

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM263Mar19

In the matter between:

Milco SA Proprietary Limited

Primary Acquiring Firm

And

Clover Industries Limited

Primary Target Firm

Panel : A Wessels (Presiding Member)
A Ndoni (Tribunal Member)
T Vilakazi (Tribunal Member)

Heard on : 14 August 2019, 09 September 2019 and
16 September 2019

Last submission received on : 20 September 2019

Decided on : 25 September 2019

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) 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 marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).



Presiding Member
Mr Andreas Wessels

25 September 2019
Date

Concurring: Ms Andiswa Ndoni and Dr Thando Vilakazi



competitiontribunal
SOUTH AFRICA

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date : 25 September 2019

To : Herbet Freehills Attorneys

Case Number: LM263Mar19

Milco SA Proprietary Limited And Clover Industries Limited

You applied to the Competition Commission on **26 February 2019** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

☐ no conditions.

☒ the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

ANNEXURE A

MILCO SA PROPRIETARY LIMITED

AND

CLOVER INDUSTRIES LIMITED

CT CASE NUMBER: LM263Mar19

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below:

- 1.1. **"Act"** means the Competition Act No. 89 of 1998, as amended;
- 1.2. **"Affected Employees"** mean Clover employees whose positions become redundant as a result of Project Sencillo, but excludes natural attrition, voluntary separation arrangements and voluntary early retirement packages and those Clover employees who voluntarily resign or unreasonably refuse to be redeployed in accordance with the provisions of the Labour Relations Act, 1995, as amended as a result of Project Sencillo;
- 1.3. **"Approval Date"** means the date that the Tribunal orders the conditional approval of the Merger in accordance with these Conditions;
- 1.4. **"Clover"** means Clover Industries Limited and its subsidiaries;
- 1.5. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act;
- 1.6. **"Competing Business"** means any entity that competes against Clover in respect of non-alcoholic beverages in South Africa and in which a CSI Shareholder of Milco directly and indirectly holds shareholding interest that enables that shareholder to appoint or nominate a director/s to the board of those entities;
- 1.7. **"Competitively Sensitive Information"** means information about Clover's activities in South Africa regarding the distribution and manufacturing of non-alcoholic beverage products that compete with the Competing Business, including, but not limited to:

- 1.7.1. Pricing – including, but not limited to, prices / discounts / rebates offered to specific clients and planned reductions or increases;
- 1.7.2. Margin information by product or client;
- 1.7.3. Financial data;
- 1.7.4. Cost Information;
- 1.7.5. Information on specific clients and client strategy, including information with respect to the sales volume of clients;
- 1.7.6. Marketing strategies;
- 1.7.7. Advertising strategies;
- 1.7.8. Customer information;
- 1.7.9. Budgets and business plans; and
- 1.7.10. Agreements and other (non-standard) terms and conditions relating to the supply and distribution of the relevant products;
- 1.8. **"Conditions"** mean the conditions, set out herein;
- 1.9. **"CSI Shareholder"** means a shareholder that has a direct or indirect shareholding in Clover and also has a direct or indirect shareholding in a Competing Business;
- 1.10. **"Days"** mean any calendar day which is not a Saturday, Sunday or an official public holiday in South Africa;
- 1.11. **"Implementation Date"** means the effective date of implementation of the Merger;
- 1.12. **"Merged Entity"** means Clover, subject to the control of Milco;
- 1.13. **"Merger"** means Milco's proposed acquisition of the entire shareholding of Clover;
- 1.14. **"Merging Parties"** mean Milco and Clover;
- 1.15. **"Milco"** means Milco SA (Pty) Ltd;
- 1.16. **"MMI"** means Milco Mauritius International Ltd;
- 1.17. **"Paterson level"** means the A to F grading system developed by Thomas Paterson that grades jobs based on predefined criteria;
- 1.18. **"Project Masakhane"** means the project to increase Clover's distribution reach into previously under- and unserved areas including the increase of Clover's delivery points at the bottom-end of the market;
- 1.19. **"Project Sencillo"** means the project underway by Clover to ensure the better utilisation of its assets (factories, production lines, warehouses and trucks), the completion of which, according to Clover, is expected to take up to 5 (five) years; and
- 1.20. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act.

2. CONDITIONS FOR THE APPROVAL OF THE MERGER

Information Sharing

2.1. The Merged Entity undertakes to take the following measures to limit the flow of Competitively Sensitive Information arising from cross-shareholding and cross-directorships post-Merger:

2.1.1. For as long as any shareholder may nominate a person for election as a director or alternate director of MMI, Milco or Clover, the Merged Entity and the CSI Shareholders shall ensure that the nominated person is not simultaneously a director or an alternate director or a manager of a Competing Business in South Africa, or is otherwise involved in determining strategy at a Competing Business.

2.1.2. To the extent that a CSI Shareholder receives, as part of the information that it is entitled to as a shareholder, Competitively Sensitive Information of Milco and/or its subsidiaries that relates to an activity in which the shareholder has a Competing Business, the shareholder shall ensure that the Competitively Sensitive Information will not be made available to any director or manager of, or person at a Competing Business. Compliance with this condition will include:

2.1.2.1. Milco ensuring that the Competitively Sensitive Information of Milco and/or Clover is redacted from any information that is to be provided to the CSI Shareholder. Milco shall use commercially reasonable efforts to redact such information prior to such documents and information being provided to a CSI Shareholder. Milco's board is entitled to resolve not to disclose certain information if the redaction of the Competitively Sensitive Information is impractical or unreasonably burdensome or expensive;

2.1.2.2. the CSI Shareholder ensuring that any representative that is a director or manager of, or person otherwise involved in determining strategy at a Competing Business, is recused from any discussions surrounding the CSI Shareholder's investment in MMI, Milco and/or Clover;

2.1.2.3. a board member designated by a CSI Shareholder to the boards of directors of MMI, Milco and/or Clover shall give appropriate undertakings and confirmations, as required, that the person shall not share MMI, Milco and/or Clover's Competitively Sensitive Information with any director or manager or person otherwise involved in determining strategy at a Competing Business; and

2.1.2.4. a director or alternate director of MMI, Milco and/or Clover nominated by the CSI Shareholder shall cease to hold office as such if he/she becomes a director or alternate director of a Competing Business, with effect from that date.

Local Procurement

- 2.2. The Merged Entity undertakes, for a period of 3 (three) years from the Implementation Date, to continue to procure its required volumes of bulk juice concentrate from local suppliers of bulk juice concentrate on substantially the same terms and conditions as are currently in place with Clover's local suppliers (allowing for reasonable variations in price and commercial terms in response to market conditions unrelated to the Merger) subject to the following:
- 2.2.1. the bulk juice concentrate from local suppliers is at least of the same quality as is currently procured by Clover;
 - 2.2.2. the price at which local suppliers offer to supply the bulk juice concentrate to the Merged Entity is not higher than the price at which bulk juice concentrate is available in the South African market; and
 - 2.2.3. the bulk juice concentrate volumes required by the Merged Entity are readily available from the local suppliers.
- 2.3. If the conditions set out in 2.2.1 to 2.2.3 above are not met for any reason, including an event of force majeure such as drought, fire or other unforeseen event, the Merged Entity is permitted to procure bulk juice concentrate from alternative local and/or global sources.
- 2.4. For the sake of completeness, the conditions set out in 2.2.1 to 2.2.3 above relate to Clover's current bulk juice concentrate purchases only and thus do not apply to new products to be manufactured or distributed by Clover or to other individual ingredients that may be involved in the preparation of juices and juice drinks.

Employment

- 2.5. The Merged Entity shall not retrench any employee in South Africa as a result of the Merger. It is recorded that this undertaking does not extend to:
- 2.5.1. voluntary separation arrangements, voluntary early retirement packages and unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 1995, as amended;
 - 2.5.2. dismissals due to poor performance;
 - 2.5.3. dismissals due to operational requirements or changes in market circumstances unrelated to the Merger; and
 - 2.5.4. retrenchments arising from the completion of Project Sencillo subject to clause 2.6 below.
- 2.6. The Merged Entity shall not retrench any employees as a result of the completion of Project Sencillo for a period of 3 (three) years from the Implementation Date. In the two-year period thereafter, the Merged Entity shall limit the net impact of the job losses as a result of the completion of Project Sencillo to a maximum of 277 jobs.
- 2.7. The Merged Entity shall, in the 5 (five) year period following the Implementation Date, create 550 new permanent employment positions at Clover through the expansion of Project

Masakhane. It is recorded that Clover currently employs 332 permanent employees through Project Masakhane in South Africa.

2.8. All Affected Employees will be offered:

- 2.8.1. the opportunity to apply for, and preference in relation to, any new or vacant position that exists within Clover and which requires similar skills to the redundant position, including for any vacant or new position created by Project Masakhane; or
- 2.8.2. if an Affected Employee elects not to apply for positions contemplated in 2.8.1 above, the Affected Employee will receive a severance package of 2 (two) weeks' remuneration per completed year of service, a pro-rata bonus (where applicable in terms of Clover's policy), a pro-rata long service bonus (where applicable in terms of Clover's policy) and pro-rata leave due (where applicable in terms of the Clover's policy).

Specific assistance to Affected Employees to secure employment in Project Masakhane

2.9. The Merged Entity will consider applications from Affected Employees for employment in Project Masakhane taking into account the following factors:

- 2.9.1. length of service, taking into consideration the retention of skills and qualifications;
- 2.9.2. compliance with minimum requirements for the vacant or new position;
- 2.9.3. possession of skills and knowledge required for the vacant or new position; and
- 2.9.4. documented performance.

2.10. It is recorded that Project Masakhane requires 5 (five) categories of employees:

- 2.10.1. regional sales managers: to manage the team, manage bottom-end customers, interact with sales and distribution and interact with Clover's principals;
- 2.10.2. area managers: to implement the bottom-end sales and distribution strategy, implement and control the bottom end management initiatives and enhance performance and team development;
- 2.10.3. sales representatives: to increase sales volumes in stores, provide services to customers through sales processes, monitor and report on sales volumes and pricing and optimise basket of product;
- 2.10.4. delivery drivers: to deliver product to customers, drive delivery vehicles and supervise van assistants, interact with sales and distribution and communicate with and support sales representatives; and
- 2.10.5. van assistants: to deliver stock, maintain vehicle roadworthiness, oversee stock returns and perform administrative duties,

2.11. The Merged Entity undertakes to make available the following training to bridge identified skills gaps for a position in Project Masakhane:

- 2.11.1. Regional sales manager: industrial relations or essentials of management and

leadership;

2.11.2. Area manager: industrial relations or customer management;

2.11.3. Sales representative: industrial relations or national certificate wholesale and retail or customer management or essentials of management and leadership; and

2.11.4. Driver and van assistant: industrial relations or driver on-site training and a driver learnership.

2.12. The Merged Entity will contribute reasonable relocation and training costs for Affected Employees that successfully apply for a vacant or new position in Project Masakhane and will cover the cost of such training up to a total of R5 000 000 (five million Rand) and the cost of relocation up to a total of R5 000 000 (five million Rand), with a maximum combined contribution of R10 000 000 (ten million Rand).

2.13. The employee benefits (medical aid, retirement fund, group scheme, spouse and trauma insurance, housing allowance, meal allowance, 13th cheque, long service bonus, maternity leave, family responsibility leave, sick leave and annual leave) of permanent employees in Project Masakhane will be substantially similar to all other Clover permanent employees taking into consideration the Paterson level of the relevant permanent employee.

3. MONITORING

3.1. The Merged Entity shall notify the Commission in writing of the Implementation Date within 5 (five) days of it becoming effective.

3.2. The Merging Parties shall circulate non-confidential versions of the Conditions to the members of the Food and Allied Workers Union; General Industries Workers Union of South Africa and Inqubelaphambili Trade Union (Trade Unions) and all of Clover's local suppliers of bulk juice concentrate (Suppliers) within 10 (ten) business days of the Approval Date.

3.3. As proof of compliance with paragraph 3.2, the Merging Parties shall within 10 (ten) business days of circulating the non-confidential version of the Conditions, submit an affidavit by a senior official attesting to the circulation of the non-confidential version of the Conditions and provide a copy of the notices that were circulated to the aforementioned Trade Unions and Suppliers.

3.4. The Merged Entity shall within 10 (ten) days of the Approval Date or the date of the appointment of a representative(s) to the boards of directors of MMI, Milco or Clover by the CSI Shareholder, whichever comes later, inform the Commission of the identity of that director and provide to the Commission a copy of the undertakings and confirmations, as required in condition 2.1, that the director shall not share MMI, Milco and/or Clover's Competitively Sensitive Information with any director or manager or person at a Competing Business. At any stage and for as long as Clover has a CSI shareholder, if the identity of the representative(s) to the boards of directors of MMI, Milco or Clover appointed by the CSI Shareholder changes, the Merged Entity shall within 10 (ten) days of the appointment inform the Commission of the identity of the new director and provide to the Commission a copy of that director's undertakings and confirmations, as required in condition 2.1.

- 3.5. The Merged Entity shall within 30 (thirty) Days of the Implementation Date provide the Commission with the name of each local supplier of juice concentrate and the volumes procured per supplier for the 12-month period preceding the Implementation Date.
- 3.6. The Merged Entity shall within 1 (one) month of the first anniversary of the Implementation Date and for a period of 3 (three) years thereafter, submit a report to the Commission confirming compliance with paragraphs 2.2 to 2.4 during the 12 (twelve)-month period preceding the anniversary of the Implementation Date. The report will include the identity of each local supplier from whom the Merged Entity has procured juice concentrate, the volumes procured per local supplier, reasons for a decline in volumes procured (where applicable) and reasons for a decline in the number of local suppliers (where applicable).
- 3.7. The Merged Entity shall within one month of the first anniversary of the Implementation Date and for a period of 5 (five) years thereafter, submit a report to the Commission confirming its compliance with paragraphs 2.5 to 2.13 during the 12 (twelve)-month period preceding the anniversary of the Implementation Date, including:
- 3.7.1. confirmation that no retrenchments occurred in terms of clauses 2.5 and 2.6;
 - 3.7.2. details of the number of retrenchments as a result of Project Sencillo after the expiry of the 3 (three) year period referred to in clause 2.6, which must include a description of the relevant job function and skills level of the Affected Employees, as well as the reasons for the retrenchments and reasons why the retrenchments could not be avoided;
 - 3.7.3. details of the roles created as a result of Project Sencillo, the number of applications and successful applications by Affected Employees and a description of the relevant job function and skills level created; and
 - 3.7.4. details of the number of roles created, including a description of the relevant job functions and skills levels, as a result of Project Masakhane, the number of applications and successful applications by Affected Employees for positions created by Project Masakhane, as well as details of how this impacts (i.e. lowers) the net job losses as a result of the completion of Project Sencillo.
- 3.8. The above reports shall be accompanied by an affidavit from a senior official of the Merging Parties attesting to the accuracy and compliance of the conditions.
- 3.9. The Commission may, for the duration of the Conditions, request additional information on compliance with these Conditions.

4. VARIATION

- 4.1. The Merged Entity or the Commission may at any time, on good cause shown, including changes in economic conditions, apply to the Tribunal for the Conditions to be lifted, revised or amended.

5. BREACH

- 5.1. In the event that the Commission receives any complaint in relation to non-compliance with the Conditions, or otherwise determines that there has been a breach by the Merging

Parties of the Conditions, the breach will be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

6. GENERAL

- 6.1 All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

NON-CONFIDENTIAL