



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM083Aug20

In the matter between:

AFGRI Agri Services (Pty) Ltd

Primary Acquiring Firm

Senwes Limited

Primary Acquiring Firm

And

**Certain Assets and Businesses by Hinterland Holding
(Pty) Ltd and its Subsidiaries**

Primary Target Firm

Hinterland Holdings Proprietary Limited

Primary Target Firm

Panel:	Ms M Mazwai (Presiding Member) Mr E Daniels (Tribunal Member) Mr A Roskam (Tribunal Member)
Last submission received on:	15 September 2020
Heard on:	16 September 2020
Order Issued on:	17 September 2020
Reasons Issued on:	20 October 2020

REASONS FOR DECISION

APPROVAL

- [1] On 17 September 2020, the Competition Tribunal (“Tribunal”) conditionally approved the proposed transaction consisting of two parts whereby, on the one hand, AFGRI Agri Services Proprietary Limited (“AFGRI”) is to acquire certain assets and businesses conducted by Hinterland Holdings Proprietary Limited and its subsidiaries; and, on the other hand, Senwes Limited (“Senwes”) will acquire sole control over Hinterland Holdings Proprietary Limited. This transaction constitutes a

demerger of a joint venture (“JV”) formed in 2013¹, the Hinterland JV (as discussed more fully below). The conditions are attached marked Annexure A.

[2] The reasons for the conditional approval follow.

PARTIES TO THE TRANSACTION

Primary Acquiring Firms

[3] The first acquiring firm is AFGRI, a private company controlled by AFGRI Group Holdings Proprietary Limited (“AGH”) which is in turn controlled by AFGRI Holdings Proprietary Limited (“AFGRI Holdings”). AFGRI Holdings is ultimately controlled by Fairfax Financial Holdings Limited (“Fairfax”).

[4] The AFGRI group operates through seven divisions which are involved in the growing of agricultural produce and the retail of agricultural products. Its product offering comprises of input and mechanisation solutions to farmers, grain management through secure storage of agricultural products, financial services with a main focus on risk solution and insurance, collateral and stock monitoring and farming equipment amongst other things.

[5] The second acquiring firm is Senwes, a public company listed on the ZAR X Securities Exchange (“ZAR X”). Senwes is controlled by Senwesbel Limited, a company also listed on ZAR X. Senwesbel is not controlled by any firm as its shares are widely held.

[6] Senwes is one of the largest agricultural businesses in South Africa with business activities categorised into three main business areas (i) financial services operations (ii) input supply operation, and (iii) market access. It provides grain handling and storage, financing, grain trading, grain transport, equipment sales, agricultural retail stores, insurance, agriculture inputs, and agriculture services to commercial farmers, processors (millers and oil seed processors) and traders.

¹ As per case Hinterland JV Merger Case No: 87/LM/Sep12.

Primary Target Firms

- [7] The target firms constitute disparate portions of the Hinterland JV. In 2013 when forming the JV, the parties contributed certain assets and businesses, more precisely, AFGRI contributed 37 agricultural requisites stores, fuel retail stores and two wholesale businesses which supply various agricultural equipment and products. Senwes, on the other hand, contributed 26 requisites stores.
- [8] Hinterland Holdings operates through Hinterland SA and Hinterland Fuels retail entities.
- [8.1] Hinterland SA is a retail company with 58 retail outlets that provide agricultural requisites to farmers while Hinterland Fuels conducts business from 56 fuel stations across 6 provinces. It also has immovable properties that are in relation to the retail outlets and retail fuel stations. Hinterland SA, Hinterland Fuels and the immovable properties are ultimately controlled by the JV - Hinterland Holdings, which is in turn controlled by the acquiring firms. Both acquiring firms each hold 50% in the JV.
- [8.2] Each of AFGRI and Senwes own 45% interest in Hinterland Fuels and the remaining 10% interest is shared equally between their broad-based black economic empowerment (“B-BBEE”) partners, Izitsalo Employee Investments Limited (“Izitsalo”) and Thobo Trust, respectively.
- [9] In relation to AFGRI, the primary target firm constitutes certain assets and businesses owned by Hinterland Holdings Proprietary Limited and its subsidiaries (the Target Hinterland Businesses) which assets were AFGRI’s initial contribution to the 2013 joint venture. The Target Hinterland Businesses include the former AFGRI retail store businesses; former AFGRI retail fuel businesses; former AFGRI’s retail stores and retail fuel immovable properties. The activities of the Target Hinterland Businesses comprise the 33 retail outlets and 27 retail fuel stores located in Mpumalanga, KwaZulu Natal, Gauteng and the Free State provinces.
- [10] In relation to Senwes, the primary target firm consists the 50% shareholding owned by AFGRI in the Hinterland JV.

PROPOSED TRANSACTION

- [11] As stated earlier, this transaction is a demerger between AFGRI and Senwes that formed a joint venture in April 2013 and named it Hinterland Holdings Proprietary Limited (“Hinterland JV”), through a merger that was approved subject to conditions by the Tribunal.²
- [12] Through the current transaction, AFGRI will regain sole control over the businesses it contributed to the joint venture and as consideration for that, Senwes will acquire AFGRI’s 50% interest in the joint venture and move to a position of sole control over the remaining businesses of the joint venture. Senwes will carry on with the remaining Hinterland business.³
- [13] This demerger was notified as a single transaction because the suite of agreements constituting the mergers include a termination agreement and ancillary agreements that are interdependent, and cross-conditional on one another.⁴ All agreements concluded between AFGRI and Senwes will cease to exist following approval. Therefore, the current transaction will lead to the undoing of part of the Hinterland JV structure because AFGRI will cease to be a shareholder in the Hinterland JV.

COMPETITION ANALYSIS

- [14] When considering the parties’ activities, the Commission found that both AFGRI and Senwes do not own any retail outlets or fuel stores other than those they contributed to the 2013 Hinterland JV; thus, no horizontal overlap is raised by this transaction.
- [15] Prodist, an agricultural requisites store that supplies various agricultural equipment and products to the retail outlet stores and retail fuel stores, will continue to be operated by Senwes post-merger. The Commission found that

² Hinterland JV Merger Case No: 87/LM/Sep12

³ Consequently, the conditions imposed by the Tribunal on the Hinterland JV will no longer apply in terms of Clause 3.1 because AFGRI will cease to be a shareholder in Hinterland Holdings

⁴ According to the Termination Agreement, AFGRI has concluded three sale of businesses and immovable properties agreements (“Ancillary Agreements”) with Hinterland Holdings, Hinterland SA, and Hinterland Fuels, in terms of which AFGRI or its nominees will purchase: former AFGRI’s retail store business from Hinterland SA; former AFGRI’s retail fuel business from Hinterland Fuels; and former AFGRI’s immovable properties in relation to the retail outlets and fuel stations from Hinterland Holdings.

Senwes' ownership of Prodist, raises a minor vertical overlap as it supplies requisites to the Hinterland JV. At the time of the 2013 Hinterland JV Merger, the Tribunal found that the ownership and operation of Prodist by the JV partners would not result in foreclosure concerns as there were alternative wholesalers available upstream and there were customers downstream in the form of agricultural requisites stores. In the current transaction, the Commission found that the competitive landscape in which Prodist is active as a wholesale business has not changed, there are still several competitors such as Gold Medal, Agri-net, Matis, L&G Tool and others that all supply agricultural requisites to downstream agricultural requisites stores. Therefore, the proposed transaction is unlikely to result in input or customer foreclosure.⁵

[16] It was found that neither AFGRI nor Senwes is likely to adopt different incentives in their respective Hinterland Businesses as they will still face competition in their respective geographic locations in which they operate. The merging parties' agricultural requisites stores do not compete against each other, but against third party stores. The Commission submitted that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition, in fact, it was of the view that the demerger will, to an extent, eliminate unilateral effects in the markets in which the JV was involved and instead create more competition. We found no reason to disagree with this.

PUBLIC INTEREST

[17] In relation to the transaction's effect on employment, the merging parties submitted that the proposed transaction will not result in any retrenchments, job losses or any negative impact on employment terms and conditions. The Hinterland employees transferring back to AFGRI will do so on terms and conditions that are no less favourable than those enjoyed pre-merger, as required by section 197(3) of the Labour Relations Act (LRA). However, the employees who belonged to the Bargaining Council for the Grain Industry ("Bargaining Council") in the Hinterland JV that are part of AFGRI will cease to participate in

⁵ It was submitted that Prodist is currently operating at a loss and may be scaled down substantially in terms of its product lines after the demerger. Senwes will be solely responsible for the restructuring after the termination of the Hinterland JV. Agri Onderdele, a wholesale business which was also part of the JV has since closed and has been deregistered after its assets and obligations were managed out prior to and effective since 31 October 2019. It is submitted that this business was also loss making

the Bargaining Council post transaction. The parties submit that these employees will nevertheless have access to similar benefits enjoyed in the JV as required by section 197(3) of the LRA.

[18] During the merger investigation, the Commission engaged with various unions and employee representatives.⁶ The National Union of Food Beverages Wines and Spirits Allied Workers (‘NUFBWSAW’) is the only union that filed a formal notice of intention to participate (CC5(1)) before the Commission. In its notice, NUFBWSAW highlighted concerns regarding the Hinterland employees that are to transfer back to AFGRI. NUFBWSAW was concerned that these employees may be forced to withdraw from participating on the Bargaining Council, which may adversely impact these employees’ terms and conditions of employment as well as their ability to continue to belong to NUFBWSAW.

[19] NUFBWSAW submitted that the proposed transaction should be approved subject to conditions⁷ which comprise of a three to four year moratorium on the retrenchment of employees of the Target Hinterland Businesses and/or those remaining with Senwes; and for employees to remain members of the union and the Bargaining Council.

[20] The Commission assessed NUFBWSAW’s concerns and noted that the parties’ strategic documents contemplated retrenchments at the Hinterland JV’s wholesale and shared services functions as a result of the proposed transaction. The parties submit that retrenchments were at some point contemplated by Senwes, however, this changed. An unequivocal undertaking assuring that the proposed transaction will not result in retrenchments was given by the merging parties. For certainty, a condition for a 2-year moratorium on retrenchments was imposed on the parties to safeguard against any employment related public interest concerns which may arise as a result of the proposed transaction. The parties agreed to the moratorium.

⁶ The Trade Unions contacted include Solidarity, SACCAWU, FAWU, NUFBWSAW and NUMSA. AFGRI non-unionised employees were notified by Theresa van Rensburg, Human Resource General Manager and Senwes non-unionised employees were notified by Yolandie Jansen van Rensburg.

⁷ These exact same concerns were submitted by letter from NUFBWSAW to the Tribunal on 15 September 2020. The merger parties’ raised objection to the submission. No decision was required on the issue as the concerns did not raise any new issues.

[21] The other concerns raised by the union were found not to be merger specific as the employees transferring to AFGRI will do so subject to section 197(3) of the LRA and their employment terms and conditions are required by law not to be less favourable than those enjoyed premerger. In addition, AFGRI, to whom employees will transfer to as a result of the merger, did not belong to the Bargaining Council pre-merger.

[22] In terms of the effects on small business and historically disadvantaged persons as mentioned above, Thobo (Senwes B-BBEE partner) and Izitsalo (AFGRI B-BBEE partner) each own 5% in Hinterland Fuels. Post transaction, Izitsalo together with AFGRI will exit the Hinterland JV, this will however not result in a reduction in the Hinterland's shares owned by the historically disadvantaged persons as the merging parties submitted that Thobo Trust will increase its shareholding in Hinterland's fuel business from 5% to at least 25%. In addition to this, Izitsalo is already the empowerment partner of the AFGRI Group, holding 26.77% of the shares and when the Target Hinterland Businesses are transferred to AFGRI, it will hold a 26.77% interest in these businesses. Due to these submissions, no reduction in ownership held by HDIs in any of the entities to the transaction is envisaged

CONCLUSION

[23] In light of the above, we approved the transaction subject to the conditions agreed to by the Commission and the parties attached hereto marked **Annexure A**.


Ms Mondo Mazwai

20 October 2020
Date

Mr Enver Daniels and Mr Anton Roskam

Tribunal Case Manager:	Lumkisa Jordaan and Mpumi Tshabalala
For the merging parties:	Andries Le Grange of Cliffe Dekker Hofmeyr Inc.
For the Commission:	Rakgole Mokolo and Wiri Gumbie

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CONDITIONS

1. **DEFINITIONS**

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

- 1.1 **"Acquiring Firms"** means AFGRI Agri Services Proprietary Limited and Senwes Limited;
- 1.2 **"AFGRI"** means AFGRI Agri Services Proprietary Limited;
- 1.3 **"Approval Date"** means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT10);
- 1.4 **"Bargaining Council"** means the Bargaining Council for the Grain Industry;
- 1.5 **"Business Day"** means any calendar day which is not a Saturday, Sunday or public holiday in South Africa;
- 1.6 **"CC5(1)"** means the Notice of Intention to Participate filed in this Merger by NUFBWSAW;
- 1.7 **"Commission"** means the Competition Commission of South Africa;
- 1.8 **"Competition Act"** means the Competition Act, No. 89 of 1998, (as amended);
- 1.9 **"Conditions"** mean these conditions;

- 1.10 **"Employees"** means employees of Hinterland to be transferred to AFGRI with the Target firm in terms of section 197 of the LRA and the employees of Hinterland as at the Approval Date of the proposed transaction;
- 1.11 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.12 **"Hinterland"** means Hinterland Holdings Proprietary Limited, the erstwhile joint venture between AFGRI and Senwes;
- 1.13 **"LRA"** means the Labour Relations Act, No. 66 of 1995, (as amended);
- 1.14 **"Merger"** means the acquisition of the Target Firms by the Acquiring Firms;
- 1.15 **"Merging Parties"** means the Acquiring Firms and the Target Firm;
- 1.16 **"Minister"** means the Minister for the Department of Trade, Industry and Competition;
- 1.17 **"Moratorium"** means a period of 2 years from the Approval Date;
- 1.18 **"NUFBWSAW"** means the National Union of Food Beverages Wines and Spirits Allied Workers;
- 1.19 **"Rules"** mean the Rules for the Conduct of Proceedings in the Competition Commission and the Rules for the Conduct of Proceedings in the Competition Tribunal;
- 1.20 **"Target Firm"** in respect of AFGRI means, all the agricultural requisites retail stores and the retail fuel outlets that AFGRI had initially contributed to Hinterland and is re-acquiring from Hinterland pursuant to the Merger. In respect of Senwes, the target firm is AFGRI's 50% shareholding in Hinterland;
- 1.21 **"Tribunal"** means the Competition Tribunal of South Africa.

2. **CONDITIONS TO THE APPROVAL OF THE MERGER**

- 2.1 The Merging Parties shall not retrench any Employees for the period of the Moratorium.
- 2.2 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.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Merging Parties shall circulate a copy of the Conditions to all their employees within 5 (five) Business Days of the Approval Date.

3.2 As proof of compliance with 3.1 above, a director of each Merging Party 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.

3.3 The Acquiring Firms shall inform the Commission in writing of the Implementation Date within 5 (five) Business Days of its occurrence.

3.4 The Acquiring Firms shall, on each anniversary of the Implementation Date, during the period referred to in 2.1 above submit an affidavit confirming compliance with the condition 2.1 above for the duration of the Moratorium.

3.5 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 Merging 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.

4. VARIATION

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

5. **GENERAL**

- 5.1 All correspondence in relation these conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.