



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM017May24

In the matter between:

THEBE SPV 022 PROPRIETARY LIMITED

Acquiring Firm

and

**PRIDE MILLING COMPANY PROPRIETARY
LIMITED**

Target Firm

Panel: : Prof. Liberty Mncube (Presiding Member)
: Adv. Anisa Kessery (Tribunal Member)
: Prof. Thando Vilakazi (Tribunal Member)

Heard on : 02 July 2024
Last date of submission : 16 July 2024
Order issued on : 18 July 2024
Reasons issued on : 16 August 2024

REASONS FOR DECISION

Approval

- [1] On 18 July 2024, the Competition Tribunal (“Tribunal”) conditionally approved a large merger in which Thebe SPV 022 Proprietary Limited (“Thebe SPV”) intends to acquire an additional ■■■% of the issued share capital of Pride Milling Company Proprietary Limited (“Pride Milling”) through the exercise of a call option. Post-merger, Thebe SPV will exercise sole control over Pride Milling. At present, Thebe SPV hold ■■■% in Pride Milling.

Parties to the transaction and their activities

Primary Acquiring firm

- [2] The primary acquiring firm is Thebe SPV. Thebe SPV is wholly controlled by Thebe Investment Corporation Proprietary Limited ("Thebe Investment"), a company registered in accordance with the company laws of the Republic of South Africa. Thebe Investment is currently held █% by the Batho Batho Trust, █% by Main Street 1485 (RF) Proprietary Limited, █% by Main Street 1547 (RF) Proprietary Limited and █% by Umhломulo Equity Participation Proprietary Limited.
- [3] Apart from Thebe SPV, Thebe Investment controls numerous other firms in South Africa. Of relevance to the proposed transaction are Thebe Investment's control of, WeGrow Farming Enterprise Proprietary Limited ("WeGrow") and Empact Group South Africa Proprietary Limited ("Empact"). Where appropriate, Thebe Investment and the companies it controls will collectively be referred to as Thebe Investment Group.
- [4] WeGrow is an entity that produces and supplies yellow maize and Empact is a commercial catering and cleaning company servicing blue chip private sector clients and the public sector.
- [5] Thebe SPV does not conduct any business activities. It presently only has a its █% shareholding in Pride Milling.
- [6] Thebe Investment is an investment holding and management company of the Thebe Investment Group. The Thebe Investments Group's interests, which are primarily South African based, consist mainly of investments in the Energy and Resources Division (comprising power and water, oil and gas, mining and chemicals business units) and Services Division (comprising investments in property and financial services, food and logistics services and media as well as telecommunication business units).

The primary Target firm

- [7] The Primary Target firm is Pride Milling. Pride Milling is held 30% by Thebe SPV, █% by Mr Cornelius Johannes Petrus Jordaan (“CJP Jordaan”) and 19% by Mr Johannes Arnoldus Bothma (“JA Bothma”). CJP Jordaan and JA Bothma are private individuals who do not directly or indirectly control any other company, apart from Pride Milling.
- [8] Pride Milling is active in the manufacturing, marketing and distribution of basic and essential staple food products (i.e., predominantly white maize products) to local and international customers. In South Africa, its activities are predominately limited to the manufacture, marketing and distribution of milled maize products. Pride Milling's main product lines are white maize products, pulses, mabele (sorghum), yellow maize products (whole maize and crushed maize) including other human consumption products and animal feed (bird seed, fowl feed and pet food). Pride Milling also buys beans from farmers, packages, rebrands and sells them to retailers.

Proposed transaction and rationale

- [9] In terms of the proposed transaction, Thebe SPV intends to acquire an additional █% of the issued share capital of Pride Milling through the exercise of the Call Option which was granted in favour of Thebe SPV in terms of the provisions of the Shareholders' Agreement of Pride Milling. At present, Thebe SPV currently holds █% shareholding in Pride Milling. Post-merger, Thebe SPV will hold █% of Pride Milling's share capital and exercise sole control over Thebe SPV.
- [10] In terms of the rationale, the Thebe SPV submits that █
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[REDACTED]

[11] Pride Milling submits that its rationale for the proposed transaction is as follows:

[REDACTED]

Relevant market and impact on competition

Product market

[12] The Competition Commission (“Commission”) considered the activities of the merging parties and found that the proposed transaction results in a horizontal overlap in the supply of yellow maize. Both Thebe Investments through WeGrow and Pride Milling produce and supply yellow maize.

[13] The proposed transaction will also result in a vertical overlap because Thebe Investment (through Empact) utilize maize products produced by Pride Milling in its catering activities.

[14] The merging parties agree with this approach.

[15] In previous decisions,¹ the Tribunal found that different grain product categories are not substitutable with each other. In line with this approach, we assess the proposed transaction on the basis that yellow maize constitutes a separate market.

¹ Louis Dreyfus Commodities Africa Proprietary Limited and Another and Best Milling Proprietary Limited and Others [2015] 2 CPLR 653 (CT).

Geographic market

- [16] The merging parties did not tender their proposed geographic market. Instead, the merging parties noted that Pride Milling conducts its business in all provinces except the Northern Cape, whereas WeGrow's yellow maize businesses are only in Mpumalanga and Western Cape areas.
- [17] In line with previous² Tribunal decisions where the Tribunal considered the impact of proposed transactions at a national level, the Commission, without concluding on the precise scope of the relevant geographic market, assessed the proposed transactions nationally.
- [18] We did not receive evidence to suggest that we should depart from this way of framing the product and geographic market. Without concluding on the precise scope of the relevant geographic and product market, we examine the above product and geographic market in our analysis.

The market for the production and sale of yellow maize

- [19] In determining the merging parties' market shares in the market for the production and sale of yellow maize, the Commission relied on the consumption statistics published by the South African Grain Information Services and the merging parties' yellow maize yields during the period May 2022 to April 2023.
- [20] Post-merger, the merged entity will have a combined market share of approximately less than ■■■%, with an accretion of less than ■■■%. This combined market share suggests that the merged entity will not have substantial market power in the market for the production and supply of yellow maize and will continue to face competition from many other players in the market.
- [21] Based on the above, we do not consider it likely that the merged entity will have substantial market power.

² Afgri Operations Limited and Natal Agricultural Co-Operative Limited Case No.:17/LM/Mar04

Vertical analysis

[22] Given that the proposed transaction will result in a vertical overlap,³ we considered the effects of the proposed transaction in the upstream market for the supply of maize products and the downstream market for the procurement of maize products. Pride Milling is active in the upstream market, while Empact is active in the downstream market.

[23] Our approach to assessing vertical theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive to do so, and (c) the overall effect of the strategy on competition.

Input foreclosure

[24] The Commission found that Pride Milling is unlikely to have the ability to exercise market power in the upstream market for the supply of maize products to foreclose downstream competitors because there are numerous other firms⁴ that compete with Pride Milling in the upstream market for the supply of maize products. As a result, we do not find it necessary to consider the merging parties' incentives or the effects of a strategy foreclosing rivals.

[25] No third party raised any concerns regarding this aspect of the merger.

[26] Given the market positions of the merging parties, the small increment, and the lack of third-party concerns, we conclude that the proposed transaction is unlikely to raise input foreclosure concerns.

Customer foreclosure

[27] The Commission found that there are numerous other customers in the market that operate in a variety of sectors that can serve as alternatives to Empact. These include reputable retail chain stores such as Spar, Boxer Superstores,

³ Thebe Investments (through Empact) utilizes maize products that are produced by Pride Milling in its catering activities. These maize products include maize meal, maize rice and maize samp. Empact currently procures the relevant maize products from third party suppliers and does not procure any of the relevant products from Pride Milling.

⁴ Botselo Milling Proprietary Limited, Brenner Brands Proprietary Limited, Premier Foods FMCG Limited, Tusk super maize meal and Tiger Brands Limited, amongst others.

catering companies, wholesalers, and government institutions, amongst others who all procure maize products from other upstream suppliers.

[28] Given the availability of alternative customers, we are of the view that Empact is unlikely to have the ability to exercise market power in the downstream market for the procurement of maize products to foreclose upstream competitors. We also do not find it necessary to consider the merging parties' incentives or the effects of a strategy foreclosing rivals.

[29] No third party raised any concerns regarding this aspect of the merger.

[30] In light of the above, we conclude that the proposed transaction is unlikely to raise customer foreclosure concerns.

Conclusion on the competition assessment

[31] In light of the above, we do not believe that the proposed transaction is likely to result in a substantial lessening of competition.

Public Interest

Effect on employment

[32] During its investigation, the Commission received a notice of intention to participate from the Department of Trade, Industry and Competition (the "DTIC"). The DTIC raised concerns that the merging parties had not given unequivocal undertakings that the proposed transaction will not result in any retrenchments.

[33] Following these, the merging parties gave an unequivocal undertaking that the proposed transaction will not have any negative effects on employment.

[34] The Commission contacted Thebe SPV's employee representative and the Agricultural Food & Allied Democratic Workers Union as well as the Voice of Workers of South Africa Civil Rights Union which represents Pride Milling's employees, who raised no concerns regarding the proposed transaction.

[35] In light of the above, we find that the proposed merger is unlikely to raise employment concerns.

Effect on ownership

[36] Thebe SPV has an Historical Disadvantaged Persons (“HDP”) shareholding of ██████%, and Pride Milling is currently held ██████% by HDPs which is largely attributable to Thebe SPV.

[37] In its engagements with the Commission, the DTIC, *inter alia*, requested the merging parties to commit to a specific initiative that are incremental and promote B-BBEE in its supply chain and support for historically disadvantaged operators. Following engagements between the DTIC and the merging parties, committed to creating an ESOP, delivering maize products to townships and rural areas or facilitate the purchasing of maize directly from farms owned and/or controlled by HDPs, utilizing independent HDP truck drivers.

[38] These conditions are attached as annexure “A” to our order.

Other public interest factors

[39] The proposed transaction raises no other public interest issues.

Conclusion on public interest assessment

[40] Considering the public interest holistically, we believe that the proposed transaction is justifiable on public on interest grounds.

Conclusion

[41] For the reasons set out above, we approve the proposed transaction without conditions.

Signed by:Liberty Mncube
Signed at:2024-08-16 12:29:27 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

Professor Liberty Mncube

16 August 2024

Date

Advocate Anisa Kessery and Professor Thando Vilakazi concurring.

Tribunal case manager : Ofentse Motshudi

For the merging parties : Phuti Mashalane and Nkonzo Hlatshwayo of Werksmans attorneys

For the Commission : Reabetswe Molotsi and Grashum Mutizwa