

NON-CONFIDENTIAL



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM190Jan17

In the matter between:

THE BRUCE FRUIT (PTY) LTD

Acquiring Firm

and

JAB DRIED FRUIT PRODUCTS (PTY) LTD

Target Firm

| | |
|-------------------|------------------------------------|
| Panel | : Norman Manoim (Presiding Member) |
| | : Yasmin Carrim (Tribunal Member) |
| | : Andiswa Ndoni (Tribunal Member) |
| Heard on | : 22 February 2017 |
| Order Issued on | : 22 February 2017 |
| Reasons Issued on | : 07 March 2017 |

Reasons for Decision

Approval

[1] On 22 February 2017, the Competition Tribunal ("Tribunal") approved the proposed transaction between The Bruce Fruit (Pty) Ltd ("TBF") and JAB Dried Fruit Products (Pty) Ltd ("JAB").

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

Parties to the Proposed Transaction

Primary Acquiring Firm

- [3] The primary acquiring firm is TBF, a newly formed company incorporated in accordance with the laws of the Republic of South Africa. It is wholly-owned and controlled by Sanlam Life Insurance Limited ("Sanlam Life"), acting through its Sanlam Private Equity division ("SPE").
- [4] Sanlam Life is wholly owned and controlled by Sanlam Limited ("Sanlam"), a public company which is not controlled by any firm. Sanlam controls in excess of 10 firms, collectively referred to as ("the Sanlam Group").
- [5] TBF is purely an investment holding company and as such it does not currently hold any investments or conduct any business activities. The Sanlam Group is a leading financial services group in South Africa.

Primary Target Firm

- [6] The primary target firm is JAB, a company incorporated in accordance with the laws of the Republic of South Africa and is wholly owned and controlled by the Barnard Trust.¹
- [7] JAB specialises in the procurement, processing, packaging and distribution of dried fruit and nuts. Its primary operations are based in Mpumalanga and its products are sold in both local and export markets.

Proposed Transaction

- [8] TBF intends to acquire 60% of the issued share capital of JAB. The merging parties submit that the proposed transaction will result in TBF acquiring control over the business of JAB.²

¹ The Barnard Trust is currently controlled by Adam Johannes Barnard and Johanna Wilhelmina Barnard.

² Page 41 of the Merger Record.

Rationale

Primary Acquiring Firm

- [9] [REDACTED]
[REDACTED]. SPE
views the dried fruit and nuts business as an attractive sector in which to invest.

Primary Target Firm

- [10] The proposed transaction will enable JAB to expand its business with a reputable financial partner providing the necessary capital.

Impact on Competition

- [11] The Commission considered the activities of the merging parties and found that Sanlam does not have any investments in firms that are active in the market where the target group is active, being the market for the procurement, processing, packaging and distribution of dried fruit and nuts. Therefore the Commission concluded that the proposed transaction does not result in a horizontal overlap.
- [12] The Commission was therefore of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any market in South Africa.

Public Interest

- [13] The merging parties submit that the proposed transaction will have no adverse effect on employment as TBF is purely an investment holding company and JAB will continue its operations in the way these are currently taking place. Furthermore, because part of the transaction involves expansion of current business operations, there is likely to be an increase in the workforce.³

³ Page 10 of the Transcript.

[14] The Commission was of the view that the proposed transaction is unlikely to raise concerns on any other public interest grounds.

Reasons for the Condition

[15] The parties to the transaction in this matter did not submit any transaction documents or a Memorandum of Incorporation ("MOI") for the post-transaction firm. The merging parties submit that they do not wish to incur the cost of drafting the agreements before receiving regulatory approval and thus only intend drafting same after such approval.

[16] An Indicative Term Sheet was provided and the merging parties submit that this Term Sheet sets out the applicable provisions which will be contained in the shareholders agreement or MOI.⁴ The Tribunal, however, found three issues with the Term Sheet, which it considered to be material.

[17] The first is that it is unclear from the Term Sheet what assets of JAB's business are being sold. On a reading of the Term Sheet the Tribunal was under the impression that all business operations of JAB were being sold to TBF. However, at the hearing the merging parties submitted that the Mozambique operations of JAB are excluded from the transactions but that TBF does have an option to acquire these operations.⁵ This aspect of the transaction was not included in the Term Sheet.

[18] The second issue also relates to what assets of JAB are being sold. The Term Sheet refers to an option which Barnard Family Investments have to acquire the Adelic retail stores. The Term Sheet, however, does not indicate what these stores are. The merging parties have submitted that these stores refer to two small shops in Nelspruit which sell dried fruit, nuts and biltong and are considered to be part of the distribution network of JAB.⁶

⁴ Page 647 of the Merger Record.

⁵ Page 12 of the Transcripts.

⁶ Page 9 of the Transcripts.

[19] Thirdly the merging parties have submitted that post-transaction TBF will exercise sole control. On a reading of the Term Sheet it appears that the Barnard Trust retains some degree of negative control by being able to prevent a quorum from forming in JAB shareholders' and directors' meetings.⁷ At the hearing the merging parties submitted that it is their intention to add a provision into the shareholders agreement stipulating that in the event of no quorum being formed the meeting would be postponed by a week and thereafter whoever is present forms the quorum.⁸ This is not included in the Term Sheet.

[20] To correct such uncertainty the Tribunal has imposed a condition to the effect that the transaction documents and MOI must be provided by the merging parties to the Commission by no later than 30 April 2017 so that the Commission can see if the contents of the documents are consistent with the version put up by the merging parties at the merger hearing.

[21] We attach below, for convenience, a copy of this condition in Annexure "A".

Conclusion

[22] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market or raise any adverse public interest issues. Accordingly, we approve the proposed transaction with conditions.



Mr Norman Manoim

Ms Andiswa Ndoni and Ms Yasmin Carrim concurring

7/3/2017
DATE

Tribunal Researcher:

Hayley Lyle

For the merging parties:

Irma –Dalene Gouws of Werksmans Attorneys.

For the Commission:

Amanda Mfuphi

⁷ Page 51 of the Merger Record.

⁸ Page 7 of the Transcript.

ANNEXURE "A"

CONDITIONS

The Bruce Fruit (Pty) Ltd

and

JAB Dried Fruit Products (Pty) Ltd

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1. The merging parties are to provide the Competition Commission with the Memorandum of Incorporation of JAB Dried Fruits (Pty) Ltd and the underlying transaction documents by no later than 30 April 2017.