunal's clearance certificate (Form CT 10);
- 1.1.6 "**Business Days**" mean any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.1.7 "**Commission**" means the Competition Commission of South Africa duly established under the Competition Act;
- 1.1.8 "**Commission Rules**" mean Rules for the Conduct of Proceedings in the Commission;
- 1.1.9 "**Competition Act**" means the Competition Act 89 of 1998;

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- 1.1.10 **“Conditions”** mean, collectively, the conditions referred to in this document;
- 1.1.11 **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merger Parties;
- 1.1.12 **“LRA”** means the Labour Relations Act, 66 of 1995;
- 1.1.13 **“Merger”** means Afrique’s acquisition of the M&M Target Business;
- 1.1.14 **“Merged Entity”** means Afrique and the M&M Target Business;
- 1.1.15 **“Merger Parties”** means Afrique and M&M;
- 1.1.16 **“Minister”** means the honourable Minister for the Department of Trade, Industry and Competition;
- 1.1.17 **“M&M”** means Martin & Martin (Proprietary) Limited;
- 1.1.18 **“M&M Target Business”** means, as a going concern, M&M’s dry pet food business conducted at M&M manufacturing facility in Isando, the manufacturing facility itself, the Epol and Vitagen dry pet food brands and all the dry pet food co-manufacturing agreements concluded by M&M;
- 1.1.19 **“Moratorium”** means a period of 2 (two) years from the Approval Date;
- 1.1.20 **“Qualifying Employees”** means Affected Employees that have a Matric qualification or less;
- 1.1.21 **“Restraint Period”** means the period 5 (five) consecutive years contained in clause 23 of the Sale of Business Agreement;
- 1.1.22 **“Sale of Business Agreement”** means the Merger agreement concluded between the Merger Parties;
- 1.1.23 **“South Africa”** means the Republic of South Africa;
- 1.1.24 **“Target Firm”** means the M&M Target Business;
- 1.1.25 **“Tribunal”** means the Competition Tribunal of South Africa.

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1.1.26 “Tribunal Rules” mean Rules for the Conduct of Proceedings in the Tribunal.

## 2. CONDITONS

### Employment

- 2.1 Other than the Affected Employees, the Merger Parties shall not retrench any other employees because of the Merger for the duration of the Moratorium.
- 2.2 Afrique shall provide all Qualifying Employees with an opportunity to receive focused core-skills training upon termination of their employment by attending a training course of their choice with an Accredited Institution of their choice to the value of R20 000 per employee. Each Qualifying Employee that wishes to receive such training must inform Afrique within 3 (three) months following the termination of their employment which training course they have elected to attend. Any training course elected by Qualifying Employees must be scheduled to commence within 12 (twelve) months following termination of their employment. Afrique shall pay the course fees directly to the Accredited Institution concerned.
- 2.3 For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) retrenchments as a result of unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.
- 2.4 For a period of 36 (thirty-six) months post the Implementation Date, if vacancies at the Merged Entity become available, first preference to apply for vacancies at the Merged Entity will be offered to the Affected Employees.

### Restraint of trade

- 2.5 The Merger Parties shall reduce the Restraint Period from 5 (five) years to 3 (three) years prior to the Implementation Date.

## **CONFIDENTIAL**

### **3. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 3.1 The Merger Parties shall circulate a copy of the Conditions to all their employees within 5 (five) Business Days of the Approval Date.
- 3.2 The Merger Parties shall submit to the Commission a signed addendum to the Sale of Business Agreement, reflecting the amendment contemplated by clause 2.5 above, within 20 Business Days of the Approval Date.
- 3.3 As proof of compliance with 3.1 above, a director of each of the Merger Parties shall within 10 (ten) Business Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees in that regard.
- 3.4 The Acquiring Firm shall inform the Commission in writing of the Implementation Date within 5 (five) Business Days of its occurrence.
- 3.5 The Acquiring Firm shall, for a period of three years from the Implementation Date, submit an affidavit confirming compliance with the Conditions, on an annual basis within one week after each anniversary of the Implementation Date. The first such affidavit shall, with respect to the conditions in paragraphs 2.2 and 2.4, include a list of the names of all the Qualifying Employees and specify the training course attended by each such employee.

### **4. APPARENT BREACH**

- 4.1 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merger Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Rules read together with Rule 37 of the Competition Tribunal Rules.

### **5. VARIATION**

- 5.1 The Merger Parties or the Commission may at any time, and on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

### **6. GENERAL**

- 6.1 All correspondence in relation to these Conditions must be submitted to the following email addresses: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za) and [ministry@thedtic.gov.za](mailto:ministry@thedtic.gov.za).



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM171Dec20

**Afrique Pet Food (Pty) Ltd (Primary Acquiring Firm)**  
and  
**Part of the Dry Pet Food Business of Martin & Martin (Pty) Ltd (Primary Target Firm)**

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### REASONS FOR DECISION

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- [1] On 24 March 2021, the Competition Tribunal conditionally approved the large merger between Afrique Pet Food (Pty) Ltd (“Afrique”) and Part of the Dry Pet Food Business of Martin & Martin (Pty) Ltd (“M&M Target Business”).
- [2] The transaction involves Afrique acquiring control of M&M Target Business.<sup>1</sup> This is the second part of a divisible transaction. The first part of the transaction involved Afrique acquiring the dry pet food business of Philafrica Foods (Pty) Ltd.<sup>2</sup>
- [3] Afrique is a newly incorporated company,<sup>3</sup> which through the recent acquisition of a dry pet food business, manufactures and supplies dry dog food under the brand JOCK and co-manufactures dry pet food for other brand owners.
- [4] M&M Target Business currently manufactures and supplies both dry and wet dog and cat food under the Epol and Vitagen dry pet food brands and has co-manufacturing agreements for dry pet food with various third parties.
- [5] The Competition Commission identified a horizontal overlap in the activities of the merger parties in respect of the manufacture and supply of dry dog food. The impact of the transaction was therefore assessed on the national market for the supply of dry dog food and the market for installed capacity of dry dog food manufacturers. In the market for the supply of dry dog food, the post-merger market share based on annual sales is <15%; and the post-merger market share based on annual revenue value is <20%. In the market for installed capacity of dry dog food manufacturers, the post-merger market share is <27%.

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<sup>1</sup> The M&M Target Business comprises the dry pet food manufacturing business carried on by Martin & Martin (Pty) Ltd (“M&M”) at its manufacturing facility at Isando and includes the Epol and Vitagen dry pet food brands, and existing dry pet food co-manufacturing agreements with various third parties.

<sup>2</sup> The Tribunal simultaneously approved the first part of the transaction under CT case number: LM177Dec20 on 24 March 2021.

<sup>3</sup> Afrique is currently a wholly owned subsidiary of Philafrica, which is in turn controlled by AFGRI Group Holdings (Pty) Ltd, an entity ultimately controlled by [REDACTED]. Prior to the implementation of the proposed transaction, QSA Holdings Limited (“QSA”) will acquire 50% of the ordinary issued share capital of Afrique, such that Afrique will be jointly controlled by Philafrica and QSA.

- [6] The merger parties will continue to face competition from other players.<sup>4</sup>
- [7] The Commission considered the reasonableness of the restraint of trade agreed between the merger parties, in terms of which M&M is restrained from conducting any competing dry pet food business against the merged entity in South Africa for a period longer than 3 years from the implementation of the merger. Relying on jurisprudence and submissions made by market participants regarding the barriers to entry and expansion in the dry pet food market, the Commission concluded that a restraint of trade applicable for a period of 3 years is justifiable. We find this to be acceptable and that any longer period would give rise to competition concerns. The merger parties have accepted this as a condition and undertook to amend their agreement prior to implementation of the merger.
- [8] We conclude that the proposed transaction does not substantially prevent or lessen competition in any relevant market.
- [9] The transaction does however give rise to employment concerns, resulting from the retrenchment of 35 employees of the merged entity ("affected employees"), who the Commission considered to be vulnerable employees as they hold no post matric qualifications. To address this concern, the merger parties have accepted the condition to provide those affected employees with a matric qualification or less ("qualifying employees"), with core-skills training at an institution accredited by the South African Qualifications Authority to improve their skills and enhance their ability to seek alternative employment.
- [10] Further, the merger parties made an undertaking that they shall pay each qualifying employee, an additional amount of 20% of the cost of the training course being attended, upon submission of proof of registration for the course concerned, in order to cover the cost of transport to attend a training course.
- [11] The Minister of Trade, Industry and Competition (DTIC) also required that the merger be approved subject to any of the affected employees having the opportunity to apply for any vacancies that may arise at the merged entity for a period of 5 years from the date of approval of the merger. The merger parties have accepted a condition that the affected employees shall have first preference to apply for any vacancies that arise at the merged entity, for a period of 36 months from the date of the merger implementation.
- [12] The conditions for the approval of the transaction are attached hereto as Annexure A.

*Enver Daniels*

24 March 2021

**Mr Enver Daniels**

**Date**

**Ms Yasmin Carrim and Mr Halton Cheadle concurring.**

Tribunal Case Manager: D Mogapi

For the Merging Parties: D Rudman and A Liebenberg of Webber Wentzel

For the Commission: W Gumbi and N Myoli

<sup>4</sup> AVI, Montego, and RCL.