



**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**CASE No: IM238JAN19**

In the matter between:

<b>Klein Karoo International (Pty) Ltd</b>	First Applicant
<b>Mosstrich (Pty) Ltd</b>	Second Applicant

<b>Cape Karoo (Pty) Ltd</b> (Previously Ostrich Skins (Pty) Ltd)	Third Applicant
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and

<b>The Competition Commission of South Africa</b>	Respondent
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*In re* the intermediate merger between:

<b>Cape Karoo (Pty) Ltd</b> (Previously Ostrich Skins (Pty) Ltd)	Acquiring Firm
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and

<b>Klein Karoo International (Pty) Ltd</b>	Target Firms
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**Mosstrich (Pty) Ltd**

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Panel	: Norman Manoim (Presiding member)
	: Yasmin Carrim (Tribunal member)
	: Andreas Wessels (Tribunal member)
Heard on	: 1 to 8 July 2019

Last submission received on: 19 July 2019

Order Issued on : 14 August 2019

Reasons Issued on : 19 December 2019

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**REASONS FOR DECISION**

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## **Conditional approval of intermediate merger**

[1] On 14 August 2019, the Competition Tribunal (“Tribunal”) conditionally approved the proposed transaction involving Cape Karoo (Pty) Ltd (“Cape Karoo”) and Klein Karoo International (Pty) Ltd (“KKI”) and Mosstrich (Pty) Ltd (“Mosstrich”).

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

## **Background**

[3] The proposed transaction was notified as an intermediate merger to the Competition Commission (“Commission”) on 22 August 2018. It involves the two largest vertically integrated players in the ostrich industry in South Africa. The Commission concluded that the proposed merger would result in a permanent structural change to the affected markets which raised significant competition concerns in South Africa. The Commission accordingly prohibited the merger on 19 December 2018.

[4] On 22 January 2019, the merging parties filed an application for consideration in terms of section 16 of the Competition Act, 89 of 1998, as amended (“the Act”).

[5] They challenged the Commission’s decision to prohibit the proposed merger and requested an approval of the proposed transaction subject to proposed remedies. The merging parties, more specifically, disputed the Commission’s findings of post-merger anti-competitive effects relating to increased pricing power in the ostrich meat market in South Africa and the substantial foreclosure of (downstream) ostrich feather processors<sup>1</sup> in South Africa. In the merging parties’ view the Commission’s conclusions were based on incorrect findings, including that (i) ostrich meat falls within a narrow / niche relevant product market as opposed to a broader relevant product market for all red meat and potentially even other sources of protein; and (ii) the merging parties would have the ability and incentive to prevent ostrich feather processors from accessing raw or unprocessed ostrich feathers post-merger.

[6] The Tribunal heard the matter over the period 1 to 8 July 2019.

[7] In their application for consideration and throughout the Tribunal hearing, the merging parties contended that the proposed merger is necessary to stabilize the South African ostrich industry which is suffering significant decline due to the large-scale exit of ostrich

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<sup>1</sup> Feather processor means any processor or trader of ostrich feathers.

farmers. The large-scale exit of ostrich farmers and resulting decline in local production volumes were said to result from a number of factors which contribute to ostrich farmers being unable to realise sufficient overall returns on their farming activities. These factors include, amongst others, droughts (in certain areas of the country) and the recurrence of Avian Influenza ("AI"), resulting in bans on the export of raw ostrich meat in the context of an industry which is heavily reliant on exports.

[8] The Commission's overarching position was that the proposed merger should be prohibited since it would create a near monopoly in the ostrich industry in South Africa that would enable the merged entity to control the entire ostrich value chain. According to the Commission, the permanent structural change to the affected markets is a significant factor when considering that KKI was the sole marketer of ostrich products prior to the deregulation of the ostrich industry in 1993. The effect being that that the post-merger market structure would enable KKI to "take back" control of the South African ostrich industry.

[9] In relation to the effects of the proposed transaction on competition, the Commission argued that the proposed merger would give the merged entity increased pricing power in the ostrich meat market in South Africa since its market share would exceed 90% in that market. Further, that the proposed merger would likely result in the significant foreclosure of (downstream) ostrich feather processors in South Africa. The Commission was further concerned that third parties would be prevented from accessing the merged entity's abattoirs and tanneries given its substantial post-merger market power.

[10] The merging parties called the following factual witnesses at the Tribunal hearing:

- Mr Johannes Hendrik Schoeman ("Schoeman"), the executive manager of KKI;
- Dr Hendrik Francois De Wet ("De Wet"), the managing director of Mosstrich and managing director of Cape Karoo post-merger; and
- Mr Johan Hunter ("Hunter"), the general manager of the meat division of Shoprite Checkers, a grocery retailer.

[11] The Commission called the following factual witnesses:

- Mr Jacques Roets ("Roets"), the national butchery manager of Spar, a grocery retailer;
- Mr Hennie Van Zyl ("Van Zyl"), a director of Ostriland Import Export (Pty) Ltd ("Ostriland"). Ostriland is involved in the supply and processing of ostrich products. It currently makes use of Mosstrich's ostrich slaughter and tanning services; and

- Mr Johannes Myburgh (“Myburgh”), the founder and former MD of Rancho Las Plumas, currently operating as Ostrich.Com. Ostrich.Com is a feather processor which supplies processed ostrich feathers and related products.

[12] The Commission called Ms Khalirendwe Ranenyeni (“Ranenyeni”) whilst the merging parties called Professor Nicola Theron (“Theron”) as economic experts. To this end, a ‘hot tub’ was held on 5 July 2019 where the two economists debated issues including market delineation, theories of harm, the relevant counterfactual, competition effects, efficiencies, public interest issues as well as the appropriateness of remedies to address the competition concerns.

[13] Since the issue of remedies was central to the Tribunal proceedings, we highlight certain preliminary points about the merging parties’ tendered remedies.

[14] We note that the merging parties’ tendered remedies evolved over time in response to concerns raised by the Commission about the proposed remedies’ effectiveness and monitoring aspects, as well as questions raised by the Tribunal during the proceedings. This culminated in the merging parties submitting further conditions during the hearing with their final set of conditions proposed on 9 July 2019.

[15] The Commission maintained its position that the Tribunal should prohibit the proposed transaction and that no remedies would satisfactorily address the competition concerns resulting from the proposed transaction. The merging parties, on the other hand, argued that their final set of conditions adequately addressed the Commission’s concerns and that the dire state of the South African ostrich industry favours a conditional approval over an outright prohibition of the proposed transaction.

[16] The primary focus of these reasons will be the merging parties’ proposed remedies and the extent to which they address the Commission’s concerns relating to (i) post-merger unilateral effects in the national market for ostrich meat; (ii) input foreclosure in the national market for ostrich feathers; and (iii) third-party access to the merging parties’ abattoirs and tanneries post-merger.

## **Parties to the proposed transaction**

### ***Primary acquiring firm***

[17] The primary acquiring firm is Cape Karoo, previously trading as Ostrich Skins (Pty) Ltd (“Ostrich Skins”). Cape Karoo is a special purpose vehicle incorporated for purposes of

the proposed transaction. It is a wholly owned subsidiary of Mosstrich and is currently dormant.

### **Primary target firms**

[18] The primary target firms are Mosstrich and KKI.

[19] Mosstrich operates as a co-operative model and is not controlled by any single firm or individual. According to the merging parties, it has between [REDACTED] and [REDACTED] individual shareholders. These shareholders originally were ostrich farmers. However, due to a decline in the ostrich industry in South Africa, only [REDACTED] of the shareholders remain active ostrich farmers who send their ostriches to be processed by Mosstrich.

[20] KKI is a wholly owned subsidiary of Klein Karoo (Pty) Ltd ("Klein Karoo"). Klein Karoo is a co-operative entity. It has [REDACTED] shareholders, all of whom are bona fide farmers. Of these [REDACTED] shareholders, about [REDACTED] are ostrich farmers / producers. However, only about [REDACTED] are still actively farming ostriches for slaughter.

### **Proposed transaction**

[21] The proposed transaction will take place in two steps. In the first leg of the transaction, Ostrich Skins, now known as Cape Karoo, will acquire control of the businesses of Mosstrich and KKI as going concerns. In the second leg, Mosstrich and KKI will acquire shares in Cape Karoo as consideration for the sale of their respective businesses to Cape Karoo.

[22] Post-merger, Mosstrich will have [REDACTED]% equity interest and [REDACTED]% of the voting rights in Cape Karoo; KKI will have a [REDACTED]% equity interest and [REDACTED]% voting rights; a BEE workers trust will have [REDACTED]% equity interest and [REDACTED]% voting rights; and ostrich farmers will enjoy [REDACTED]% of the voting rights.

[23] According to the merging parties, although the voting rights of each of KKI and Mosstrich will be [REDACTED]%, KKI will in essence acquire sole control over Cape Karoo owing to its majority equity interest and its deciding vote on the board of Cape Karoo.

### **Rationale for the proposed transaction**

[24] The merging parties submitted that the proposed transaction is an attempt to stabilize the ostrich industry in South Africa in the face of significant declines in production volumes

and the large-scale exit of ostrich farmers. As noted above, the merging parties indicated that the key reason for the declining local production volumes is the recurrence of AI which has resulted in bans on the exportation of specifically raw ostrich meat in an industry that is primarily export driven. According to the merging parties, AI, export bans and droughts (in certain regions of South Africa) have contributed to ostrich farmers in South Africa being unable to realise sufficient returns on their ostrich farming activities.

[25] The merging parties also asserted that the proposed transaction would enable them to pool personnel and marketing resources in order to expand existing export markets and access new export markets with the ultimate goal of stimulating growth in the South African ostrich industry as a whole.

[26] The merging parties further argued that the proposed transaction would facilitate a greater return to ostrich farmers in South Africa since it would enable the merged entity to increase the prices of certain ostrich products in the export markets.

[27] The Commission however disputed the merging parties' stated rationale for the proposed transaction. Its view was that the proposed merger was primarily aimed at eliminating competition between the merging parties in the South African and export markets through consolidating their businesses. The Commission further contended that the merging parties failed to provide sufficient clarity as to how the proposed transaction would ensure greater returns to local ostrich farmers, stabilize the ostrich industry in South Africa and stimulate growth. In this regard the Commission's primary argument was that the present decline in production volumes is attributable to a range of demand- and supply-side factors that are beyond the merging parties' control, thus indicating that the proposed merger would not have the effect of stabilizing the ostrich industry in South Africa and generating the claimed efficiencies.

#### **Merging parties' activities and areas of overlap**

[28] At the outset, we note that the ostrich industry is premised on the supply of three core products, namely ostrich (i) leather; (ii) feathers; and (iii) meat. The value chain is such that the ostrich farmers deliver their live ostriches for slaughter at abattoirs, including the merging parties' abattoirs. The slaughtered bird yields skins for leather products, raw or unprocessed feathers used in a variety of cleaning, decorative and fashion-related applications, as well as meat. Each of these raw products are then further processed and / or packaged.

[29] KKI is vertically integrated and active in the supply of all three core ostrich products. Ostrich farmers deliver their live ostriches for slaughter at KKI's abattoirs situated in Oudtshoorn and Graaff-Reinet. It is involved in each of the three relevant products as follows:

- ostrich skins are tanned at KKI's tannery where ostrich leather is produced and sold predominantly to the export market, but also to the local market;
- raw ostrich feathers purchased from the farmer or on tender are processed at KKI's feather processing plant for the (downstream) use in cleaning and decorative applications. Processed feathers are primarily sold in export markets, but also locally; and
- it has a meat processing facility where the meat is packaged for sale to retailers, wholesalers and restaurants. KKI mainly supplies steak and fillet to the export markets, whilst trimmings are sold in the local market.

[30] Mosstrich is also vertically integrated in the ostrich supply chain. It purchases live ostriches from ostrich farmers for slaughtering at its abattoirs situated at DeAar and Mosselbay. It has a meat processing facility and a tannery, but unlike KKI, it does not have a feather processing facility. It is involved in the relevant products as follows:

- ostrich skin is sent to Mosstrich's tannery, where leather is produced and sold on the export markets, as well as to customers in South Africa;
- raw ostrich feathers are sold on an audited tender basis to local third party feather processors. The current participants in the tender are (i) Ostrich Products South Africa (Pty) Ltd ("OPSA"); (ii) Lewitton Industrial Corporation CC ("Lewitton"); (iii) Ostrich.com, previously Ranchos Las Plumas; and (iv) KKI; and
- ostrich meat is processed and packaged for export (mainly to Europe) and for sale to retailers, wholesalers and restaurants in South Africa. For export purposes, given the current ban on the export of raw ostrich meat, the meat is heat-treated by way of a sous-vide process to enable the sale of the meat on the international market even in the presence of AI.

[31] In light of the above, the Commission found that the proposed transaction results in horizontal overlaps between the activities of the merging parties in the production and supply of ostrich meat and leather respectively since both firms own abattoirs, meat processing facilities and tanneries.

[32] The Commission further found that a vertical relationship exists between the merging parties in that Mosstrich, which does not currently have any feather processing facilities,

supplies its raw ostrich feathers on a tender basis to KKI and other feather processors in South Africa.

### **Background and key features of the ostrich industry in South Africa**

[33] To understand the competitive dynamics of the ostrich industry in South Africa, one must consider the current state of the ostrich industry, its history, as well as certain of its key features. The following three issues are significant: first, the industry is in decline due to a range of factors; second, the industry is largely export-orientated; and third, from a supply-side perspective, ostrich is a portfolio product. These factors influence the commercial decisions of farmers and processors.

[34] By way of background: the ostrich industry was deregulated in 1993 at which point the industry became fully commercialised. South Africa is the largest provider of ostrich products globally. The diverse range of applications of the ostrich skin, feathers and meat contributes to making ostrich products attractive for export purposes. Similarly, due to the substantial revenues that can be obtained from exporting ostrich products, the local industry responded by directing most of its attention to the international markets.

[35] In relation to ostrich meat, the international demand for ostrich meat increased over time, which resulted in more fresh meat being exported. Since export meat prices significantly exceeded domestic prices, there were strong incentives for suppliers to export as much fresh meat as possible. This in turn led to decreased volumes being available to the local market. However, the recurrent AI problem and corresponding bans on the export of fresh ostrich meat have proved to be a challenge for local ostrich meat suppliers who are unable to export fresh meat when the bans are in place. In these circumstances, suppliers resort to diverting fresh meat sales to the local market at significantly lower prices than in the international markets.

[36] The first AI outbreak and ban on the export of fresh ostrich meat occurred between August 2004 and November 2005, followed by another short-term ban in 2006. However, over the period between 2006 and 2011, the export markets were open and again there were strong incentives to export as much fresh meat as possible. The next AI outbreak occurred in 2011 with a ban being imposed from 2011 – 2015.

[37] The factual witnesses confirmed that AI is a recurring problem. De Wet said that AI is here to stay.<sup>2</sup> He however explained that the ban on the export of processed meat (i.e.

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<sup>2</sup> Transcript, page 194, line 21, to page 195, line 1.



precooked ostrich meat, also referred to as heat-treated ostrich meat) was lifted already (also see paragraph 39 below). Van Zyl was very pessimistic about the export market for fresh ostrich meat opening up again.<sup>3</sup> No one could say when the current export bans in relation to raw ostrich meat would likely be lifted.<sup>4</sup>

[38] According to the merging parties, the challenges associated with the intermittent bans have resulted in a shift away from a purely export-orientated focus towards a three-pronged strategy in relation to ostrich meat that includes: (i) supplying adequate local volumes; (ii) exporting heat-treated ostrich meat products that qualify for export; and (iii) exporting fresh meat when no export bans are imposed.

[39] On 25 February 2019 the EU lifted the export ban on heat-treated ostrich meat. The merging parties have managed to export heat-treated ostrich meat products successfully since 2013 – ceasing that activity only during the period of the ban caused by a residue monitoring issue, which has since been resolved. However, a ban on fresh and frozen ostrich meat will continue until AI is no longer present in live ostriches.

[40] The supply of ostrich leather and feathers is unaffected by export bans; thus, global demand for both products has remained relatively stable. Conversely, commitment to the local market in respect of ostrich meat is essential since the recurrence of AI makes the export market volatile.

[41] Van Zyl's evidence was consistent with the information provided by the merging parties' economic expert who indicated that ostrich leather is the largest contributor to revenue when meat bans are in place, but that meat remains the main contributor when export bans are absent.<sup>5</sup> It is also important to note that when export bans on ostrich meat are in place, revenues from meat are much lower since it is not possible to obtain the same prices in the local market as in international markets. The converse is true when bans are absent, with the data indicating significantly higher revenues associated with meat exports.<sup>6</sup> These factors indicate that the ostrich industry is highly impacted by whether or not it is possible to export ostrich meat at any given time.

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<sup>3</sup> Transcript, page 561, line 14, to page 562, line 7.

<sup>4</sup> De Wet, transcript page 193, lines 13 to 20; Roets, page 351, lines 5 to 16; Schoeman, page 605, lines 9 to 13.

<sup>5</sup> FTI Consulting Report, "*Economic Analysis of the Proposed Merger between KKI and Mosstrich*", dated 24 May 2019, paragraph 37 to 39 (Expert Witness Bundle, Section B, record pages 19 to 21).

<sup>6</sup> FTI Consulting Report dated 24 May 2019, paragraphs 38 to 51 (Expert Witness Bundle, Section B, record pages 19 to 24).

[42] A further factor is the presence of droughts experienced in certain ostrich producing geographical areas of South Africa, which also had an adverse effect on the scale of ostrich farming in South Africa.

[43] The above factors have over time resulted in the large-scale exit by ostrich farmers in South Africa, which has resulted in an overall decline in the production volumes of the South African ostrich industry as a whole. The number of ostrich farmers rearing ostriches to slaughter age has reduced from more than 400 prior to 2011 to less than 200 in 2018. This has led to only 123 000 ostriches being slaughtered in South Africa in the most recent slaughter season compared with 300 000 in 2002 / 2003. Furthermore, of the eight ostrich abattoirs in operation in 2011, only four remain open today. The number of ostrich tanneries has also reduced from eight to four.<sup>7</sup>

[44] It is against the above backdrop that the merging parties submitted that it is necessary to consolidate in order to stabilise the South African ostrich industry. The merging parties reiterated that the merged entity intends to market specifically ostrich leather and meat more effectively and charge higher prices in international markets in order to generate greater returns to ostrich farmers in South Africa.

[45] As stated above, ostrich is a portfolio product. The ostrich farmers' income is derived through the selling of live ostriches to players such as the merging parties for processing. The merging parties pay the farmer for the various ostrich products generated from the slaughtered ostrich i.e. the meat, skin and feathers. In the case of meat, the amount paid to the farmer is determined by the weight of the slaughtered bird. The quality of the skin determines the farmers' return for the skin. In the case of Mosstrich, the farmer gets a return through the tender process for the raw ostrich feathers. KKI has its own feather processing facility and offers the farmer a particular price for the feathers which he / she generally accepts, or the feathers go on tender.

[46] Van Zyl stressed the importance of being active across all three ostrich products and adding value to these products in order to be a viable player in the industry. He indicated that due to customer preferences and other factors such as droughts and AI, it became necessary to extend his operations to all three products. Part of his evidence was that he [REDACTED] from ostrich products. He testified: "*So I went into other things and I wanted to be part of more of the circle of the*

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<sup>7</sup> Transcript, page 4. See also Econex Competition and Applied Economics, "*Economic Analysis: The Proposed Merger between Klein Karoo International and Mosstrich*" dated 15 August 2018, paragraphs 29 and 30 (Expert Witness Bundle, Section A, record page 13).

*ostrich industry, like I've said to you it's very difficult for a farmer to be in this whole set-up if he can't do value-adding on all three lines of an ostrich, and that is the feathers, the leather and the meat.*<sup>8</sup> This approach of adding value across all three ostrich products contributed to Ostriland being able to increase production and supply and remain a viable player in the industry.

[47] We accept that the proposed transaction is taking place in an industry that is under stress with a significant decline over time in the number of ostrich farmers in South Africa. In simple terms, droughts in certain areas of South Africa, the presence of AI and export bans on fresh ostrich meat make the industry volatile and risky for ostrich farmers from an investment and operational perspective. These factors had an impact on our overall decision to approve the proposed merger subject to a wide range of conditions.

### **Competition assessment**

[48] The Commission assessed the impact of the proposed transaction on the following relevant markets:

- the national market for ostrich leather;
- the national market for ostrich meat;
- the national (upstream) market for the production and supply of raw or unprocessed ostrich feathers; and
- the national (downstream) market for the production and supply of processed feathers.

[49] It advanced the following theories of harm:

- unilateral effects in the form of increased pricing power in the market for ostrich meat;
- input foreclosure in the market for the supply of unprocessed ostrich feathers to the merging parties' downstream rivals; and
- the post-merger ability and incentive to limit or prevent third party access to the merging parties' abattoirs and tanneries.

[50] In the sections that follow we deal with the Commission's alleged theories of harm in each of these markets and consider the extent to which the proposed conditions remedy the concerns raised.

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<sup>8</sup> Transcript, page 481.

## **Ostrich leather**

[51] Although the Commission raised no competition concerns in relation to ostrich leather, we very briefly highlighting certain aspects regarding ostrich leather before analysing the other markets in which the Commission identified competition concerns.

[52] We highlight the fact that ostrich is a portfolio product and that leather is an important element of that portfolio. This is because leather appears to be the most stable source of income across the three ostrich products and an important contributor to the overall income that a farmer and processors derive from an ostrich.

[53] We next discuss ostrich feathers.

## **Ostrich feathers**

### ***Market delineation***

[54] As indicated above, the Commission identified two vertically related markets pertaining to ostrich feathers, namely (i) the (upstream) market for the production and supply of unprocessed ostrich feathers; and (ii) the (downstream) market for the sale of processed ostrich feathers.

[55] The Commission defined the relevant product market as ostrich feathers based on market participants' submissions indicating that feathers from other types of birds such as turkey, peacock and rhea are not substitutable with ostrich feathers in a number of applications. The Commission found, in particular, that ostrich feathers are preferred to other types of feathers in the fashion industry and that feathers from other birds are less effective when used in certain specialised cleaning applications.

[56] The Commission further noted that the price of processed ostrich feathers is higher than unprocessed feathers and that processed feathers are mainly exported where it fetches higher prices.

[57] The merging parties argued that ostrich feathers are used in a variety of applications and that feathers from other birds may be used in certain of these applications. The merging parties specifically contended that feathers used in cleaning products cannot be confined solely to ostrich feathers and should include substitutes such as synthetic, micro-fibre and wool dusters. Similarly, they argued that feathers from birds such as peacock,

pheasant, turkey and rhea are similar to ostrich feathers and are suitable for decorative purpose.

[58] Whilst the merging parties did not agree with the Commission's market delineation, for purposes of the foreclosure analysis, they accepted that the feather processors in South Africa seek access to ostrich feathers in particular. Furthermore, they offered a tender-based remedy to address any potential input foreclosure concerns resulting from the proposed transaction.

[59] Before discussing the conditions tendered and why we believe the final conditions address the input foreclosure concern, we explain the Commission's theory of harm.

### ***Input foreclosure***

[60] We first set out certain key features relating to the upstream and downstream markets for ostrich feathers.

[61] From a supply-side perspective, there are three different types of unprocessed ostrich feathers:<sup>9</sup>

- juvenile bird feathers: feather processors obtain juvenile ostrich feathers directly from the ostrich farmers. The feathers are clipped from the juvenile birds when they are 6-7 months old. These feathers are smaller and of a lower quality relative to feathers obtained from mature birds;
- Slaughtered bird feathers: the majority of unprocessed ostrich feathers are obtained from slaughter birds at maturity age being 12 months old. They are the best quality and the highest value feathers. In general, farmers sell slaughtered bird feathers directly to the processor or through a tender process operated by KKI in Oudtshoorn; and
- breeder bird feathers: these feathers are obtained from breeder birds once or twice a year. These feathers are of a better quality than the juvenile feathers and are most comparable to slaughter bird feathers, although the extent to which breeder bird feathers alone may be sufficient was contested.

[62] As noted above, KKI is vertically integrated in the ostrich feather market whilst Mosstrich, which does not currently have its own feather processing facility, supplies unprocessed feathers to (downstream) feather processors, including KKI, by way of a

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<sup>9</sup> Myburgh, Witness Statement pages 144 and 145 of the record, paragraphs 19 to 21; Van Zyl, Witness Statement pages 130 and 131 of the record, paragraphs 81 to 85.

tender system. In light of this vertical relationship, the Commission assessed whether or not the proposed transaction would give rise to input foreclosure concerns since post-merger Mosstrich's feathers could be processed internally at KKI's feather processing facility.

[63] There are currently four main suppliers of unprocessed ostrich feathers in South Africa namely (i) KKI; (ii) Mosstrich; (iii) Gondwana; and (iv) Ostriland through BKM Vere (Pty) Ltd ("BKM Vere").

[64] KKI offers a price to farmers for their ostrich feathers for birds slaughtered at its abattoirs. If the farmer does not accept the price, the feathers are put out to tender. As already mentioned, the feathers of slaughtered birds at Mosstrich's abattoirs are sold via an audited tender process in Oudtshoorn. Gondwana and Ostriland (via BKM Vere) sell feathers on tender in either Gauteng or Oudtshoorn.

[65] Mosstrich's tender system for unprocessed ostrich feathers has been in place since the early 2000s, whilst KKI did not previously have a tender system. However, since August 2018, both KKI and Mosstrich have weekly tender processes. These tenders are facilitated by KKI – through independent auditors - and managed on KKI's premises. Although these tenders are closed, all current feather processors in South Africa are commonly invited to participate in these tenders.

[66] The tender process works as follows: pursuant to the tender process, the ostrich feathers are sorted into different categories with potential bidders being allocated time slots in which to evaluate the feathers. After the evaluation stage, the bidders are required to submit their bids to the auditor via email. The auditor then provides the KKI administrator with the names of all bidders and their corresponding bid values who in turn sends an email detailing the winning bidder for each tender lot. An invoice is immediately issued to the awarded bidder who has three days to make payment. If the winning bidder does not make payment in the three-day period, the second highest bidder receives the lot, but the initial winning bidder is required to pay the difference between its bid and the second highest bid. Once payment is made, the ostrich feathers are available for collection at KKI's premises.<sup>10</sup>

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<sup>10</sup> Myburgh, Witness Statement pages 147 to 151 of the record, paragraphs 30 to 42.

[67] At a (downstream) ostrich feather processing level there are currently four processors in South Africa namely (i) KKI; (ii) Ostrich.Com, formerly Rancho Las Plumas;<sup>11</sup> (iii) OPSA; and (iv) Lewitton.

[68] Ostrich.Com and Lewitton have no farming-related activities and therefore are not vertically integrated in the value chain. As such, both rely on the merging parties and independent farmers for the supply of unprocessed ostrich feathers. OPSA is owned by Mr Jonker, one of the largest ostrich producers in the industry. Jonker / OPSA supplies live ostriches for slaughter to either or both of the merging parties and has arrangements whereby the ostrich feathers and skins are returned to him / OPSA after slaughter.

[69] In terms of the Commission's analysis, it ultimately concluded that the proposed transaction gives rise to significant input foreclosure concerns in that the merged entity would have both the ability and incentive to restrict access to unprocessed ostrich feathers (particularly from slaughter birds) and ultimately foreclose downstream rivals in South Africa.

[70] In relation to the merging parties' ability to foreclose downstream rivals post-merger, the Commission found that KKI has a market share of approximately 18% in the sale of unprocessed ostrich feathers in 2017 in South Africa; and Mosstrich a market share of approximately 63%. This means that the merged entity will have a post-merger market share of approximately 81% in this market. Based on these market shares, the Commission found that the merged entity will have significant market power in the upstream market.

[71] The Commission further found that the merged entity will be in a position, through its abattoirs and first option to offer farmers a price for slaughtered bird feathers at its abattoirs, to significantly influence competitive conditions in the relevant markets. In the Commission's view, this is exacerbated by the fact that access to slaughter bird feathers is critical for the downstream rivals.

[72] In relation to incentive, the Commission concluded that the merged entity would have the incentive to foreclose downstream rivals or raise the prices of unprocessed feathers for a number of reasons. First, the revenue from the sale of processed feathers on the

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<sup>11</sup> Rancho Las Plumas was voluntarily liquidated in January 2019. The Rancho Las Plumas business continues to trade under a different company called Ostrich.Com. Of relevance is that Ostrich.Com is the subject of a partnership between Myburgh and Mr JP Schoeman, one of the largest ostrich farmers in the industry. See Myburgh, Witness Statement pages 137 and 138 of the record, paragraphs 4 and 5. Also see Transcript, page 755, line 7, to page 756, line 12; and page 762, lines 9 to 21.

export markets is greater than the revenue from the sale on the domestic market. Thus, the merged entity is likely to process Mosstrich's feathers internally in order to obtain greater revenue from the export markets. Second, █% of KKI's ostrich feathers are processed internally which is a further factor indicating that feathers will not be supplied to other downstream firms. Third, KKI's feather processing facility is currently operating at █% which means that the merged entity will be able to use KKI's excess capacity for the purpose of its processing operations. The Commission also noted that due to the under-supply of feathers, purchase prices have risen sharply. Lastly, the Commission noted that there is no pre-determined price that KKI offers to ostrich farmers for their feathers since the process is such that KKI offers a price to farmers and the farmer either accepts the price or elects to place the feathers on tender. Although the farmer may in theory appear to have the discretion, the Commission contended that this is not the case when considering that the tender process is managed by KKI and occurs on its premises. In this way, the tender process could be susceptible to manipulation.

[73] The merging parties disputed that the proposed transaction would result in input foreclosure. Their arguments included that (i) all customers direct the majority of their feather sales to export markets; (ii) neither Lewitton nor Ostrich.Com rely on Mosstrich for the majority of their supply; (iii) since the conclusion of the Commission's investigation, the business of Rancho Las Plumas had been liquidated and transferred to Ostrich.Com, an entity jointly owned by Myburgh and JP Schoeman - the largest ostrich farmer in the industry; (v) OPSA would not be foreclosed since even though it relies on Mosstrich for a significant volume of feathers, it has direct access to about █% of slaughter line feathers produced locally through Jonker's farming activities. This is significant when considering that █  
█  
█. In addition, the merging parties disputed that slaughter line feathers were critical for a successful business in the downstream market and argued that breeder bird and juvenile feathers should also be considered in the overall analysis.

[74] Myburgh and Lewitton raised concerns about the supply of unprocessed ostrich feathers and how the tender system would operate post-merger.<sup>12</sup>

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<sup>12</sup> See, for example, Myburgh Witness Statement pages 153 to 155, paragraphs 47 to 53. Also see pages 179 and 180 of the record.



[75] Evidence was given by Van Zyl (Ostriland) and Myburgh (Ostrich.Com) regarding the required access to unprocessed ostrich feathers, the nature of arrangements with ostrich farmers, the current feather tender process and potential remedies.

[76] Myburgh said that the current tender process for unprocessed ostrich feathers has proven to be very successful and useful<sup>13</sup> because it gives processors a fair opportunity to evaluate different categories of feathers for quality purposes per lot and submit a competitive bid in circumstances where the highest bid wins.<sup>14</sup> This is in contrast to the process whereby the feather prices are directly negotiated with ostrich farmers.

[77] Myburgh further noted that transparency issues arise from the fact that KKI is structured in a similar way to a co-operative. He testified: "*Obviously feathers that are purchased directly from farmers who slaughter at the co-op, that is an internal process and that is not transparent to competitors, obviously.*"<sup>15</sup> Competitors thus do not know the price offered to an ostrich farmer for his / her unprocessed ostrich feathers.

[78] The Tribunal questioned why the ostrich farmers would choose to accept KKI's offer of a price rather than place their unprocessed ostrich feathers on tender where they potentially could obtain a higher price because multiple parties would be bidding for the feathers. Schoeman attributed this to the "*co-operative mindset*" amongst the farmers due to the history of the industry, the structure of the company and the arrangements with farmers whereby KKI provides value-adding services on the products, as well as bonuses to farmers. His evidence in general was that [REDACTED] do not prefer the tender system for reasons such as [REDACTED] value the tender system.<sup>16</sup>

[79] The merging parties argued that the ostrich farmers – and not the merging parties – own the unprocessed ostrich feathers and that the farmers ultimately have the choice regarding whether to accept KKI's price or place the feathers on tender. However, from the Commission's perspective, Schoeman's evidence directly supports its contention that the merged entity would have the ability to foreclose competitors since pre-merger each entity has farmers aligned with its respective incentives whilst post-merger all farmers' incentives are aligned. In this regard the Commission emphasised that Schoeman's

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<sup>13</sup> Transcript, page 765, lines 12 to 21.

<sup>14</sup> Myburgh, Witness Statement pages 150 and 151 of the record, paragraphs 38 to 42. Transcript, page 765, line 15, to page 766, line 1.

<sup>15</sup> Transcript, page 758, lines 15 to 17.

<sup>16</sup> Transcript, page 400, line 10, to page 403, line 2.

repeated assertions of a “*co-operative mindset*” were significant when considering that “*the goal of cooperatives (such as Mosstrich and KKI) is to maximise the member welfare or member net earnings.*”<sup>17</sup>

[80] As noted above, even though the merging parties did not agree with the Commission’s theory of harm and analysis, they offered a tender-based condition to address the concerns. They revised and enhanced this offered remedy during the Tribunal proceedings following concerns raised by both the Commission and Tribunal respectively in the course of the proceedings. We have to decide if the merging parties’ tender-based condition addresses the input foreclosure concern. We consider this next.

### ***Tender condition***

[81] The merging parties’ initial undertaking was that all the ostrich feathers obtained from the Mossel Bay and De Aar slaughter lines of Mosstrich will continue to be sold on tender post-merger. Similarly, all feathers obtained from the Oudtshoorn and Graaf Reinet slaughter lines of KKI will also be sold on tender – in the event that the ostrich farmers do not wish to sell their feathers directly to the merged entity. The merging parties further proposed that an independent auditor will oversee this tender process. They, however, initially offered this condition for (at least) a four-year period.<sup>18</sup>

[82] The Commission argued that the merging parties’ initial proposed remedy was inappropriate and inadequate for a number of reasons. First, the duration period of only four years was insufficient given the permanent structural change to the market arising from the proposed merger. Second, the tendered remedy would apply across all types of feathers (juvenile, breeder and slaughter line) when access to slaughter line feathers specifically is the most critical for effective competition. Third, the merging parties’ market power at the abattoir level would give them the first option to offer ostrich farmers a price for slaughter line feathers which is important when considering that only OPSA and Piet Botha Schoeman currently retain their feathers after slaughter at the merging parties’ abattoirs. Fourth, the merging parties could manipulate the tender process since it would be facilitated by KKI at its premises.

[83] Following the Commission’s concerns and questions raised by the Tribunal in the course of the proceedings, the merging parties revised their tendered remedy in a number of respects. They reiterated that their overall intention was to provide a condition that

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<sup>17</sup> Commission’s Heads of Argument, page 39.

<sup>18</sup> See paragraph 3 of the initial *Consolidated list of undertakings proposed by the merging parties*.

addressed the Commission's concern and that would preserve the pre-merger status quo by ensuring that the pre-merger Mosstrich volumes of unprocessed feathers remain available on tender post-merger.

[84] We note that one of these changes / enhancements of the remedy related to volume. The merging parties ultimately committed to █% of the merged entity's slaughter line feathers to be offered on tender on an annual basis. The underlying basis for the █% commitment is to preserve the pre-merger status quo i.e. the pre-merger volume of Mosstrich slaughter line feathers that are available on tender for downstream customers to purchase.<sup>19</sup>

[85] However, following receipt of the merging parties' revised remedy, the Commission raised the concern that the formula associated with the █% commitment could be manipulated by the merging parties to distort tender volumes. The merging parties' response, which we accept, was that if fewer farmers elected to take their feathers directly, the volume of feathers placed on tender would increase, since the merged entity would have to ensure that █% of all slaughter line feathers not taken directly by farmers is placed on tender. We further note that the imposed conditions oblige the merged entity to allow ostrich farmers to retain their feathers (see condition 5.3).

[86] The tender-based condition ultimately imposed by us is made up of a number of elements, including:

- (i) a formula which shows how the █% commitment is to be calculated (see conditions 5.1 and 5.2);
- (ii) the duration of the condition is indefinite (subject to a variation clause on good cause shown) (see condition 5.4, read with condition 9); and
- (iii) the merging parties must allow third parties i.e. ostrich producers in South Africa, if they so wish, to retain their feathers on terms that are fair, reasonable and non-discriminatory (see condition 5.3).

[87] The imposed conditions further require that the post-merger ostrich feather tender process be administered by an independent auditor mandated to report to the Commission. This conditions further includes the obligation on the merging parties to obtain and submit a certificate compiled by a reporting auditor in respect and the tender

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<sup>19</sup> Currently the Mosstrich feathers that are sold via tender is about █% of the total feathers that are sold by the merging parties off the slaughter line. The condition relates to a guarantee of the sale of █% of the slaughter line feathers on tender indefinitely. Although this tender of █% is █ the abovementioned █%, this is █.

condition relating to ostrich feathers,<sup>20</sup> and to bear the costs occasioned by the employment of the reporting auditor (see condition 8). Furthermore, the merged entity's reporting obligations in relation to ostrich feathers include details regarding: (i) the total number of ostriches of which feathers are offered on tender; (ii) the total number of ostriches slaughtered at the abattoirs; (iii) the total number of ostriches of which producers retain feathers by agreement with the merged entity; and (iv) the percentage of feathers placed on tender in accordance with the prescribed formula. Furthermore, if the merged entity does not allow ostrich farmers to retain their feathers, if they so wish, they will complain to the Commission. This adequately addresses the Commission's concern that the tender process may post-merger be manipulated, or volumes distorted.

[88] We are satisfied that the imposed tender-based conditions in relation to slaughter line ostrich feathers adequately address the input foreclosure concerns raised. The conditions are responsive to the concern that the Mosstrich feathers that were available on tender pre-merger ought to remain available on tender post-merger and therefore is adequate and proportionate since they preserve the pre-merger status quo by ensuring that the equivalent volume of Mosstrich slaughter line feathers will remain available on tender post-merger.

[89] We next discuss ostrich meat.

## **Ostrich meat**

### ***Market delineation***

[90] The Commission in the course of its investigation contacted a number of retail and wholesale customers and competitors of the merging parties to solicit their views of the competitive landscape and the proposed transaction. It specifically asked market participants whether ostrich meat competes with other red meat with reference to product characteristics, price, the customers' income bracket and other factors. In order to assess potential substitution, the Commission also conducted a retail price analysis comparing the prices of different cuts of ostrich, beef and lamb to determine whether there are significant price differences between the products.

[91] Based on the responses received, the Commission, from a functional perspective, concluded that ostrich meat constitutes a distinct relevant product market - excluding other

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<sup>20</sup> The same applies to the volume-based condition relating to ostrich meat.

red meat products such as beef and lamb - because it contains lower fat and cholesterol and is therefore a healthier option. It found that ostrich meat is a niche product, primarily consumed by higher Living Standard Measure ("LSM") customers, as opposed to the broader range of customers that purchase beef.

[92] In relation to price, the Commission submitted that beef pricing cannot be considered a competitive constraint for any cut of ostrich meat regardless of whether analysed from retail data, wholesale data or competitive dynamics per meat species. The Commission based this on several factors. First, the prices of ostrich meat have been kept fairly stable in South Africa. Further, unlike beef and lamb which is priced weekly, ostrich meat negotiations are done every six months. The Commission contended that the price differences between ostrich steak and fillet and similar beef cuts were on average outside the SSNIP<sup>21</sup> band meaning that the merged entity could profitably increase the price of ostrich meat by more than 5 to 10%. The Commission said that this was confirmed by De Wet's evidence of a 2018 price increase to one specific customer of approximately █% on ostrich trimmings.<sup>22</sup>

[93] The merging parties contested the Commission's market delineation contending that it is too narrow and disregards genuine competitive constraints on ostrich meat products in South Africa.

[94] To deal with the competitive dynamics relating to ostrich meat, both the merging parties and the Commission called factual witnesses from the retail sector, Hunter from Shoprite Checkers and Roets from Spar. Unfortunately, neither party called a witness from the wholesale sector – this means that we do not have a clear view of how the wholesale buyers of ostrich meat see the relevant product market based on their customers' (such as restaurants and food processors) considerations.

[95] Hunter from Shoprite Checkers, called by the merging parties, indicated that there is a small demand for ostrich meat in the Shoprite stores.<sup>23</sup> He said that ostrich meat products are kept in the Shoprite cabinet to compete with other retailers such as Woolworths who have a range: "*I really keep it in my cabinet because we* █  
█".<sup>24</sup> Consumer choice therefore is a relevant factor from a retail perspective. We shall come back to this issue below.

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<sup>21</sup> A small but significant non-transitory increase in price.

<sup>22</sup> Transcript, page 143, line 2, to page 144, line 15.

<sup>23</sup> Transcript, page 275, line 1.

<sup>24</sup> Transcript, page 275, lines 1 to 3.

[96] In relation to price, Hunter indicated that he pays significantly more for ostrich fillet than for beef fillet.<sup>25</sup> However, he said that ostrich trimmings, specifically “A trim”, are cheaper than beef trimmings, but it depends on the quality of the trim and what you are comparing.<sup>26</sup> Ostrich trimming products, such as ostrich sausage, mince and burger patties, service a wider and more price sensitive customer base than fillet and steak, i.e. the middle tier LSM.<sup>27</sup>

[97] In relation to potential substitution, Hunter’s evidence in essence was that ostrich meat competes with similar cuts of beef and other red meat.<sup>28</sup> His view was that only a small portion of retail customers would (still) pay a higher price for ostrich meat purely based on preferences. He confirmed that Checkers compares ostrich meat prices with the price of beef. Further, most customers would not purchase ostrich meat products that are priced substantially higher than other red meat products such as beef.<sup>29</sup>

[98] Roets of Spar initially described ostrich meat is a “*destination category*” explaining that it is a unique type of meat appealing to a niche portion of health conscious, higher LSM consumers and therefore is not substitutable with for example beef.<sup>30</sup> He testified: “... we believe that ... ostrich meat is marketed as a more healthier option of protein. And for that reason we can’t really compare that against beef, which is obviously if you take the whole carcass of an animal, of a beef animal, there’s certain types of markets that it fits to. And that’s really why. So when we look at ostrich we don’t really look at ostrich in comparison versus the other species.”<sup>31</sup>

[99] From a price perspective, Roets indicated that increases in the price of ostrich have no effect on the other types of meat in Spar.<sup>32</sup>

[100] However, despite his earlier statements suggesting there to be no substitutability between ostrich meat and other meat products, under cross-examination Roets conceded that ostrich may be substitutable with certain other meat products that offer similar benefits to consumers or are better priced. When probed on what these other meat options may be Roets initially listed venison,<sup>33</sup> but subsequently also stated that white meat such as

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<sup>25</sup> Transcript, page 274, lines 2 to 6.

<sup>26</sup> Transcript, page 282, line 1, to page 283, line 2.

<sup>27</sup> Hunter, Witness Statement page 94 of the record, paragraph 19.

<sup>28</sup> Transcript, *inter alia* page 257, line 1, to page 259, line 20.

<sup>29</sup> Transcript, pages 256 to 259. Hunter, Witness Statement pages 93 to 95 of the record, paragraphs 17 to 21.

<sup>30</sup> Transcript, page 322, lines 14 to 20; page 323, lines 6 to 12.

<sup>31</sup> Transcript, page 323, lines 6 to 12.

<sup>32</sup> Transcript, page 322, lines 14 to 20.

<sup>33</sup> Transcript, page 349, lines 3 to 8.

chicken or fish, from a functional perspective, could be alternatives to ostrich. He stated: “... again like I said, because your white meats, so fish and chickens is considered as white meat and also not as high in fat as your beef, lamb and pork I do believe that people would consider switching to those type of meat proteins as well.”<sup>34</sup> He further testified that the per kilo price of chicken is significantly lower than ostrich.<sup>35</sup>

[101] The Commission’s expert economist, Ranenyeni, contended that even though the factual evidence may suggest that ostrich meat could be substituted with other sources of protein from a functional perspective, it is not substitutable from an economic perspective. This she based *inter alia* on the price data contained in Exhibit B and the evidence of De Wet indicating the actual retail price differences between ostrich meat and other types of meat. Ranenyeni said that these data show that the price difference between venison and ostrich is in the range of 13% - in either direction. She said that this range is beyond 10% and the standard SSNIP test. With regards to beef she testified that the Commission found that there is a band between ostrich prices and beef prices ranging from approximately 13% in the instance of fillet and 20% in the instance of rump. She therefore concluded that the pricing of beef does not constrain the pricing of ostrich.<sup>36</sup>

[102] One issue was common cause between the economic experts namely that the demand for ostrich meat in South Africa is elastic. Ranenyeni stated and explained “*it’s common cause that the demand for ostrich meat is elastic, I agree. And what that simply means is that an increase in price will result in more than 1% of a decrease in volume*”.<sup>37</sup> Ranenyeni however indicated that one does not know where those lost volumes are going, and specifically that one does not know that those volumes are being substituted for beef.<sup>38</sup>

[103] Theron, the merging parties’ economic expert, argued that there is a conceptual problem with the Commission’s analysis and that its reasoning is problematic from an economic theory perspective.<sup>39</sup> Theron submitted “*the Commission has a problem on the own price elasticity because of the, if the whole category is elastic then you have to think about where these people will switch to. So, that analysis we haven’t seen. We have seen a result from the Competition Commission that says that the own price elasticity is elastic*”.<sup>40</sup> She further referred to various pieces of factual evidence and concluded that

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<sup>34</sup> Transcript, page 347, line 18, to page 348, line 2.

<sup>35</sup> Transcript, page 366, lines 1 to 8.

<sup>36</sup> Ranenyeni, transcript, page 816, line 3, to page 817, line 19.

<sup>37</sup> Transcript *inter alia* page 828, line 20, to page 829, line 2.

<sup>38</sup> Transcript, page 829, lines 2 to 4.

<sup>39</sup> Transcript, page 827, line 11, to page 828, line 9.

<sup>40</sup> Transcript, page 832, lines 10 to 16.

*“there must be some constraint in this category, and we see it from the own price elasticity”.*<sup>41</sup>

[104] As noted above, we have no factual testimony on how the wholesale buyers of ostrich meat view the relevant product market since no witness was called from the wholesale sector by either side.

[105] Given the merging parties’ tendered volume-based remedy in relation to the post-merger supply of ostrich meat in South Africa, our assessment will focus on the adequacy of the proposed remedy. We specifically consider two key factors: (i) the importance of choice to South African consumers i.e. having ostrich meat products available to them post-merger; and (ii) the extent to which the tendered volume condition itself, as well as the availability of other meat products to consumers may post-merger constrain the merged entity’s pricing of ostrich products in South Africa.

[106] Before we deal with the proposed volume-based remedy, we first discuss the Commission’s theory of harm and the corresponding arguments of the merging parties.

#### ***Unilateral effects***

[107] Assuming a narrow product market for ostrich meat, the Commission argued that KKI and Mosstrich are the two largest players in South Africa, thus the proposed transaction constitutes a merger to near monopoly and raises significant unilateral concerns. Acquiring a near monopolist position in the market would provide the merged entity with both the incentive and ability to reduce local ostrich meat volumes and / or increase prices to the detriment of South African consumers. It argued that post-merger nothing would prevent or restrict the merged entity from deciding not to sell ostrich meat to the South African market. This is exacerbated by the fact that the ostrich industry as a whole, including the ostrich meat market, is characterized by high barriers to entry.

[108] The Commission found that the correct proxy for market shares is the actual volumes supplied to the local market instead of the overall slaughter volumes (as proposed by the merging parties). Based on this, the Commission estimated that the merged entity would have a market share of approximately 86%. The remaining players in the market are Ostriland and Gondwana, neither of which would be capable of constraining the merged entity due to their relatively small presence in the market.

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<sup>41</sup> Transcript, page 832, line 8, to page 835, line 21.



[109] In terms of restricting ostrich meat volumes in South Africa post-merger, the Commission submitted that the proposed merger would not only remove an effective competitor to KKI, but would remove the more reliable supplier to the local market in times of no export bans when there is a greater incentive to short the local market. According to De Wet, ostrich meat could fetch R160/kg for steak and R240/kg for fillet on the export market, compared to the average of R70/kg for steak and R115/kg for fillet on the local market.<sup>42</sup> It is therefore clear that any profit maximising firm would divert sales to the export market.

[110] The Commission further contended that even during periods where export bans are present, the merged entity could still reduce the supply of ostrich meat to the local market in favour of exporting more heat-treated ostrich meat. This led to the concern that the merging parties would divert ostrich meat sales to the export market irrespective of whether an export ban was in place and increase the price of local ostrich meat post-merger.

[111] The merging parties contested the Commission's unilateral effects analysis. They argued that certain evidence from retailers such as Shoprite and Woolworths, the largest two retailers of ostrich meat in South Africa, supported the view that switching to alternative suppliers is possible. Hunter indicated "*there is* [REDACTED] [REDACTED]. *And then also if it comes to push I think* [REDACTED] [REDACTED] [REDACTED]"<sup>43</sup>

However, this argument assumes that these potential alternative sources of supply are not constrained in their ability to supply due to, for example, existing contracts / volume commitments to customers. The Commission argued that a supplier like Ostriland would not be a credible alternative to local customers because of quality issues or the inability to supply the required volumes.<sup>44</sup>

[112] The merging parties further contended that the prices of ostrich meat in South Africa are constrained by beef prices and that there was sufficient evidence from a retail perspective showing customer switching from ostrich to beef and in some cases to chicken.

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<sup>42</sup> De Wet, Witness Statement page 39 of the record, paragraph 58.1.

<sup>43</sup> Transcript, page 249, line 18, to page 250, line 3.

<sup>44</sup> Ranenyeni, transcript page 818, lines 1 to 7.

[113] The merging parties also contended that it would not make commercial sense to stop supplying the local market at any point given the ongoing threat of AI, a sentiment shared by Shoprite. Hunter submitted: *"many of these meat suppliers that exported previously, I think they've come to learn that you should try and run your business in the local market. And then take the cream, when and if it comes, to export. And I think Klein Karoo they've been through that exercise before. So has Mosstrich on the export side. So, I don't think they're ever going to neglect the local market the incident we had in 2007 where it just became too expensive to sell. So I think the marketplace will keep it intact."*<sup>45</sup>

[114] Notwithstanding the merging parties' position, in order to address the Commission's concerns, they ultimately tendered a volume-based condition that requires the merged entity to provide certain minimum volumes of ostrich steak and fillet, as well as trimmings, to the South African market for an indefinite period.<sup>46</sup> This remedy will be discussed in more detail below.

[115] With regards to the exportation of ostrich meat, Schoeman made it clear that exports are a priority to the merging parties. He testified: *"We want to export everything, let us be clear about that, but we cannot because of the risk."*<sup>47</sup> This must be read with the merging parties' stated rationale for the proposed transaction to *inter alia* pool personnel and marketing resources in order to expand existing and access new export markets (see paragraph 25 above). Furthermore, as indicated (see paragraph 39 above), the merging parties have managed to export heat-treated ostrich meat products successfully. Thus, there is a real risk of ostrich meat not being available to the South African market post-merger.

[116] As already indicated above, Hunter explained that ostrich meat is not a high demand product in the South African retail sector, but that retailers keep the product to ensure that they have a variety of meat options in their cabinet in order to compete with other retail stores.<sup>48</sup>

[117] In relation to the potential effects of the proposed transaction on ostrich meat prices in South Africa, the body of evidence provided by Hunter, from a retail perspective, was that the merged entity will have limited potential to unilaterally increase prices because meat generally has become price sensitive and ostrich meat pricing is constrained by the prices

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<sup>45</sup> Transcript, page 261, lines 1 to 8.

<sup>46</sup> See condition 4 of the imposed conditions.

<sup>47</sup> Transcript, page 626, lines 17 to 19.

<sup>48</sup> Transcript, *inter alia* page 275, lines 1 to 5.

of certain other meats. He noted that South Africa customers have become price sensitive when they buy meat products: "... in every price range in your cabinet there is now multiple products and everything is expensive. So, it's difficult to choose when you stand in front of the cabinet. People are price sensitive ..."<sup>49</sup> He further testified "if you go and you add together all the ostrich sales and the volume sold for the year on average pricing, you will see that we are currently on most of the cuts slightly under beef ... And every item's got like a threshold. If you go over that price and you look at the volumes then it comes down significantly".<sup>50</sup> "I always say to ... the ostrich guys when they come to me for an increase I would say, listen, guys, you must be careful. We're not selling a lot. As soon as those cuts are above beef cuts and other cuts in the cabinet then you're on dangerous territory because the volumes come down. Last year I think we, I speak under correction, but I think we had one increase last year if I'm not mistaken, from Mosstrich. I'm 22% down 10 on volume this year that ended Sunday, compared to the previous year. So, ja, people are very – they know prices now much better than in the past. And I think you walk through those cabinets before you make a decision".<sup>51</sup>

[118] Hunter further said that where meat prices increase, a retailer's first response is not to "merchandise down" the more expensive products, but rather to place them on a shelf that is eye-level or slightly more visible to the consumer to try and encourage sales. He however said that where ostrich prices become too expensive so that the retailer needs to pay in, the retailer may need to remove the product from the cabinet.<sup>52</sup> His testimony was: "There is, as I said earlier, a very small niche market still that I think would pay ... there comes a day where the waste on the products that you have to recover from you cabinet, just like kills it ...."<sup>53</sup> This must be read with the abovementioned evidence that retailers keep ostrich products on their shelves in order to compete with their rivals.

[119] Although Roets of Spar initially indicated that ostrich meat is a "destination product" and not comparable with beef and other meat products, he later conceded that ostrich meat may, from a functional perspective, be substitutable with other types of meat such as venison, chicken and even fish. This suggests that ostrich prices could potentially be constrained by the prices of other types of meat.

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<sup>49</sup> Transcript, page 253, lines 14 to 18.

<sup>50</sup> Transcript, page 255, lines 6 to 18.

<sup>51</sup> Transcript, page 254, lines 4 to 13.

<sup>52</sup> Transcript, pages 258 and 259.

<sup>53</sup> Transcript, page 257, line 21, to page 259, line 1.

[120] The merging parties further argued that the tendered volume commitment would oblige the merged entity to find a local market to sell their ostrich meat or it would suffer inefficiencies. We concur that the tendered supply condition (i.e. the requirement on the merged entity to supply certain volumes of specific ostrich cuts in South Africa) would significantly contribute to regulating ostrich meat prices in South Africa post-merger since it would impose a pricing constraint on the merging parties based on the forces of demand and supply.

[121] Furthermore, based on the evidence of the two retailers who testified, we cannot conclude that ostrich meat prices in South Africa will post-merger not be constrained by the prices of other meat products.

[122] For the above reasons we - in this case - conclude that there is not sufficient evidence that a pricing remedy in relation to ostrich meat is warranted to address the competition issues. The merged entity's ostrich meat pricing in South Africa would be constrained by a combination of factors, (i) there is a small demand for ostrich meat in South Africa; (ii) the imposed volume condition that obliges the merged entity to sell certain minimum volumes of different ostrich meat cuts in South Africa which will affect its pricing ability in South Africa; and (iii) the constraining effect on the merged entity's ostrich meat pricing of other meat cuts to which certain customers could switch, although we lack evidence regarding the proportion of customers that are likely to switch in response to a SSNIP.

[123] We highlight that the above issue of a pricing remedy not being warranted in this case was a crucial consideration in the Tribunal's decision to conditionally approve the proposed transaction. If a pricing remedy was indeed required to address the competition concerns in relation to ostrich meat - which is not the case here - then the Tribunal would have been reluctant to accept any behavioural remedy since we are mindful of the well-established principles that caution antitrust authorities against assuming the role of a price regulator in markets.

[124] We next discuss the tendered and imposed volume-based remedy in more detail.

### ***Volume remedy***

[125] In relation to the tendered volume condition for ostrich meat, we note that the merging parties during the Tribunal proceedings amended and enhanced the remedy in response to a number of issues raised during the proceedings.

[126] For the sake of completeness, we note that the merging parties initially proposed a structural remedy in the form of the divestiture of the Swellendam abattoir. However, it emerged from the factual evidence that the divestiture of the Swellendam abattoir would not be a viable and effective remedy since it would not restore any lost competition in the market resulting from the proposed transaction. This is because the Swellendam abattoir is located too far away from the majority of ostrich farmers to be viable. If ostrich farmers were to slaughter at this abattoir, they would incur increased transportation costs and significant risks associated with the transportation of the live birds to this location. Schoeman testified: “*we closed that abattoir down two years approximately ago. Why? Because there are not enough ostriches. We cannot – it’s not profitable to keep that doors open of the abattoir ...*”.<sup>54</sup> The merging parties ultimately withdrew the Swellendam divestiture remedy.

[127] We further note that the merging parties’ initial volume commitment was to supply (at least) █% of their ostrich meat to the local market for (at least) a three-year period.<sup>55</sup> The Commission indicated that this low volume commitment was totally inadequate since it would be insufficient to meet the domestic demand. The merging parties responded to this concern by raising the volume contained in their commitment.

[128] The Commission also indicated that a remedy with a limited duration of three years would be insufficient in light of the permanent structural change to the market resulting from the proposed transaction, as well as the dynamics of the industry and how long it would take any potential entrant to effectively compete with the merged entity. We concur with the Commission on this score.

[129] When questioned regarding the basis for the limited duration of the proposed remedy, the merging parties’ factual witnesses were unable to provide any reason why a three-year period would address the competition concerns resulting from the proposed transaction based on the theories of harm.<sup>56</sup> The merging parties however responded to this by altering the duration of the tendered volume remedy – ultimately to an indefinite period, which addressed the Tribunal’s concern.

[130] The Commission further raised a concern that the volume commitment was too broadly formulated since it referred to “ostrich meat products” in general without specific reference to different ostrich cuts such as fillet, steak and trimmings. The Commission noted that the

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<sup>54</sup> Transcript, page 441, line 20, to page 442, line 2.

<sup>55</sup> See paragraph 2 of the initial *Consolidated list of undertakings proposed by the merging parties*.

<sup>56</sup> See for example De Wet, transcript page 194; page 214, line 14, to page 215, line 11.

merging parties generally do not export trimmings, but that it is imperative that the local volume commitment aims to ensure that adequate volumes of specifically ostrich fillet and steak are supplied to the local market.<sup>57</sup> The merging parties responded to this concern by committing to certain minimum volumes of specific ostrich meat cuts to be supplied in South Africa post-merger, i.e. to make available to the local market █% of all ostrich steak and fillet and █% of all ostrich trimmings produced by the merged entity.

[131] According to the merging parties the above percentages were higher than their current supply to the local market in the most recent year. The Commission however argued that the volume commitment to the local market should be far higher if sales in the period 2015 – 2017/8 are considered. This latter period includes years in which the export ban on raw ostrich meat was in place. The merging parties responded by arguing that the Commission's analysis was flawed since it took into account data from the years in which export bans on ostrich meat were in place. During the export ban periods, the merging parties were forced to sell high volumes to the local market at prices substantially lower than that achieved in the export markets. This they argued distorts the overall picture for the purpose of the volume condition, since the condition is specifically intended to address periods when export bans are not in place when sales could be diverted to the export markets. For this reason, the merging parties reaffirmed their approach of using 2016<sup>58</sup> as the base year for determining the volume condition since it reflects the data for the most recent annual period in which export bans were not in place. We concur with the merging parties' approach. AI and the corresponding export bans remain a concern for the industry and the (most recent) period in which bans were not in place, is the appropriate benchmark for addressing the competition concerns in relation to ostrich meat.

[132] The merging parties further noted that pre-merger there is no obligation on each of them to supply any specific volume of ostrich meat to the local market. The individual parties could elect to export all ostrich meat and / or short supply the local market without any restriction.

[133] As indicated above, the merging parties' revised volume condition specifically addresses the concern that the condition must apply to specific categories of ostrich meat, i.e. fillet, steak and trimmings. The merging parties furthermore revised the duration of the volume condition to an indefinite period in response to concerns regarding the permanent structural change to the market.

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<sup>57</sup> Ranenyeni, transcript page 842.

<sup>58</sup> The 2016 year was the most recent calendar year in which no comprehensive export ban prevailed and therefore presents the position pre-merger of local sales in the absence of an export ban.

[134] Although we are mindful of the Commission's monitoring and enforcement roles in relation to behavioural remedies, we are of the view that the monitoring of the volume commitment in this matter – we stress, without a pricing remedy since it is not warranted in this case – will not be overly burdensome on the Commission.

[135] The ultimate condition that we have imposed in relation to ostrich meat requires the merged entity to in every reporting period (i.e. annually) make available for sale in the local market at least ■% of all ostrich steak and fillet and ■% of all ostrich trimmings produced by the merged entity (see condition 4, read with paragraph 1.31). This condition will be effective indefinitely, subject to a variation clause (see condition 4.2, read with paragraph 9).

[136] The above commitment in our view is proportional to the competition harm contemplated. It specifically addresses the major concern in relation to ostrich meat post-merger, i.e. that of choice - South African consumers (still) having the choice of buying ostrich meat after the proposed transaction. As explained above, a number of factors, including the volume remedy itself, will have a constraining effect on the merged entity's pricing of ostrich meat in South Africa.

[137] We next discuss post-merger third party access to the merged entity's abattoirs and tanneries.

### **Third party access to the merged entity's abattoirs and tanneries**

[138] The Commission considered whether the proposed transaction would adversely affect third parties that require access to the merged entity's abattoirs and tanneries.

[139] In relation to abattoirs, the Commission calculated the merging parties' market shares based on (i) the number of ostriches slaughtered; and (ii) the revenue generated from local ostrich meat sales. In terms of the total number of ostriches slaughtered, the Commission found that KKI and Mosstrich are the two largest players and that the merged entity would have a market share of approximately 84% at the abattoir level. In terms of ostrich meat sales in South Africa, the Commission found that the merged entity's post-merger market share would be even higher, approximately 91%. The Commission concluded that these high market shares are indicative of the merged entity's significant market power in the market for the production and supply of ostrich meat in South Africa. This is intensified by the fact that the merging parties are vertically integrated. In addition, neither Ostriland nor

Gondwana would be capable of constraining the merged entity due to their relatively small presence in the market(s).

[140] Based on the Commission's findings that the proposed transaction would give rise to a near monopoly in the ostrich industry, that the merged entity would have market power at the abattoir level and that the Mosstrich tanneries would post-merger be housed within the merged entity, the Commission was concerned that third parties would be precluded from accessing the merged entity's abattoirs and / or tanneries or would be granted access on less favourable terms than were available pre-merger.

[141] The merging parties contended that given the large scale exit by ostrich farmers in South Africa and the rationale of the proposed merger to stabilize the ostrich industry in South Africa which is suffering tremendous decline, it would not make commercial sense for them to exclude third parties from accessing their abattoirs and tanneries, especially whilst having significant excess capacity.

[142] It was common cause that there is currently excess capacity at the merging parties' abattoirs and tanneries. The annual abattoir capacity per facility (Oudtshoorn, Graaff-Reinet, Mossel Bay and De Aar) at the implementation date is set out in paragraph 1.2 of the imposed conditions; and the annual tanning capacity per facility (Oudtshoorn and Mosstrich) at the implementation date is set out in paragraph 1.24 of the imposed conditions.

[143] The Commission further expressed concerns regarding the potential post-merger closure of certain of the merged entity's facilities. In this regard we note that the merging parties' largest abattoir is the one situated at Oudtshoorn (in the geographic area where the most ostriches are reared), with a slaughter capacity for 252 000 ostriches per annum. The tanning facility there has a capacity of 300 000 ostrich skins per annum. It is common cause that, in the most recent slaughter season, only 123 000 ostriches were slaughtered in total, still leaving significant excess capacity compared to the capacity currently utilized.

[144] In addition, the likelihood of a closure of the Mosstrich abattoir situated at Mossel Bay (which has a further capacity of 108 000 ostriches per annum) is low. The evidence before us was that the Mossel Bay facility serves the farmers in that geographic catchment area i.e. farmers in the Southern Cape, who are reluctant to transport birds to the Oudtshoorn facility, given the risks inherent in such transport.<sup>59</sup> Furthermore, should the merged entity

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<sup>59</sup> Transcript, page 185, line 19, to page 186, line 3; page 186, line 7, to page 187, line 2.



significantly reduce its capacity post-merger, in terms of condition 9 of the imposed conditions, the Commission may, on good cause shown, apply to the Tribunal for the waiver, relaxation, modification, variation and / or substitution of one or more of the conditions.

***Remedies relating to third-party access to abattoirs and tanneries***

[145] Whilst not agreeing with the Commission's analysis in relation to access, the merging parties provided remedies to address this concern. We discuss these remedies next.

[146] Two categories of remedies are applicable in relation to third party access to the merging parties' abattoirs and tanneries. These are contained in conditions 2 and 3 respectively as imposed by the Tribunal.

[147] Condition 2 deals with general access to the merged entity's abattoirs and tanneries. The condition requires that whilst the merged entity has excess abattoir and tanning capacity, it must offer any third party requiring access to its abattoirs and tanneries with access on terms that are fair, reasonable and non-discriminatory (so-called "FRAND terms"). Furthermore, should the merged entity decline to provide any third party with access to its abattoirs and / or tanneries, it must provide detailed and specific written reasons on request of the affected party and the Commission within seven business days of receiving the request from the party.

[148] The above general provision is warranted to ensure that all current market participants, as well as potential new entrants into the affected markets, are able to obtain access to the merged entity's abattoirs and tanneries post-merger.

[149] Condition 3 relates to two specific third parties that currently make use of the merging parties' abattoir and tanning services. These are Buffelskom Boerdery Pty Ltd ("Buffelskom") and Ostriland.

[150] To contextualise the latter condition, it is important to note that the above two entities currently do not own any abattoirs and tanneries and therefore concluded agreements with the merging parties to use their facilities. The imposed conditions aim to ensure that the Buffelskom and Ostriland agreements are retained on the same terms, or even better terms (in certain respects), post-merger as prior to the proposed merger.

[151] In relation to the Ostriland agreement with Mosstrich, Van Zyl explained the history and his concerns about the proposed transaction. He testified that his primary concern

was that the contract for slaughtering services could be terminated if the merger goes ahead since his relationship is with Mosstrich and not KKI.<sup>60</sup> He submitted that although he previously slaughtered at KKI's abattoirs, KKI discontinued those contracts when Ostriland started expanding its business across the three products and penetrating new markets. He testified: "*Ja, we are opponents, we are pumping for the same market and then, ja, then they [KKI] said but they are not going to slaughter anymore for me. Because we are – I was infiltrating their markets ....*"<sup>61</sup>

[152] Van Zyl's other concern was the ability to post-merger still be able to take back his ostrich meat, feathers and leather.<sup>62</sup>

[153] We further note that the existing agreement contained a provision that prevented Ostriland from building its own abattoir for the duration of the contract. Van Zyl's evidence was that this provision was [REDACTED]. His evidence was that it would [REDACTED] [REDACTED] the contract with the merging parties.<sup>63</sup> The merging parties agreed to remove the restriction from the contract preventing Van Zyl from building his own abattoir and also agreed to extend the notice period to 24 months.

[154] Similarly, the existing agreement with Buffelskom contained a provision preventing it from competing with Mosstrich for the duration of the agreement. As was the case with the restriction imposed on Van Zyl, the merging parties agreed to remove this provision from the contract. The notice period in the Buffelskom agreement would also be extended to 24 months.

[155] In terms of the imposed conditions, the existing Ostriland Agreement<sup>64</sup> shall be replaced with a new agreement within one month of the implementation date and will provide for the following –

- (i) the new agreement will remain in place indefinitely subject to a twenty-four-month notice period in which either party may cancel the agreement;
- (ii) the percentage annual inflationary increase of the slaughter fee will not exceed the Abattoir Cost Inflation<sup>65</sup> (as defined) and shall be subject to Expert Determination.

<sup>60</sup> Transcript, page 551, line 14, to page 552, line 8.

<sup>61</sup> Transcript, page 482, line 19, to page 483, line 1.

<sup>62</sup> Transcript, page 551, lines 9 to 11.

<sup>63</sup> Transcript *inter alia* page 492, line 20, to page 493, line 20.

<sup>64</sup> The current agreement between Ostriland and Mosstrich, dated 1 July 2018, for slaughter and tanning services.

<sup>65</sup> See condition 1.3.

- (iii) the percentage annual inflationary increase of the tanning fee will not exceed the Tannery Cost Inflation (as defined) and shall be subject to Expert Determination.
- (iv) Ostriland will not be restricted in any way from competing with the merged entity for the duration of the agreement with the merged entity, including during the notice period, or thereafter. For example, there will be no restriction on Ostriland in respect of the construction of an ostrich abattoir at any time nor will there be any restriction on the processing, marketing and selling of ostrich meat.

[156] The above conditions in relation to Ostriland are sufficient to address Ostriland's concerns regarding access to contract slaughtering services. First, they ensure that the contract is retained post-merger. Second, the restriction on Van Zyl's ability to build his own abattoir at any point is removed. Third, it allows for a 24-month notice period, which will allow Ostriland to continue with the construction of an own abattoir, if it so wishes. Fourth, it provides a mechanism for inflationary fee increases. For the same reasons, the imposed conditions in relation to Buffelskom, as set out below, are sufficient.

[157] The ultimately imposed conditions state that the existing Buffelskom Agreement<sup>66</sup> shall be amended within one month of the implementation date of the proposed transaction as follows:

- (i) the Buffelskom Agreement will remain in place indefinitely subject to a twenty-four-month notice period in which either party may cancel the agreement;
- (ii) the percentage annual inflationary increase of the tanning fee will not exceed Tannery Cost Inflation<sup>67</sup> (as defined) and shall be subject to Expert Determination<sup>68</sup>.
- (iii) Buffelskom will not be restricted in any way from competing with the merged entity during the currency of the Buffelskom Agreement with the merged entity, including during the notice period, or thereafter. For example, Buffelskom will not be restricted by the merged entity from constructing its own tannery at any time.

[158] The above imposed conditions adequately address the concerns relating to post-merger third-party access to the merged entity's slaughter and tanning services.

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<sup>66</sup> The current agreement between Mosstrich and Buffelskom, dated 28 May 2019, for tanning services.

<sup>67</sup> See condition 1.25.

<sup>68</sup> See condition 1.11.

### **Conclusion on competition effects and remedies**

[159] In summary, the Tribunal has imposed three main categories of conditions on this transaction to address any competitive harm resulting from the proposed transaction. The first set of conditions, in relation to ostrich feathers, relate to a tender-based condition to address the issue of input foreclosure in the market for unprocessed feathers. This condition obliges the merged entity to offer at least ■% of the merged entity's slaughter line feathers on tender for an indefinite period. The tender process shall be administered by an independent auditor and the merging parties are obliged to ensure that all third parties (i.e. ostrich farmers) be permitted to retain their feathers, if they so wish, on FRAND terms. The second set of conditions, in relation to ostrich meat, relate to a volume-based condition which obliges the merged entity to make ■% of all ostrich steak and fillet and ■% of all ostrich trimmings produced by the merged entity available to the local market for an indefinite period. The third set of conditions relate to ensuring that the merged entity provide third parties with access to its abattoirs and tanneries on FRAND terms whilst the merged entity has excess capacity and that the existing agreements with Buffelskom and Ostriland are continued on the same or better terms (in certain respects) as prior to the merger. These three categories of conditions collectively (read with the public interest considerations discussed below) adequately address the competition concerns relating to the proposed transaction.

### **Efficiencies**

[160] The merging parties alleged that the proposed transaction will lead to a number of efficiency gains, including:

- the merger is necessary to stabilise the ostrich industry in South Africa and ensure greater return to ostrich farmers in South Africa;
- the merger would facilitate more effective negotiations with industry bodies;
- the merger would enable the merging parties to pool marketing personnel and other resources;
- the merger would generate efficiencies in the leather market; and
- the merger would lead to significant cost savings in terms of distribution, packaging, and logistics arrangements.

[161] It is well established in South African competition law that the Tribunal will only accept efficiencies that have satisfied the legal standard. This requires that the alleged efficiencies must first of all be merger specific and must furthermore be real, verifiable and be passed

on to consumers.<sup>69</sup> Further, the claimed efficiencies must be timely, likely and sufficient to offset any competitive harm. The onus is on the merging parties to prove that the efficiencies satisfy the legal standard.<sup>70</sup> In this regard, we note that the Commission argued that the merging parties did not provide any evidence regarding these efficiencies in which case they could not be deemed to have passed the legal threshold.

[162] The merging parties' economics expert, Theron, conceded that the claimed efficiencies had not been quantified.<sup>71</sup> Similarly, De Wet confirmed that no exercise was done to quantify the claimed efficiencies.<sup>72</sup>

### **Public interest**

#### ***Employment effects***

[163] In relation to the effects of the proposed transaction on employment, the Commission found that the proposed merger is unlikely to give rise to any employment concerns. Nevertheless, the merging parties provided an undertaking that no merger-related retrenchments would take place for three years following the implementation of the proposed merger.

#### ***Other public interest issues***

[164] In relation to the overall effect of the proposed merger on the public interest, the merging parties submitted that this effect is positive since the proposed transaction would enable them to grow and achieve better prices in export markets.

[165] The Commission however rejected the merging parties pro-public interest claims on the basis that the anti-competitive harm associated with the local market cannot be justified or outweighed by anticipated growth in export / international markets.

[166] We next take a closer look at the merging parties' claims.

[167] The merging parties argued that they will pool their resources to effectively market and increase the demand for exported ostrich products. If achieved, the proposed transaction would make the South African ostrich industry globally more competitive in accordance with section 12A(3)(d) of the Act. They further contended that achieving higher prices in

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<sup>69</sup> Trident Steel (Pty) Ltd and Dorbyl Limited (89/LMOct00) [2001] ZACT 2 (30 January 2001).

<sup>70</sup> Pioneer Hi-Bred International Inc. and Pannar Seed (Pty) Ltd (81/AM/Dec10).

<sup>71</sup> Transcript, page 885, line 21, to page 886, line 2.

<sup>72</sup> Transcript, page 197, line 21, to page 198, line 6.

the export markets will in turn benefit the ostrich industry in South Africa and ensure a better return to ostrich farmers in South Africa. They highlighted that a (further) decline in ostrich production volumes in South Africa is likely to have an adverse socio-economic effect in certain geographic regions of South Africa, such as the Klein Karoo and surrounding areas, where ostrich production is concentrated and where economic activity is otherwise limited.

[168] The merging parties specifically argued that the proposed merger would eliminate “fierce” price competition between KKI and Mosstrich in the export markets for ostrich skins. The only quantification provided of this was the claim that this would allow them to increase the price of leather by 1 USA Dollar per square foot in the export markets if they jointly market to the world.<sup>73</sup> Based on the same principle, the potential of a post-merger 1 USA Dollar increase in the per kilo price of ostrich meat in the export markets was also alleged.<sup>74</sup> They argued that such price increases would be significant in Rand terms and would result in a direct increase in the returns to ostrich farmers in South Africa.

[169] Van Zyl however disputed that the merged entity would be able to increase the price of ostrich leather in the export markets, at least for the next two years, since he also competes in that market.<sup>75</sup> Schoeman however said that the merging parties have the best quality and finishes of ostrich leather and export first grade skins to the likes of *Hermes* and alleged that Van Zyl is not active in this high-end side of the ostrich skin export markets.<sup>76</sup> Van Zyl confirmed that he does not currently compete with the merging parties in the export markets for ostrich meat.<sup>77</sup>

[170] In light of the imposed conditions, the proposed transaction will not have any negative effects on the public interest, specifically on ostrich farmers in South Africa. The balance of evidence rather suggests that the proposed transaction may potentially have benefits for ostrich farmers in South Africa - if the merging parties could achieve better export prices for ostrich leather and meat. However, as already indicated, the merging parties’ claimed efficiencies were not properly quantified.

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<sup>73</sup> De Wet, transcript page 75, line 9, to page 76, line 8.

<sup>74</sup> De Wet, transcript page 66, line 10, to page 69, line 7.

<sup>75</sup> Transcript, page 528, line 2, to page 529, line 16.

<sup>76</sup> Transcript, page 702, line 11, to page 703, line 19.

<sup>77</sup> Transcript, page 529, line 17, to page 530, line 2. He however does export pet treats containing ostrich.

[171] What was common cause is that the proposed transaction is taking place in an industry of South Africa that is under stress and in decline. Furthermore, droughts in certain areas of South Africa, the presence of AI and export bans on fresh ostrich meat make the industry volatile and risky, specifically for ostrich farmers in South Africa.

[172] In our final analysis of the effects of the proposed transaction we conclude that the imposed range of remedies adequately address the competition concerns resulting from the proposed transaction and furthermore that the proposed transaction has the potential of benefitting the ostrich industry in South Africa that is in significant decline, if the merged entity could successfully increase export prices over the longer term.

### Conclusion

[173] For the above reasons, the Tribunal approves the proposed transaction subject to the conditions attached hereto marked **Annexure A**.

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**Mr A W Wessels**

**19 December 2019**

**Date**

**Ms Yasmin Carrim and Mr Norman Manoim concurring**

Tribunal Case Managers	: Ammara Cachalia, Karissa Moothoo-Padayachee and Ndumiso Ndlovu
For the Merging Parties	: Advocate Greta Engelbrecht instructed by Adams & Adams Attorneys
For the Commission	: Candice Slump and Romeo Kariga

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(HELD AT PRETORIA)

CT CASE NO: IM238JAN19

*In the reconsideration application:*

KLEIN KAROO INTERNATIONAL (PTY) LTD	First applicant
MOSSTRICH (PTY) LTD	Second applicant
CAPEKAROO (PTY) LTD (PREVIOUSLY OSTRICH SKINS (PTY) LTD)	Third applicant
And	
THE COMPETITION COMMISSION OF SOUTH AFRICA	Respondent

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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. "*Abattoirs*" mean all the abattoir facilities owned and operated by the Merged Entity from time to time and currently are the Oudtshoorn, Mossel Bay, De Aar and Graaff-Reinet abattoirs.

1.2. "*Abattoir Capacity*" means the maximum number of ostriches that can be slaughtered at the Abattoirs per annum. The annual Abattoir Capacity at the Implementation Date is as follows:



1.2.1. Oudtshoorn: 252 000 ostriches per annum;

1.2.2. Graaff-Reinet: 50 000 ostriches per annum;

1.2.3. Mossel Bay: 108 000 ostriches per annum; and

1.2.4. De Aar: 12 000 ostriches per annum.

1.3. “*Abattoir Cost Inflation*” means  $0.7 \times$  (percentage labour and related cost increase) +  $0.15 \times$  (percentage services costs increase including costs such as electricity, water and waste removal) +  $0.1 \times$  (percentage consumables and cleaning cost increase) +  $0.05 \times$  (percentage other cost increases).

*For example:*

<b>Abattoir</b>	<b>Year-on-Year Cost Increase</b>	<b>Weight</b>	<b>Weighted Increase</b>
Labour and Related Cost	7.0%	0.7	4.9%
Services Cost	9.2%	0.15	1.4%
Consumables and Cleaning	8.0%	0.1	0.8%
Other	4.0%	0.05	0.2%
<b>Weighted percentage increase</b>		<b>1.0</b>	<b>7.28%</b>

1.4. “*Approval Date*” means the date referred to in the Tribunal’s merger Clearance Certificate (Form CT10).

1.5. “*Buffelskom*” means Buffelskom Boerdery (Pty) Ltd.

1.6. “*Buffelskom Agreement*” means the current agreement between Mosstrich and Buffelskom, dated 28 May 2019, for tanning services.

- 1.7. "*Business Day*" means any day which is not a Saturday, Sunday or an official public holiday in South Africa.
- 1.8. "*Commission Rules*" mean the Rules for the Conduct of Proceedings in the Commission.
- 1.9. "*Commission*" means the Competition Commission of South Africa.
- 1.10. "Conditions" mean these conditions.
- 1.11. "*Expert Determination*" means the determination by an expert appointed for the purpose of dispute resolution in accordance with Annexure A.
- 1.12. "*Feather Processor*" means any processor or trader of ostrich feathers.
- 1.13. "*Implementation Date*" means the date, occurring after the Approval Date, on which the merger is implemented by the Merging Parties.
- 1.14. "*KKI*" means Klein Karoo International (Pty) Ltd.
- 1.15. "*Local Market*" means the market in South Africa for ostrich meat for local consumption.
- 1.16. "*Merging Parties*" mean KKI and Mosstrich.
- 1.17. "*Merged Entity*" means the consolidated businesses of KKI and Mosstrich, which will be named CapeKaroo (Pty) Ltd after the Approval Date.
- 1.18. "*Mosstrich*" means Mosstrich (Pty) Ltd.
- 1.19. "*Ostriland*" means Ostriland Import Export (Pty) Ltd.

1.20. "*Ostriland Agreement*" means the current agreement between Ostriland and Mosstrich, dated 1 July 2018, for slaughter and tanning services.

1.21. "*Reporting Auditors*" mean the appointed auditors for the Merged Entity from time to time.

1.22. "*Reporting Period*" means a financial year of the Merged Entity.

1.23. "*Tanneries*" mean the tannery facilities owned and operated by the Merged Entity from time to time and include the Mossel Bay and Oudtshoorn tanneries.

1.24. "*Tanning Capacity*" means the maximum number of ostrich skins that can be tanned at the Tanneries per annum. The annual Tanning Capacity at the implementation date is as follows:

1.24.1. Oudtshoorn: 300 000 ostrich skins per annum; and

1.24.2. Mosstrich: 75 000 ostrich skins per annum.

1.25. "*Tannery Cost Inflation*" means  $0.46 \times (\text{percentage labour and related cost increase}) + 0.35 \times (\text{percentage chemicals cost increase}) + 0.1 \times (\text{percentage municipal cost increase}) + 0.09 \times (\text{percentage consumables cost increase})$ .

For example:

Tannery	Year-on-Year Cost Increase	Weight	Weighted Increase
Labour and Related Cost	7.5%	0.46	3.5%
Chemicals Cost	8.0%	0.35	2.8%
Municipal Cost	9.2%	0.10	0.9%
Consumables Cost	4.0%	0.09	0.4%
<b>Weighted percentage increase</b>		<b>1.0</b>	<b>7.53%</b>

- 1.26. “*Tender Auditors*” mean the auditors responsible from time to time for the administration of the Tender System, currently Saayman & Kie Rekenmeesters.
- 1.27. “*Tender Condition*” means the obligation on the Merging Parties in each Reporting Period to offer on Tender at least 40% of the Merged Entity’s slaughter line feathers.
- 1.28. “*Tender System*” means the tender system managed by the Tender Auditors on behalf of KKI and after the Implementation Date on behalf of the Merged Entity.
- 1.29. “*Tribunal*” means the Competition Tribunal of South Africa.
- 1.30. “*Third Parties*” mean ostrich producers in South Africa.
- 1.31. “*Volume Condition*” shall mean the obligation on the Merged Entity in every Reporting Period to make available for sale in the Local Market at least [REDACTED] of all ostrich steak and fillet and [REDACTED] of all ostrich trimmings produced by the Merged Entity.

## **2. General access to Abattoirs and Tanneries**

- 2.1. Whilst the Merged Entity has excess Abattoir Capacity and Tanning Capacity, the Merged Entity must continue to offer access to its Abattoirs and Tanneries to any party requiring access on terms that are fair, reasonable and non-discriminatory (in respect of pricing, quality and timeliness).
- 2.2. Should the Merged Entity decline to provide any party with access to Abattoirs and/or Tanneries, it must provide detailed and specific written reasons on request of the affected party and the Commission within seven (7) Business Days of receiving the request from the party.
- 2.3. Nothing in these Conditions shall be interpreted to create an obligation on the Merged Entity to build infrastructure or make investments outside of its normal course of business.

## **3. Contract access to Abattoir and Tanneries**

### **Buffelskom**

- 3.1. The existing Buffelskom Agreement shall be amended within one (1) month of the Implementation Date as follows:
  - 3.1.1. The Buffelskom Agreement will remain in place indefinitely subject to a twenty-four month (24) notice period in which either party may cancel the agreement.
  - 3.1.2. The percentage annual inflationary increase of the tanning fee will not exceed Tannery Cost Inflation and shall be subject to Expert Determination.

3.1.3. Buffelskom will not be restricted in any way from competing with the Merged Entity during the currency of the Buffelskom Agreement with the Merged Entity, including during the notice period, or thereafter. For example, Buffelskom will not be restricted by the Merged Entity from constructing its own tannery at any time.

3.2. The amended agreement duly signed by both parties shall be submitted to the Commission within two (2) months of the Implementation Date.

### **Ostriland**

3.3. The existing Ostriland Agreement shall be replaced with a new agreement within one (1) month of the Implementation Date and will provide for the following –

3.3.1. The new agreement will remain in place indefinitely subject to a twenty-four (24) month notice period in which either party may cancel the agreement.

3.3.2. The percentage annual inflationary increase of the slaughter fee will not exceed the Abattoir Cost Inflation and shall be subject to Expert Determination.

3.3.3. The percentage annual inflationary increase of the tanning fee will not exceed the Tannery Cost Inflation and shall be subject to Expert Determination.

3.3.4. Ostriland will not be restricted in any way from competing with the Merged Entity for the duration of the agreement with the Merged Entity,

including during the notice period, or thereafter. For example, there will be no restriction on Ostriland in respect of the construction of an ostrich abattoir at any time nor will there be any restriction on the processing, marketing and selling of ostrich meat.

3.4. The new agreement duly signed by both parties shall be submitted to the Commission within two (2) months of the Implementation Date.

#### 4. Ostrich meat

4.1. The Merged Entity must comply with the Volume Condition.

For example, the Merged Entity would have complied with the Volume Condition if its volumes are as follows:

	Volume sold in local market (in ton)	Total volume produced (in ton)	Proportion of total volume produced
Fillet and Steak	■	■	■
Trimmings	■	■	■

4.2. The Volume Condition will be effective indefinitely, subject to paragraph 9 below.

4.3. The percentages referred to in the Volume Condition will remain confidential.

## 5. Ostrich feathers

5.1. The Merged Entity must comply with the Tender Condition in accordance with the following formula:

$$U = \frac{X}{(Y-Z)} \times 100\%$$

where –

*(X) is the total number of ostriches of which feathers are offered on Tender.*

*(Y) is the total number of ostriches slaughtered at the Abattoirs.*

*(Z) is the total number of ostriches of which producers retain feathers.*

5.2. In order for the Merged Entity to comply with the Tender Condition, U must be equal or greater than 40%.

For example, assuming that:

$$X = 34\ 000$$

$$Y = 100\ 000$$

$$Z = 23\ 000$$

Then it follows that:

$$U = \frac{34\ 000}{(100\ 000 - 23\ 000)} \times 100\%$$

$$U = 44.2\%$$



5.3. The Merged Entity must allow Third Parties to retain their feathers, on terms that are fair, reasonable and non-discriminatory.

5.4. The Tender Condition will remain in place indefinitely, subject to paragraph 9 below.

## **6. Employment**

6.1. The Merged Entity shall not retrench any employees as a result of the Merger for a period of three (3) years from the Implementation Date.

6.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

## **7. Apparent breach**

7.1. In the event that the Commission receives any complaint in relation to non-compliance with the Conditions or otherwise determines that there has been an apparent breach of any of the Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules.

## 8. Monitoring and Compliance

8.1. The Merged Entity must, within one (1) month of the Implementation Date, inform all existing customers of tanning, slaughtering and ostrich feather-related services of these Conditions in writing. Any new customer of the Merged Entity of tanning, slaughtering and ostrich feather-related services must be informed in writing of these Conditions within one (1) month of becoming a customer of the Merged Entity.

8.2. The Merged Entity must, within one (1) month of the Implementation Date, publish a non-confidential copy of these Conditions on its website in order to promote awareness of the Condition. The Conditions shall remain available on the abovementioned website for the duration of the Conditions.

8.3. For the duration of the Conditions, the Merged Entity will be responsible for submitting within one (1) month from the end of each Reporting Period:

8.3.1. An affidavit confirming compliance in respect of the Volume Condition including a certificate issued by the Reporting Auditor in accordance with Annexure B attached hereto;

8.3.2. An affidavit confirming compliance in respect of the Tender Condition including a certificate issued by the Tender Auditor in accordance with Annexure C attached hereto;

8.3.3. The Merged Entity will pay all the costs associated with the Reporting Auditor and the Tender Auditor;

8.3.4. An affidavit confirming compliance in respect of clause 2 (*General access to Abattoirs and Tanneries*); and

8.3.5. An affidavit confirming compliance in respect of clause 6 (*Employment*) for the three (3) year period from the Implementation Date.

8.4. The Commission may request any information that relates to these Conditions as may be reasonably required to monitor and confirm compliance with the Conditions.

**9. Right to approach the Competition Tribunal**

9.1. On good cause shown, the Merged Entity or the Commission may, on written notice to the other party, apply to the Tribunal for the waiver, relaxation, modification, variation and/ or substitution of one or more of the Conditions, provided that "good cause" shall not include any circumstances which are reasonably capable of being mitigated in another manner, or which could reasonably have been foreseen at the Approval Date of these Conditions.

9.2. For the purpose of this clause, "*good cause*" means any material change or circumstance, which relates, *inter alia*, to:

9.2.1. Local and international market conditions relating to ostrich skins, feathers and/or meat;

9.2.2. The ability or inability of the Merged Entity to export its products, specifically ostrich meat;

9.2.3. Significant decline of slaughter volumes at any of the Abattoirs;

9.2.4. The entry and/ or expansion of an effective competitor to the Merged Entity;

9.2.5. The Merged Entity reaching its Tanning Capacity and Abattoir Capacity;

9.2.6. The legislative or regulatory framework; or

9.2.7. The need for more effective monitoring and enforcement of the Conditions.

## 1. EXPERT DETERMINATION

- 1.1. If any dispute arises at any time in respect of the Tannery Cost Inflation or the Abattoir Cost inflation, either party to the contract shall be entitled to refer the dispute to an expert for determination within ten (10) days.
- 1.2. Neither party shall be entitled to refer such dispute to arbitration and the decision rendered herein shall be by an expert as an expert. Any decision shall be final and binding except in the case of manifest error or fraud.
- 1.3. The procedure for the appointment of an expert shall be as follows:
  - 1.3.1. the party wishing to appoint or to refer a dispute to an expert shall give notice to that effect to the other party and, with such notice, shall give details of the dispute;
  - 1.3.2. the Parties shall meet and endeavour to agree upon a person to be the expert. If, within five (5) days from the date of the notice under 1.3.1 above, the Parties have failed to agree upon an expert, the matter shall forthwith be referred by the party wishing the appointment to be made to the Chairman of the Cape Bar Council (the **Appointor**) who shall be requested to make the appointment of the expert within ten (10) days and, in so doing, may take such independent advice as he thinks fit;
  - 1.3.3. upon a person being appointed as expert under the foregoing provisions, he/she shall be notified of his selection and requested to confirm his acceptance within five (5) days;
  - 1.3.4. if such person does not accept or fails to accept the appointment, the matter shall be referred (by either party) in the manner aforesaid to the Appointor who shall be requested to make an appointment or (as the case may be) a further appointment and the process shall be repeated until a person is found who accepts the appointment as expert; and
  - 1.3.5. if there shall be any dispute between the Parties as to the remuneration to be offered to the expert, then such amount shall be determined by the Appointor whose decision shall be final and binding on the Parties.
- 1.4. A person shall not be appointed as the expert:
  - 1.4.1. unless he/she is qualified by education, experience and training to determine the matter in dispute;
  - 1.4.2. if he/she has an interest or duty which would materially conflict with his/her role (including being a Director, officer, employee, former employee or agent or consultant to a party or to any Affiliate of a party).
- 1.5. The following procedures shall apply where an expert's determination is sought:
  - 1.5.1. each party shall supply to the expert such information as the expert may request;
  - 1.5.2. the expert shall give his decision, with full written reasons, as soon as reasonably practicable after receiving data, information and submissions which shall be supplied to him by the Parties within ten (10) days after confirmation of his appointment;
  - 1.5.3. the expert shall ignore any data, information or submissions supplied and made after the ten (10) Day period referred to in 1.5.2 above unless the same are furnished in response to a specific request from him;
  - 1.5.4. the expert shall be entitled to obtain such independent professional and/or technical advice as he may reasonably require and to obtain any secretarial assistance as is reasonably necessary..
- 1.6. All communications between the Parties and the expert or the Appointor shall be made In writing. No meeting between the expert or the Appointor and the Parties or either of them, shall take place unless both Parties have a reasonable opportunity to attend any such meeting.

- 1.7. Each party shall bear the costs of providing all data, information and submissions given by it, and the costs and expenses of all counsel, witnesses and employees retained by it, but (unless the expert shall make any award of such costs and expenses which award, if made, shall be part of the expert's decision) the cost and expenses of the expert and any independent advisers to the expert, and any costs of his appointment if he is appointed by the Appointor, shall be borne equally by the Parties.

## ANNEXURE B

<b>Reporting Period:</b>	<b>20xx to 20xx</b>		
	<b>Volume sold in local market (in ton)</b>	<b>Total volume produced (in ton)</b>	<b>Proportion of total volume produced</b>
<b>Fillet and Steak</b>			
<b>Trimming</b>			

ANNEXURE C

Reporting Period:	20xx to 20xx				
	X	Y	Z	(Y - Z)	U
	Total number of ostriches of which feathers are offered on tender	Total number of ostriches slaughtered at the Abattoirs	Total number of ostriches of which producers retain feathers by agreement with the Merged Entity		The percentage of feathers placed on tender calculated as follows:  $U = \frac{X}{(Y-Z)} \times 100\%$