



THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IM238Jan19

In the request for consideration:

Klein Karoo International (Pty) Ltd **First Applicant**

Mosstrich (Pty) Ltd **Second Applicant**

Cape Karoo (Pty) Ltd (Previously Ostrich Skins (Pty) Ltd) **Third Applicant**

And

The Competition Commission **Respondent**

In re the intermediate merger between:

Cape Karoo (Pty) Ltd (Previously Ostrich Skins (Pty) Ltd) **Acquiring Firm**

And

Klein Karoo International (Pty) Ltd **First Target Firm**

Mosstrich (Pty) Ltd **Second Target Firm**

Panel:

N Manoim (Presiding Member)
Y Carrim (Tribunal Member)
A Wessels (Tribunal Member)

Heard on:

01 July 2019 to 05 July 2019 and 08 July 2019

Heads of Argument filed on:

08 July 2019 (Merging Parties)
20 July 2019 (Competition Commission)

Last submission received on:

30 July 2019

Decided on:

14 August 2019

ORDER

Further to the request for consideration brought in terms of section 16(1)(a) of the Competition Act 1998 ("the Act") the Competition Tribunal orders that –

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).



**Tribunal Member
Ms Yasmin Carrim**

14 August 2019
Date

Concurring: Mr Norman Manoim and Mr Andreas Wessels

**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

CONDITIONS

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 $0.7 \times (\text{percentage labour and related cost increase}) + 0.15 \times (\text{percentage services costs increase including costs such as electricity, water and waste removal}) + 0.1 \times (\text{percentage consumables and cleaning cost increase}) + 0.05 \times (\text{percentage other cost increases})$.

For example:

| Abattoir | Year-on-Year Cost Increase | Weight | Weighted Increase |
|-------------------------------------|----------------------------|------------|-------------------|
| 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% |
| Weighted percentage increase | | 1.0 | 7.28% |

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% |
| Weighted percentage increase | | 1.0 | 7.53% |

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 ■■■ of all ostrich steak and fillet and ■■■ 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 | ■ | ■ | ■ |
| Trimming | ■ | ■ | ■ |

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.

| Reporting Period: | 20xx to 20xx | | |
|-------------------|--------------------------------------|--------------------------------|-------------------------------------|
| | Volume sold in local market (in ton) | Total volume produced (in ton) | Proportion of total volume produced |
| Fillet and Steak | | | |
| Trimmings | | | |

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 | | <p>The percentage of feathers placed on tender calculated as follows:</p> $U = \frac{X}{(Y-Z)} \times 100\%$ |
| | | | | | |