**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**Case no. : IM053Aug21**

In the matter between:

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| **ECP AFRICA FUND IV LLC** | First Applicant |
| **ECP AFRICA FUND IV A LLC** | Second Applicant |
| **BURGER KING (SOUTH AFRICA) RF PROPRIETARY LIMITED** | Third Applicant |
| **GRAND FOODS MEAT PLANT PROPRIETARY LIMITED** | Fourth Applicant |

And

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| **COMPETITION COMMISSION OF SOUTH AFRICA** | Respondent |

*In re:* the intermediate merger between:

**ECP AFRICA FUND IV LLC**
**ECP AFRICA FUND IV A LLC** — Primary Acquiring Firms

And

**BURGER KING (SOUTH AFRICA) RF PROPRIETARY LIMITED**
**GRAND FOODS MEAT PLANT PROPRIETARY LIMITED** — Primary Target Firms

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Panel: Mondo Mazwai (Presiding Member)
Yasmin Carrim (Tribunal Member)
Fiona Tregenna (Tribunal Member)

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| Heard on: | 18 August 2021 |
| Last submission received on: | 17 September 2021 |
| Order issued on: | 17 September 2021 |
| Reasons issued on: | 29 November 2021 |

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**REASONS FOR DECISION**

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## INTRODUCTION

[1] On 17 September 2021, the Competition Tribunal approved, with conditions, the proposed acquisition of Burger King (South Africa) RF (Pty) Ltd ("Burger King") and Grand Foods Meat Plant (Pty) Ltd ("Grand Foods Meat Plant") by ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC (collectively, "ECP Africa Funds").

[2] The reasons for conditionally approving the proposed transaction follow.

### Background

[3] On 4 March 2021, the Competition Commission ("Commission") received notice of an intermediate merger between the ECP Africa Funds, Burger King and Grand Foods Meat Plant (the "merging parties").

[4] On 1 June 2021, having investigated the merger, the Commission issued a Notice CC16 Prohibition of Merger in which it prohibited the merger for the reason that the merger would negatively impact the public interest, in particular the spread of ownership by historically disadvantaged persons ("HDPs").

[5] After prohibition, the parties continued to negotiate with the Commission and the Department of Trade, Industry and Competition ("dtic"), which had filed an intention to participate in terms of section 18(1) of the Competition Act[1] ("the Act") and participated in the merger investigation.

[1] Act No 89 of 1998, as amended.

[6] On 6 July 2021, the merging parties informed the Tribunal of their negotiations, indicating that they had not brought a Reconsideration Application in terms of section 16(1)(a) of the Act read with Tribunal Rule[2] 32(1) (which requires such application to be brought within 10 business days of the issue of the Notice of Prohibition) in order to give the negotiations with the Commission and dtic a chance. They indicated that they would in due course file a reconsideration application.

[7] On 3 August 2021, the merging parties approached the Tribunal seeking a reconsideration of the Commission's merger prohibition (the "Request for Consideration"). This application was made on the basis of a revised set of proposed merger conditions (the "Revised Conditions") argued to be an improvement to the version that was submitted to the Commission when it made its prohibition decision.

[8] We afforded an opportunity to the Commission, and the dtic and SACTWU - as parties who had participated in the Commission's investigation - to indicate whether the Revised Conditions addressed their concerns and to indicate their views in that regard. The Commission indicated that it was satisfied with the Revised Conditions. The dtic also indicated that it had no objections to the Revised Conditions. SACTWU sought clarity on certain employment issues as discussed later.

[9] As indicated, the Revised Conditions were agreed to by all parties. Accordingly, there was no need to hear any evidence during the hearing. However, in the course of the hearing, the Tribunal sought to strengthen and enhance the Revised Conditions and ultimately imposed a set of conditions which satisfied its concerns as we discuss later.

[10] For completeness, we set out the background to the transaction and the Commission's findings.

[2] Rules For The Conduct Of Proceedings In The Competition Tribunal (Published in Government Notice 2 in Government Gazette 22025 of 1 February 2001).

## THE COMMISSION'S INVESTIGATION AND FINDINGS

[11] The proposed transaction involves the ECP Africa Funds' acquisition of 95.78% of Burger King's issued share capital and 100% of the issued share capital of Grand Foods Meat Plant from Grand Foods Propriety Limited ("Grand Foods"). Post-merger, the balance of Burger King's shares will continue to be held by its current minority, non-controlling shareholder Restaurant Brands International Inc. ("Restaurant Brands").[3]

### The Parties and their activities

[12] The ECP Africa Funds are private equity funds registered in Mauritius. They are controlled by ECP Manager IV LP ("ECP Manager IV") - a limited liability partnership registered in Delaware, USA that is not controlled by any individual firm or entity. [redacted]. In South Africa, ECP Africa Funds directly and indirectly control the following firms:

12.1 [redacted]

12.2 [redacted]

12.3 [redacted]

12.4 [redacted]

12.5 [redacted]

12.6 [redacted]

[13] The ECP Africa Funds were established to make investments in Africa. The ECP Africa Funds may make investments, which include, without limitation, investments directly in assets or in securities such as common or preferred stock or any other securities or instruments including debt as a means to achieve the overall objective of the funds. The investments may involve a variety of transactions, including expansion financing, leveraged and

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[3] Restaurant Brands International Inc. is a US-Canadian multinational fast food holding company formed in 2014 through the merger between Burger King USA and Canadian coffee shop and restaurant chain Tim Hortons Inc.

unleveraged acquisitions, recapitalisations, restructurings, workouts and similar situations.

[14] [redacted]

[15] [redacted]

[16] Pre-merger, Burger King is controlled as to 95.36% by Grand Foods Investments 1 Proprietary Limited – which is wholly owned by Grand Foods, which in turn is wholly owned by Grand Parade Investments ("GPI") – and, as to 4.64%, by Restaurant Brands. GPI is listed on the Johannesburg Stock Exchange ("JSE"), its top three shareholders are: Value Active PFP H4 Q1 Hedge Fund;[4] Arakot Pty Ltd;[5] and Midnight Storm Investments Pty Ltd.[6] GPI is an empowered company: 68.56% of its shareholding is held by HDPs; of which 22.87% is held by black women.

[4] As to 11.65%.
[5] As to 10.06%.
[6] As to 5.16%.

[17] Burger King holds the long-term master franchise license in respect of the Burger King brand in South Africa and has the rights to develop and expand the brand in the country's quick service restaurant market. “Burger King” is an American multinational chain of fast-food restaurants. Through its various franchise subsidiaries, Burger King currently operates more than 90 fast food restaurants across South Africa.

[18] Grand Foods Meat Plant is also a wholly owned subsidiary of Grand Foods. Grand Foods Meat Plant operates a meat plant in Cape Town, which manufactures burger patties. Approximately [redacted]% of this meat plant's output is sold to Burger King to fulfil the requirements of Burger King’s restaurants in South Africa. The balance of the output is sold to [redacted]

## Rationale for the proposed transaction

[19] According to ECP Africa Funds, the proposed transaction represents an opportunity for it to invest in a high-growth target in line with its investment strategy and group mandate.[7]

[20] From GPI’s perspective, over the last two years, it has undergone a process of restructuring its business with the main aim of reducing the discount to its intrinsic net asset value and unlocking value for shareholders. GPI's board has decided that the best way to do this is through a controlled sale of assets. The sale of GPI's interests in Burger King and Grand Foods Meat Plant is in line with this value-unlock strategy.

## Relevant Market

[21] The Commission considered the activities of the merging parties and found that there is no horizontal overlap; as the ECP Africa Funds have interests in firms

[7] Emerging Capital Partners is a private equity firm that seeks to generate capital appreciation and foster transformative, sustainable growth by investing in African businesses.

that are active in the market for the procurement / payment services for cross-border road transportation as well as various financial services; whereas Burger King and Grand Foods Meat Plant are active in the quick service restaurant market and the market for the manufacture and distribution of meat products respectively. The Commission also found that the proposed transaction does not result in any vertical overlaps.

[22] Nevertheless the Commission assessed the size of the market accretion that the proposed transaction presents and found that Burger King is a small competitor in the market for quick service restaurants. According to Euromonitor, in 2018, Burger King's market share in South Africa was an estimated [redacted]% (measured by value). By comparison, KFC (being by far the largest provider of fast food in South Africa), had a market share of approximately [redacted]%. The fast-food or quick service restaurant market is very competitive with many competitors such as KFC, McDonalds, Nando's, Wimpy, Debonairs, Steers and Chicken Licken. These brands are all established in the South African market and have been present in the country for much longer than Burger King.

[23] The Commission therefore concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in any market.

**Public Interest**

[24] Concerns raised during the Commission's investigation related to employment (section 12A(3)(b)) and a greater spread of ownership (section 12A(3)(e)), both of which were addressed through the agreed set of Revised Conditions.

*Employment*

[25] A substantial number of Grand Foods Meat Plant's employees are represented by the Southern African Clothing and Textile Workers' Union ("SACTWU").[8] The merging parties submitted that the proposed merger would not result in any retrenchments.

[26] During the Commission's investigation SACTWU had no concerns regarding the merger. SACTWU submitted that:

> *"[w]e accept the commitments of the merger parties and will not oppose this merger, if we discover that our members at Grand Foods Meat Plant are faced with retrenchments subsequent to this merger, and if we deem these retrenchments to be merger-related, we will not hesitate to escalate the matter to the Competition Commission and Tribunal for further investigation and action, if needs be."*[9]

[27] In light of this, the Commission concluded that the merger would have no negative effect on employment. As we discuss later, during the Tribunal proceedings, SACTWU raised concerns pertaining to potential job losses resulting from the divestiture of the meat plant which was tendered as a condition by the merging parties subsequent to the Commission prohibiting the merger. At the time of SACTWU's submissions to the Commission, the impact of the divestiture on employment could not have been fully considered by SACTWU.

*Spread of Ownership*

[28] The ECP Africa Funds have no ownership by HDPs and workers. Burger King and the Grand Foods Meat Plant are ultimately controlled by GPI, an empowerment entity with 68.56% of its shareholdings held by HDPs of which

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[8] ECP Africa Funds do not directly employ any employees in South Africa. Burger King's employees are represented by an employee representative, who did not raise concerns with the merger.
[9] See email from SACTWU to the Commission dated Wednesday 28 April 2021.

22.87% is held by black women. After the implementation of the proposed transaction neither the ECP Africa Funds, Burger King nor the Grand Foods Meat Plant will have ownership by HDPs and workers.

[29] During the Commission's investigation, the dtic raised concern that the merger would negatively affect Burger King's Broad-Based Black Economic Empowerment ("B-BBEE") levels as a result of the reduction in its controlling owner's (GPI) shareholding. To remedy this concern, the dtic proposed that the ECP should set-up an Employee Share Ownership Program ("ESOP") valued at a minimum of 5% of the issued share capital of the Target Firms.

[30] During the Commission's investigation, SACTWU had also sought clarity about any plans the merging parties may have to set up workers trusts to benefit employees in the Target Firms as part of the transaction. They also sought details of the worker ownership thresholds being considered.

[31] The Commission applying section 12A(3)(e) which provides for "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*" concluded that "*the end result is that after the implementation of the proposed transaction both the Acquiring and the Target Firms will have no ownership by HDPs and workers*."

[32] The Commission submitted that section 12(1A) which requires the Commission, when considering whether a merger is likely to substantially prevent or lessen competition, makes it peremptory for the Commission to consider whether the merger can or cannot be justified on substantial public interest grounds regardless of the outcome of the competitive assessment. According to the Commission, this means that even where a merger transaction does not raise competition concerns, competition authorities are obliged to determine whether or not the merger can be justified on substantial public interest grounds.

[33] The Commission engaged the merging parties to propose remedies, especially B-BBEE commitments, to alleviate the negative effect on the public interest concern.

[34] The merging parties submitted that any loss of empowerment credentials by Burger King would not have a substantial adverse effect on the ability of SMME or HDI firms to enter into or participate in or expand in the market as contemplated in section 12A(3)(c). To the contrary, the merger parties submitted that the proposed transaction would enable GPI to unlock value for its shareholders (the majority of which are HDPs) and will allow the business to reduce debt. The ESOP requirement, argued the merging parties, is likely to have unintended consequences in that this may result in a situation where black shareholders, who are looking to divest and unlock value as in the present case, will be forced to accept major discounts as buyers will factor in the economic effects of an ESOP requirement in the pricing of deals.

[35] The merging parties tendered some expansion commitments, stating that Burger King is likely to benefit from aggressive investment resulting from the proposed merger. The expansion commitments would have the following benefits:

35.1 ECP Africa Funds undertook to procure the investment of no less than R500,000,000 in aggregate capital expenditure by the end of 2026, to be utilised towards the establishment of new Burger King stores in South Africa.

35.2 The merging parties undertook to increase the number of Burger King outlets in South Africa to at least 150 (from 90) by the end of 2026.

35.3 The merging parties undertook to increase the number of permanent employees in South Africa by no less than 1,250 historically disadvantaged individuals by the end of 2026.

35.4 The merging parties undertook to increase the total value of their payroll and employee benefits in respect of all employees employed by not less than R120,000,000 by the end of 2026.

[36] The Commission found however that the merger parties' proposal did not address the specific public interest concern (the elimination of Burger King's black shareholding through GPI) resulting from the proposed merger. The Commission noted that the commitment being offered was already contained in Burger King's own internal documents[10] which reflected plans to grow the Burger King franchise independent of the merger. Therefore, the conditions proposed by the merging parties were found not to generate substantial positive public interest benefits that would not have materialised absent the merger.

[37] The Commission acknowledged that the merger will allow GPI to raise capital and realise their investment. However, it was not clear if, absent the merger, the options to raise capital for GPI would be significantly impeded as proposed by the merging parties. The Commission noted that the merging parties' board minutes had considered other funding alternatives.[11] From this, the Commission surmised that GPI is likely to still have other options to raise capital.

[38] The Commission was not persuaded by the argument that there will be public interest benefits to HDPs as they would realise a return on investment since this would be a private gain to the empowerment shareholders. The Commission submitted that this should be balanced against an equally weighty countervailing public interest to promote a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

[10] See Burger King Letter to the Commission dated 21 May 2021 and GPI Board of Directors Minutes of a Meeting of the Board of Directors held on 3 February 2020.

[11] [redacted]

[39] The Commission came to the view that the then proposed conditions did not address the significant public interest concern resulting from the proposed merger and prohibited the proposed transaction.

[40] It bears mention that the conditions set out above, remained in the Revised Conditions presented to the Tribunal, with the improvements discussed further below.[12]

## THE HEARING

### Condonation

[41] As indicated, the Commission issued a Notice of Prohibition on 1 June 2021. The Request for Consideration was filed on 3 August 2021.

[42] Tribunal Rule 32(1) provides that a request for consideration of an intermediate merger must be filed within 10 business days after the Commission issues its merger decision.

[43] The Reconsideration Application was thus filed 34 business days outside the Rule's prescribed time limit.

[44] The merging parties submitted that the late filing was not occasioned by any tardiness or willful disregard for the Tribunal Rules, rather negotiations were being pursued in good faith with a view to facilitating the expeditious approval of the proposed transaction. As indicated, the merging parties communicated to the Tribunal prior to filing that they were in negotiations with the Commission and the dtic.

[12] We understand that an updated set of conditions (containing reference to the ESOP but without the commitment relating to the meat plant disposal) were tendered to the Commission on the last day of the Commission's time period for making a decision. Therefore the Commission had not had an opportunity to further engage the merging parties in this regard.

[45] The Commission did not oppose the merging parties' application for condonation.

[46] We condoned the late filing in terms of section 58(1)(c) which provides that the Tribunal may condone, on good cause shown, any non-compliance of Tribunal Rules or a time limit set out in the Act, since the merger parties had indicated to the Tribunal their involvement in good faith negotiations with the result that significant commitments to better the public interest had been agreed with the Commission and the dtic.

**The Revised Conditions**

[47] At the hearing, the merging parties submitted that the Revised Conditions had been materially amplified in multiple respects from the conditions initially tendered to the Commission. Firstly, the conditions, proposed to the Commission set out above in paragraph [35] were subject to prevailing economic conditions in South Africa and the merger parties' ability to cover their operational expenses. The Revised Conditions which still contain the commitments in [35] above, are not subject to these provisos, and are a firm commitment.

[48] In addition, the Revised Conditions had been amplified beyond the expansion commitments and, significantly, include a divestiture of the Grand Foods Meat Plant, and the following:

48.1 Over a period of five years from the implementation date of the proposed transaction, Burger King will achieve [redacted] for the Enterprise and Supplier Development ("ESD") element under its B-BEE scorecard.[13]

[13] An ESD scorecard essentially measures compliance against three elements, namely (i) preferential procurement; (ii) supplier development and (iii) enterprise development. [redacted]

48.2 The merged entity shall establish an ESOP for an effective 5% interest in Burger King.

48.3 ECP Africa Funds shall dispose of the meat plant to one or more HDPs (the “Meat Plant Purchaser”). Attached to this, Burger King shall conclude a direct or indirect long term supply agreement with the Grand Foods Meat Plant and/or the Meat Plant Purchaser in terms of which Burger King will continue to procure inputs from the meat plant for a period of up to 15 years from the implementation date of the disposal to the Meat Plant Purchaser.

[49] As mentioned earlier, SACTWU raised concerns regarding the impact on employment resulting from the proposed disposal of the meat plant and whether the retrenchments would be regarded as merger specific. Having been provided access to relevant confidential information, SACTWU also raised concerns regarding the meat supply agreement. The concern was that any changes to the supply arrangements could negatively impact employees in Grand Foods Meat Plant if the terms of supply to the HDP buyer of the meat plant were less favorable to the current supply agreement between Burger King and the Grand Foods Meat Plant.

[50] The merging parties have clarified that, currently, Burger King and the meat plant are both entities within the GPI group; thus [redacted]. The merging parties undertook that subject to compliance with Burger King’s Global Standards.[14] Burger King shall conclude a [redacted]

[redacted]

[14] "Global Standards" means the standards, specifications and procedures for Burger King Restaurants issued, directed and amended by Burger King Global and/or its Affiliates from time to time [redacted]

[redacted] supply agreement with the Grand Foods Meat Plant and/or the Meat Plant Purchaser in terms of which Burger King will continue to procure inputs from the meat plant [redacted]

[51] [redacted]

[52] The Tribunal was concerned that some of the Revised Conditions did not contain sufficient detail to enable assessment and ensure effective monitoring. For instance the Tribunal sought clarity regarding the mechanism of the ESOP, including funding plans for the shares and the criteria for qualifying beneficiaries.

[53] Subsequent to the hearing, the merging parties provided the foundational principles of the ESOP which were agreed with the dtic and the Commission.

53.1 [redacted][15]

[15] The Merging Parties' Letter to the Tribunal dated 15 September 2021 ("15 September 2021 Letter").

53.2 [redacted][16]

53.3 In order to understand the expansion commitments, the Tribunal requested details of the historical situation in order firstly to understand the plans for the opening of new Burger King outlets, and secondly for purposes of monitoring the conditions. The merging parties provided that the estimated cost for the roll out of one additional Burger King outlet is currently between [redacted] Thus, the new store roll out of at least 60 new Burger King outlets over the next five years amounts to a capital expenditure of approximately R500 million over five years.[17]

53.4 In order to further enable the Commission's monitoring of the conditions a base number of current employees was sought of the merging parties who provided that the commitment to employ no less than 1,250 additional historically disadvantaged individuals in South Africa is off a base amount of [redacted] employees.[18]

53.5 Related to monitoring, the Panel also sought information on the baseline value of the spend on payroll. Burger King clarified that it currently spends [redacted] on its payroll bill. Thus, the commitment to increase the total value of all payroll and employee benefits (by no less than R120 million) is off a base amount of [redacted]

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[16] That is employees that have been at Burger King for longer are given more participation units based on an objective sliding scale irrespective of grade or level.

[17] 23 August 2021 Letter.

[18] [redacted] (Email from the Merging Parties to the Tribunal dated 17 September 2021.)

**Conclusion**

[54] In light of the above, we approved the transaction subject to a set of conditions which in essence had been agreed by the parties, but which had been further enhanced following the Tribunal hearing.

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| **Ms Mondo Mazwai** | **29 November 2021**<br>**Date** |

**Ms Yasmin Carrim and Prof Fiona Tregenna concurring.**

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| Tribunal case managers: | Mpumelelo Tshabalala and Peter Kumbirai |
| For the Commission: | Bukhosibakhe Majenge, Tamara Paremoer, Maya Swart, Temba Mahlangu, Songezo Mabece and Namhla Pakade |
| For the Merging Parties: | Adv Jerome Wilson SC *instructed* by Richardt van Rensburg, Mark Garden and Sazi Madlala of ENS *on behalf of* the Acquiring Firms, and Susan Meyer, Preanka Gounden and Gasant Orrie of CDH *on behalf of* the Target Firms |
| For SACTWU | Simon Eppel |
| For the dtic: | Tanya van Meelis and Mahomed Vawda |