



## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: LM140Oct20**

In the matter between

**Trade Retail HoldCo and AgriFin HoldCo, newly incorporated private companies established by BKB Limited (“BKB”) and VKB Landbou Proprietary Limited (“VKB”)**

Primary Acquiring Firms

And

**The Trade retail, fuel and financial services business of BKB and VKB**

Primary Target Firms

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Panel : A Wessels (Presiding Member)  
: Y Carrim (Tribunal Member)  
: E Daniels (Tribunal Member)  
Heard on : 17 May 2021  
Order Issued on : 21 May 2021  
Reasons Issued on : 21 June 2021

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### REASONS FOR DECISION

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#### APPROVAL

[1] On 21 May 2021, the Competition Tribunal (“Tribunal”) approved a large merger between Trade Retail HoldCo and AgriFin HoldCo and The Trade retail, fuel and financial services business of BKB Ltd and VKB Landbou (Pty) Ltd with conditions.

[2] The reasons for the conditional approval follow.

## **PARTIES TO THE PROPOSED TRANSACTION**

[3] The primary acquiring firms are Trade Retail HoldCo and AgriFin HoldCo, newly incorporated private companies established by BKB Ltd (“BKB”) and VKB Landbou (Pty) Ltd (“VKB”). Both BKB and VKB control multiple firms. BKB is not controlled by any single shareholder. VKB is controlled by VKB Beleggings (Pty) Ltd and VKB Landbou Beneficiaries Holdings (Pty) Ltd.

[4] The primary target firms are the trade retail, fuel and financial services business of BKB<sup>1</sup> and VKB.<sup>2</sup>

[5] Trade Retail HoldCo is a joint venture established to hold and manage the retail trade and fuel retail businesses of BKB and VKB. Trade Retail HoldCo will be active in the retail of farming requisite products as a result of BKB and VKB transferring their respective farming requisite stores. Trade Retail HoldCo will also be active in the retail trade of fuel, as a result of BKB and VKB transferring their respective fuel retail businesses.

[6] AgriFin HoldCo is a joint venture established to hold and manage the financial services businesses of BKB and VKB. AgriFin HoldCo will be active in the provision of financial services to customers in the agricultural sector, as a result of VKB and BKB transferring their respective financial services businesses.

## **PROPOSED TRANSACTION AND RATIONALE**

[7] The proposed transaction involves BKB and VKB implementing certain internal corporate restructuring transactions, in terms of which their trade retail businesses will each be transferred to a designated subsidiary (being “BKB Trade Retail SubCo” and “VKB Trade Retail SubCo” respectively); and the fuel

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<sup>1</sup> The BKB Group (excluding the target businesses) comprises of a number of subsidiaries in the agricultural sector, which are active in, *inter alia*, wool and mohair brokerage services; livestock, auctioneering and sales; property, sales and leasing.

<sup>2</sup> The VKB Group (excluding the target businesses) engages in, *inter alia*, manufacturing and sale of bags used for packaging of potatoes, charcoal and other purposes; the operation of cooling facilities.

retail business will be transferred to a designated subsidiary (being “BKB Fuel Retail SubCo” and “VKB Fuel Retail SubCo”).

- [8] Trade Retail HoldCo and AgriFin HoldCo will be the ultimate holding companies of the above ‘SubCos’, certain of which will initially be wholly owned subsidiaries of BKB and VKB. Additionally, the financial services businesses of BKB and VKB will be transferred to a designated subsidiary (“BKB AgriFin SubCo” and “VKB AgriFin SubCo” respectively), which will then be held by AgriFin HoldCo.

## **RELEVANT MARKETS AND COMPETITION ANALYSIS**

- [9] The proposed transaction presents both horizontal and vertical overlaps.

### *Retail trade of agricultural products*

- [10] The Commission assessed the effects of the proposed transaction in the following markets, in the two provinces where their farming requisite stores overlap:

1. The market for farming requisite stores<sup>3</sup> located in Newcastle and surrounding areas, including Cedarville, Utrecht and Volksrust in KwaZulu Natal; and
2. The market for farming requisite stores located in the Frankfort/Heilbron, Harrismith, and Vrede, in the Free State.<sup>4</sup>

- [11] The Commission found that in all these locations, there are alternative farming requisite stores and/or alternative suppliers to the merging parties within a 50km radius in the above areas which will continue to constrain the merging parties post-merger. Further, there were no concerns from third parties regarding these markets.

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<sup>3</sup> Stores selling agricultural inputs consisting broadly of animal health products, automotive accessories, garden and forestry equipment, hardware, outdoor equipment and tools, paint, groceries and related products.

<sup>4</sup> Market participants in the instant transaction also confirmed that farming requisite stores generally compete within a 50km radius. These towns are in this radius of each other.

### *Retail trade of fuel*

- [12] The overlap between the merging parties' service stations is limited to three cities in the Free State Province: Frankfort, Heilbron and Vrede. The Commission did not conclude on a definitive geographic market<sup>5</sup> but assessed the impact of the proposed transaction in the retail of petroleum products through service stations located in these towns, since these are the narrowest geographic markets in which competition issues may arise.
- [13] The Commission found that the merging parties operate three petroleum retail service stations within Frankfort, two within Heilbron, and two within Vrede. The Commission found no readily available independent sources of industry information on the size of players within the market for the retail of petroleum products. The Commission did however identify alternative retail service stations within a 2km radius of each of BKB and VKB's service stations in Frankfort, Heilbron and Vrede, that would constrain them.
- [14] Based on the above, the Commission is of the view that the proposed transaction is unlikely to raise competition concerns in the market for the retail of petroleum products.

### *Financial services*

- [15] The Commission assessed, without concluding on the geographic market, the national market for the provision of retail financing services. Within this market, the Commission found that the merged entity would continue to compete with multiple firms such as ABSA, Nedbank, FNB and the Land Bank as these institutions offered financial solutions to farmers and customers located even in the primary areas of operation for VKB and BKB.
- [16] The Commission found that the merged entity would also continue to face competition from other agricultural businesses such as OVK and AFGRI. The Commission interacted with market participants such as Standard Bank, who submitted that all the major banks in South Africa provide finance to farmers,

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<sup>5</sup> This was due to certain competitors submitting that the relevant geographic market was national, regional and local.

similar to the financing activities undertaken by BKB and VKB; as well as ABSA who submitted that other firms such as FNB, Nedbank, Standard Bank and Land Bank provide similar financial products to BKB and VKB. Further, ABSA estimates that the largest participants within the national market for the provision of financial services similar to those offered by BKB and VKB, are ranked as follows: (1) Land Bank, (2) ABSA (3) FNB (4) Standard Bank (5) Nedbank (6) Unigrow and (7) Senwes.

- [17] From its interaction with the merging parties' financial services customers/clients, the Commission found that customers are aware of alternatives within the market and that they tend to procure financial services from more than one service provider.
- [18] Based on the above, the Commission found that the proposed transaction is unlikely to raise competition concerns in any of the above markets. We found no reason to disagree.

### **Vertical overlaps**

- [19] The Commission found that this transaction presents two vertical overlaps. The first vertical overlap arises as BKB buys consumer goods (groceries) from VKB's distribution centre. The second vertical overlap arises as VKB buys certain goods from BKB's retail outlets.

#### *The BKB and VKB groceries vertical overlap*

- [20] In assessing the first vertical overlap, the Commission considered the upstream market for the supply of consumer goods (where VKB is active), and the downstream market for the procurement of consumer goods (where BKB is active). In assessing input foreclosure, the Commission found that apart from BKB, the VKB distribution centre does not supply any other third-party retailer with groceries and will only serve Retail Holdco post-merger. Thus, input foreclosure in the supply of groceries is unlikely.

[21] The Commission assessed customer foreclosure under a scenario where BKB was an important customer to VKB's competitors. The Commission found that less than 5% of BKB's grocery spend is spent on groceries from VKB. The Commission found that BKB would still need to purchase from other suppliers as VKB's distribution centres are located outside of the reach of BKB's retail stores and VKB's distribution centres are not geared to supply a comprehensive range of products (particularly grocery products) to outside clients. BKB would therefore be unlikely to be incentivised to foreclose its upstream suppliers.

[22] Based on the above, the Commission found that the proposed transaction is unlikely to raise input foreclosure or customer foreclosure concerns for the supply of groceries.

*Vertical overlap for various products such as such as wool bags and sheep shearing equipment*

[23] In assessing the second vertical overlap, the Commission considered the upstream market for the retail of various products such as wool bags and sheep shearing equipment (where BKB is active), and the downstream market for the procurement of various products such as wool bags and sheep shearing equipment (where VKB is active).

[24] The Commission assessed the possibility of input foreclosure through BKB depriving other customers of access to its retail stores. The Commission found that there are various alternative suppliers of sheep shearing equipment and wool bags in South Africa that compete against BKB. VKB is therefore unlikely to exercise market power in this market.

[25] Additionally, the Commission is of the view that the merged entity is unlikely to have an incentive to adopt an input foreclosure strategy as BKB would be unlikely to recoup the significant loss of sales from such a strategy.

[26] The Commission assessed customer foreclosure under a scenario where VKB was an important customer to BKB's competitors. The Commission found that VKB only procures various products from third-party retailers on an ad-hoc basis when there is an immediate shortage of a product which needs to be purchased urgently. In the preceding year, VKB only procured the relevant

products from BKB. There are therefore no third-party retailers that are likely to be affected by the proposed transaction.

- [27] Based on the above, the Commission is of the view that the proposed transaction is unlikely to raise input foreclosure or customer foreclosure concerns in the supply of sheep shearing equipment and wool bags.

### **Coordinated effects assessment**

#### *Grain storage*

- [28] The Commission also considered possible overlaps in the activities of BKB and VKB outside of the Trade Retail HoldCo and AgriFin HoldCo joint venture to determine whether the proposed transaction could enhance or facilitate coordination in any other markets. As BKB and VKB offer a wide variety of similar services and products within the broader agricultural sector, there are possibilities that the merger could be used to facilitate the exchange of commercially sensitive information.
- [29] Both BKB and VKB are active in grain storage services across several provinces, with overlapping silos in the Free State. The Commission assessed whether the merger could be used as a platform to facilitate the exchange of commercially sensitive information, that may raise coordinated outcomes in grain storage.
- [30] The farmers interviewed indicated that they only deal with storage facilities within a 30-50km radius of their farms. VKB owns and operates a small number of storage facilities within a 30-50km radius of the BKB facilities. The Commission found that farmers tend to be affiliated to storage companies located near their farms. For example, farmers located within VKB territories only utilise VKB storage facilities near them and have never utilised BKB's facilities. Additionally, the Commission interviewed farmers in the VKB territories who indicated that they do not consider the BKB facilities as viable alternatives due to the roads being unsustainable over longer distances and the damage this might inflict on their vehicles. The merging parties' storage facilities are therefore unlikely to compete significantly.

### *Information exchange*

- [31] The Commission also found that even if the merging parties' storage facilities were not in direct competition, coordinated conduct through sensitive information exchange may still arise, such as (1) VKB and BKB electing not to target each other customers, and (2) exchanging pricing metrics such as storage discounts and other trade secrets which may be beneficial to both.
- [32] The Commission found that the two joint ventures could be platforms where competitively sensitive information could be exchanged to the detriment of competition in grain storage markets. Conditions were imposed to prevent cross-directorships to ensure that directors of companies of BKB and VKB that are active in grain and oilseed storage and trading activities are not directly involved in the day-to day management of the grain and oilseed storage and trading activities accordingly imposed.

### *Grain trading*

- [33] The Commission found that BKB and VKB compete in the procurement and trading of grain. Although BKB and VKB generally operate in the territories where most of their activities are located, they still compete for the procurement of grain from farmers located in the border areas of the BKB and VKB territories. The merging parties compete with various players.
- [34] The Commission contacted farmers who stated that they trade with various grain traders, including those that are not located in their areas. These farmers usually trade their grain with the trader that offers the best price, and they are not restricted to one trader while some even export. The Commission found that the merging parties are unlikely to exercise market power, especially considering that VKB's national market share is approximately 5%, and BKB's is less.

### *Views of third parties*

- [35] The Commission assessed a concern received from a competitor of the merging parties in the retail of petroleum products, relating to a potential unfair advantage in the diesel trade due to bulk sales and pricing. The Commission



investigated this concern and found that VKB and BKB already operate in the petroleum market as retailers. The Commission found no information that suggests the merging parties are active in the wholesale of petroleum products. The Commission also found that they would face competition from various other retailers in the areas they both operate, namely Vrede, Frankfort and Heilbron.

## **PUBLIC INTEREST**

- [36] The merging parties submitted that the proposed transactions would not result in any adverse effects on employment, specifically that there would be no retrenchments or job losses. The various unions representing BKB and VKB's employees did not raise any concerns.
- [37] The Commission also inquired as to whether the merging parties would consolidate any of their stores in the overlapping areas. The merging parties stated that it is not currently anticipated, but they may wish to do so in the future. The Commission found there to be no concerns due to part of the transaction's rationale stipulating their intent to manage their retail operations separately.
- [38] The Commission however was concerned that the internal restructuring occasioned by the merger would have an adverse impact on historically disadvantaged individuals ("HDI"). BKB provided an undertaking to ensure that it will implement a transformation initiative within 24 months of implementation which has been imposed as a condition.

## **CONCLUSION**

- [39] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, any competition or public interest concerns raised by the merger could be cured by the conditions agreed to by the merging parties.

[40] Accordingly, we approved the proposed transaction subject to the conditions attached as Annexure A.

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**Ms. Yasmin Carrim**

**21 June 2021**

**Date**

**Mr. A Wessels and Mr E Daniels concurring**

Tribunal Case Managers: P Kumbirai and C Mathonsi

For the Merging Parties: A Le Grange of Cliffe Dekker Hofmeyr Inc

For the Commission: G Mutizwa and R Molotsi

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**CONDITIONS**

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**1. Definitions**

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

- 1.1. **“Acquiring Firms”** mean “Trade Retail HoldCo” and “AgriFin HoldCo”;
- 1.2. **“Approval Date”** means the date the Tribunal issues a Clearance Certificate (Notice CT10) in terms of the Competition Act;
- 1.3. **“BKB”** means BKB Limited;
- 1.4. **“BKB Trade Retail SubCo”** means a private company to be incorporated by BKB which will acquire the BKB Trade Retail business and all the shares held by BKB in BKB Fuel Retail SubCo from BKB prior to the implementation of the Trade and Fuel Retail Transaction.
- 1.5. **“Commission”** means the Competition Commission of South Africa;
- 1.6. **“Competition Act”** means the Competition Act 89 of 1998, as amended;
- 1.7. **“Competitively Sensitive Information”** includes, but is not limited to, any and all such information relating to:
  - 1.7.1. pricing – including but not limited to pricing of specific products, prices/discounts offered to specific customers and planned price reductions or increases in Grain and Oilseed Storage And Trading Activities;
  - 1.7.2. margin information by product or customers in Grain and Oilseed Storage And Trading Activities;
  - 1.7.3. cost information particular products offered in Grain and Oilseed Storage and Trading Activities;
  - 1.7.4. information on specific customers and customer strategy, including

information with respect to the grain volumes of customers, areas of operations of customers for Grain and Oilseed Storage and Trading Activities; and

- 1.7.5. business plans, advertising strategies and marketing strategies on Grain and Oilseed Storage and Trading Activities.
- 1.8. "**Conditions**" mean these conditions contained in this Annexure A;
- 1.9. "**Charter**" means the Charter for the South African Petroleum and Liquid Fuels Industry: Empowering Historically Disadvantaged South Africans;
- 1.10. "**Days**" mean business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.11. "**Grain and Oilseed Storage and Trading Activities**" mean the solicitation, financing, procurement, trading, marketing, handling and storage of grain and oilseed;
- 1.12. "**HDIs**" means historically disadvantaged individuals, as defined in section 3(2) of the Act;
- 1.13. "**Implementation Date**" means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties, and all conditions precedent to the implementation of the Merger are fulfilled;
- 1.14. "**Merger**" means the acquisition of the trade retail, fuel and financial services business of BKB and VKB;
- 1.15. "**Merging Parties**" mean the Acquiring Firms, VKB and BKB, in respect of the Target Businesses;
- 1.16. "**PPA**" means the Petroleum Products Act, No. 120 of 1977;
- 1.17. "**The Target Businesses**" mean the trade retail, fuel and financial services business of BKB and VKB to be acquired by the Acquiring Firms;
- 1.18. "**Transformation Initiative**" means BKB's commitment to, within 24 months of the Implementation Date, restructure BKB Fuel Retail SubCo so that no less than 25% of the shares in BKB Fuel Retail SubCo is held, directly or indirectly, by one or more HDI shareholders as set out more fully in these Conditions;

- 1.19. **“Tribunal”** means the Competition Tribunal of South Africa;
- 1.20. **“VKB”** means VKB Landbou Proprietary Limited; and
- 1.21. **“VKB Trade Retail SubCo”** means a private company to be incorporated by VKB Landbou which will acquire the VKB Trade Retail business, and all the shares held by VKB Landbou in VKB Fuel Retail SubCo from VKB Landbou prior to the implementation of the Trade and Fuel Retail Transaction.

## **2. Conditions to the approval of the merger**

### **2.1. Cross directorships**

- 2.1.1. For as long as BKB and VKB can appoint or nominate individuals to the board of directors of the Acquiring Firms they shall ensure that their nominees:
- 3.1.1.1 who are also employed by or serve on, or are nominated and/or appointed on any board or management committees of the holding companies and/or affiliate companies of BKB and VKB that are active in Grain and Oilseed Storage and Trading Activities are not directly involved in the day-to day management of the Grain and Oilseed Storage and Trading Activities.

### **2.2. Confidentiality of information**

- 2.2.1. No Competitively Sensitive Information in relation to the Grain and Oilseed Storage and Trading Activities shall be discussed, disclosed nor shared in any form or means by the boards of directors of the Acquiring Firms.
- 2.2.2. The nominees of VKB shall not disclose to nominees of BKB contemplated in clause 2.1.1 and any employee of VKB's holding or affiliate companies who are seconded to the Acquiring Firms, any Competitively Sensitive Information. The nominees of BKB shall be bound to a similar undertaking *mutatis mutandis*, as contained in this clause.
- 2.2.3. The nominees of VKB and BKB contemplated in clause 2.1.1 shall be required to sign a Confidentiality Undertaking with the Acquiring Firms to ensure compliance with the abovementioned conditions.

2.2.4. Within 60 (sixty) Days of the Implementation Date, the Merging Parties shall put in place, for the Commission's approval, an appropriate confidential and information exchange policy to ensure compliance with clause 2 of the Conditions. Within 60 (sixty) Days of receiving the confidential and information exchange policy prepared by the Merging Parties, the Commission shall provide any comments that it has thereon to the Merging Parties and the Merging Parties shall within 30 (thirty) Days thereof seek to finalize the policy with the Commission.

### **2.3. Transformation Initiative**

2.3.1. Within 24 (twenty-four) months of the Implementation Date, BKB will implement the Transformation Initiative. For the purposes of this Condition, BKB will, in its sole discretion, determine the identities of such HDIs as well as the proportion of shares that will be allotted to each such HDI shareholder.

2.3.2. Prior to the Implementation of the Transformation Initiative, BKB will provide the Commission with details of the Transformation Initiative in writing. These details shall include, but not be limited to, the transaction structure, identities of prospective HDIs, documentary evidence that prospective shareholders are HDIs, the proportion of shareholding in BKB Fuel Retail SubCo that each prospective HDI shareholder will receive, the number of board appointments each HDI shareholder is entitled to and confirmation of whether the Transformation Initiative constitutes a merger for the purposes of the Act. The Commission will assess competition concerns that are likely to arise from the Transformation Initiative, which would include *inter alia* information exchange, HDI verification etc.

2.3.3. Within 60 (sixty) Days of receipt of the details of the Transformation Initiative, the Commission shall provide its written approval, or any comments or queries to the Transformation Initiative to BKB, in writing.

2.3.4. For the avoidance of doubt, the Transformation Initiative may not be implemented without the Commission's written approval, which approval will not be unreasonably withheld.

2.3.5. For the avoidance of further doubt, to the extent that the Transformation Initiative approved by the Commission in writing also constitutes a merger (whether or not the

thresholds for mandatory notification are met), the Transformation Initiative can then only be implemented once same has been notified to the Commission as a merger and approved with or without conditions.

### **3. Monitoring of compliance with the Conditions**

- 3.1.** Within 20 (twenty) Days of the Implementation Date, the Merging Parties shall submit an affidavit listing the names of the persons nominated and/or appointed by BKB and VKB to the board of directors of the Acquiring Firms, their tenure and the nature of their directorships. This affidavit shall also confirm that the nominees to the Acquiring Firms' board meet the requirements set out in clause 2.1.1.
- 3.2.** The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.
- 3.3.** Within 20 (twenty) Days of the Implementation Date, the Merging Parties shall provide the Commission with a copy of the Confidential Undertaking(s) referred to clause 2.2.3 signed by each director of the Acquiring Firms and for subsequent Directors within 30 (thirty) Days of appointment. The Acquiring Firms shall ensure that the Confidentiality Undertaking shall form part of Directors' appointment letters and Employees' service agreements within 30 (thirty) Days after the appointment of the Director(s) and Employee(s).
- 3.4.** For as long as these conditions remain in place, the Acquiring Firms shall annually, within 45 (forty-five) Days of each anniversary of the Implementation Date, submit to the Commission an affidavit from one of its directors confirming compliance with clause 2 of the Conditions, including compliance with the confidential and information exchange policy.
- 3.5.** Should either BKB or VKB dispose of their shareholding in the Acquiring Firms, they shall inform the Commission of the sale within 30 (thirty) Days of concluding a sale agreement and submit a copy of the sale agreement irrespective of whether the transaction is notifiable in terms of the Act.

- 3.6.** BKB shall, upon implementation of the Transformation Initiative contemplated on clause 2.3, submit an affidavit confirming compliance with the Conditions.
- 3.7.** An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.
- 3.8.** The affidavits/reports and or documents referred to in the Conditions shall be submitted to the following email address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za) and [Ministry@thedtic.gov.za](mailto:Ministry@thedtic.gov.za) .

#### **4. Duration**

- 4.1.** The cross ownership and confidential information conditions in clause 2.1. and 2.2 above shall apply for as long as the Acquiring Firms exist and/or as long as BKB and VKB can appoint directors to the boards of the Acquiring Firms.
- 4.2.** The Transformation Condition in clause 2.3. above shall apply for a period of 24 (twenty-four) months following Implementation Date.

#### **5. Variation**

- 5.1.** The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted.