



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM108Sep19

In the matter between:

SIMBA (PTY) LTD

Primary Acquiring Firm

And

PIONEER FOOD GROUP LIMITED

Primary Target Firm

Panel:	Ms M Mazwai (Presiding Member) Ms Y Carrim (Tribunal Member) Mr AW Wessels (Tribunal Member)
Date of Pre-Hearing:	21 February 2020
Heard on:	05 March 2020
Order Issued on:	06 March 2020
Reasons Issued on:	15 May 2020

REASONS FOR DECISION

APPROVAL

- [1] On 6 March 2020, the Competition Tribunal (**Tribunal**) approved a large merger between Simba (Pty) Ltd (**Simba**) and Pioneer Food Group Limited (**Pioneer**) subject to the conditions attached hereto as “Annexure A”.
- [2] The reasons for the approval of the proposed transaction follow.

PARTIES TO THE PROPOSED TRANSACTION

Primary acquiring firm

- [3] The primary acquiring firm is Simba, a wholly owned indirect subsidiary of PepsiCo Inc (**PepsiCo**) – a large food and drink producer (collectively referred to as the **Acquiring Group**).
- [4] The Acquiring Group, through Simba, sells in South Africa ready-to-eat products under well-known brands and is active in the provision of savoury snacks including peanuts and raisins, chips, ready-to-eat popcorn and pretzels.
- [5] PepsiCo is also active in the beverage market in South Africa. It provides carbonated soft drinks (**CSDs**) through its bottler and distributor, Little Green Beverages (Pty) Ltd (**LGB**). Globally, PepsiCo and Unilever co-own a joint venture, Pepsi Lipton International Limited (**PLI**), which licenses the Lipton trademark. PLI also provides concentrate kits to franchisees for the manufacture and distribution of Lipton ready-to-drink teas.

Primary target firm

- [6] The primary target firm is Pioneer, a South African incorporated company listed on the Johannesburg Stock Exchange Limited (the **JSE**). It is not controlled by any one entity; its top three shareholders as at 28 June 2019 were Zeder Investments Limited as to 26.3%, Coronation Fund Managers Limited as to 8.3%, and the Government Employees Pension Fund through the Public Investment Corporation as to 8.1%.
- [7] Pioneer is one of the largest South African producers and distributors of a range of branded food, like Spekko, White Star, Weetbix, Safari and Wellingtons; and beverages such as Ceres, Liquifruit and Fruitree. Pioneer supplies wholesale, retail and informal trade customers and exports to more than 80 countries.

PROPOSED TRANSACTION AND RATIONALE

- [8] Pioneer, through this transaction, intends to delist from the JSE. The transaction will be implemented by way of a scheme in terms of section 114(1)(c) of the Companies Act (**Transaction**). The Transaction Implementation Agreement provides for Simba to acquire Pioneer's entire issued share capital; excluding shares held by subsidiary companies.
- [9] The Acquiring Group's rationale for the Transaction is that it will increase PepsiCo's presence in a country and region of high growth potential. Pioneer's manufacturing and go-to-market capabilities will expand penetration of PepsiCo's products to South African consumers. It is intended for South Africa to become an export hub facilitating PepsiCo's entry, participation and expansion in the African food and beverage sector.
- [10] From Pioneer's perspective, this Transaction provides an opportunity to access global research and development (R&D) and brand expertise; as well as access to a global geographic footprint and distribution network. The Transaction will provide Pioneer's ordinary shareholders with an opportunity to dispose of their scheme shares for cash at a substantial premium and with manageable transaction risk.

RELEVANT MARKET AND IMPACT ON COMPETITION

- [11] The Competition Commission (**Commission**) considered the activities of the merging parties and identified horizontal overlaps in (i) the market for the provision of non-alcoholic ready-to-drink beverages; (ii) the broad market for the provision of savoury snacks; and (iii) the narrow market for the provision of peanuts (or nut varieties).

Horizontal overlaps

Non-alcoholic ready-to-drink beverages

- [12] The Commission accepted the merging parties' submission that the market for non-alcoholic ready-to-drink beverages (**NABs**) can be further segmented into carbonated soft drinks (**CSD**) and non-carbonated beverages (**NCSD**). However, we do not have to take a view in this matter on the exact product market delineation since the Transaction does not raise competition concerns when various potential product markets are considered.
- [13] The Acquiring Group is active in the market for CSDs (i.e. Pepsi branded CSDs) and Pioneer in the market for NCSDs (i.e. Liquifruit and Ceres branded fruit juices). In the CSD market, in South Africa, Coca-Cola is a significant player; with PepsiCo's having a 2% national market share. Pioneer's South African market share in the NCSD market is estimated to be between 11% and 15%. Furthermore, the Commission estimated that the merged entity would have a market share of 6% in the broader market for non-alcoholic ready-to-drink beverages. The remaining 90% market share is held by at least 7 other competitors.¹ None of the customers and competitors raised concerns with the proposed Transaction in relation to any of these markets.

Savoury snacks

- [14] The Commission found that both parties are active in a national, broadly defined market for the supply of savoury snacks, which includes: potato chips, fruit and vegetable chips, tortilla chips, pita and bagel chips, ready-to-eat and microwavable popcorn, snack mixes, trail mix, extruded snacks, multigrain snacks, other grain snacks, salty biscuits, pretzels, bread snacks, salsa and dips, pork-rind, biltong/droewors/meat jerky, and nuts and seeds. This market is distinguishable from sweet snacks, by virtue of the products' limited sweetness and non-confectionary nature. Canvassing multiple sources of case

¹ These include, inter alia, Kingsley Beverages, Chill Beverages, The Coca-Cola Company, The Beverage Company / Softbev, Rhodes Food Group, Jive and Co-ee.

law, the Commission found examples of where competition authorities further segmented the savoury snack market. Engagements with various market participants produced mixed views on whether savoury snacks constitute a broad product market or whether the individual products constitute separate product markets. The Commission proceeded to assess the effects of this merger in both markets and we follow the same approach of leaving the exact product market delineation open.

- [15] The Commission found that the Acquiring Group has an estimated market share of 55% and Pioneer a 1.4% market share in the broad savoury snacks market. The Commission found that the market will not be significantly altered on account of the Transaction because acquiring Pioneer will not result in a high market accretion for Simba.
- [16] Furthermore, there are many firms with strong brands that compete with the merging parties, including large retailers such as Shoprite, Pick n Pay and Woolworths through their own house brands; and other firms such as Kellogg Company South Africa (Pty) Ltd, Truda Snacks (Pty) Ltd, Frimax (Pty) Ltd, National Brands Limited, Merraris, Almans, and In2 Food Group (Pty) Ltd.
- [17] The savoury snacks customers of the merging parties in general comprise large retailers, convenience stores, wholesalers and buying groups, which include sophisticated entities. The customers further confirmed that they do not have any exclusive arrangements with the merging parties; thus they can source snack products from the merging parties' competitors.
- [18] The merged entity's large customers are likely to have some degree of countervailing power because the customers serve as critical routes to market, can negotiate prices with suppliers, have their own house brands and have credible alternatives to switch to.
- [19] The Commission found that the barriers to entry in the market for savoury snack products include (i) brand loyalty; (ii) routes to market; (iii) shelf space in retail and wholesale stores; (iv) incumbents with sufficient economies of scale; and (v) regulatory requirements. However, these barriers to entry appear to be

surmountable since there has been entry by various firms in the last three years.

Peanuts

- [20] There is international case precedent² where the broadly defined savoury snacks market was narrowed to an examination of the market for nut snacks as a separate relevant product market.³ In this Transaction the Commission found a direct overlap in the activities of the parties in the provision of peanut products. Further, third parties raised concerns, regarding this Transaction, in relation to the narrow market for peanut products.
- [21] In the narrow market for peanuts, the Commission relied on AC Nielsen data, the merging parties' and third parties' revenue information to derive market shares. Based on these data, Simba was estimated to hold a national market share of approximately 26% with Pioneer holding approximately 10%, resulting in a combined market share of 37%.⁴ However, the Commission found at least 10 other competitors that hold the remaining 63% of the market shares including Almans, Montagu Snacks and BestNut.⁵ These competitors will, post-merger, likely constrain the merged entity.
- [22] Furthermore, the merged entity's customers for peanut products include large national retailers like Pick n Pay, Shoprite and Woolworths. These firms are likely to exercise a degree of countervailing power on the merged entity. The merging parties do not supply their rivals with peanuts through contract packing and Simba does not perform any category captaincy/management functions at retailers in respect of the category in which peanuts fall.

² Granaria Food Group B.V. ("Granaria") / Ültje Vermögensverwaltungs-GmbH ("Ültje") / Intersnack Knabbergebäck GmbH & Co ("Intersnack") / May Holding GmbH & Co. ("May-Holding") Case No. COMP/JV.32.

³ Nut snacks consist mainly of peanuts and to a lesser extent cashew, pistachios, brazil nuts, hazelnuts, almonds, walnuts, macadamia and pecans.

⁴ Based on the merging parties' internal data and the South African Grain Information Services' data on national peanut volumes the merged entity is estimated to hold a market share of approximately █%.

⁵ In addition to Ace Nuts, Roastwell Coffee, Almans Dried Fruit & Nuts, Nature's Choice, Messaris Snacks, and JAB Dried Fruits & Nuts.

[23] Market shares were calculated only with reference to formal data and do not include informal traders and other routes to market such as independent retailers, health stores, small neighbourhood convenience stores and street vendors. Including the latter in the concentration analysis would dilute the abovementioned market shares; and this adds to the conclusion that the Transaction will not result in a substantial prevention or lessening of competition as the merged entity is likely to still face significant competitive constraints in the peanut market post-merger.

Vertical overlaps

- [24] The pre-existing vertical relationships between the merging parties are:
- a. Simba sources all its raisin requirements from Pioneer for the manufacturing of Simba's peanut and raisin product. In relation to its peanut products Simba utilises a third-party manufacturer, Zutco (Pty) Ltd to manufacture and produce its peanuts and raisin products.
 - b. Pioneer supplies a pretzel flour blend (white bread flour and wheat flour) to PepsiCo for the manufacture of its Simba pretzel products; and
 - c. Pioneer is the appointed PLI bottler and distributor of Lipton Iced Tea as a PLI franchisee. LGB is the current bottler and distributor of PepsiCo's carbonated soft drinks products.

Input foreclosure

[25] The Commission defined the following markets for purposes of assessing input foreclosure: (i) the upstream market for the processing of raisins; (ii) the downstream market for the sale of packaged raisins and packaged peanut and raisins; (iii) the upstream market for the manufacturing of pretzel flour blend (white bread flour and wheat flour); and (iv) the downstream market for the manufacturing and supply of pretzel products.

Raisins

- [26] The raisins supplied to Simba by Pioneer account for approximately █% of Pioneer's total raisin volumes and approximately █% of the total South African raisin production volumes. Based on this, the Commission concluded that the merged entity will not have the ability to foreclose downstream competitors from accessing raisins in South Africa, given that there are other raisin processors that account for over 65% of the raisin processing market. The merged entity therefore would not have the ability to foreclose the downstream competitors of Simba from inputs because there are viable alternative players that can supply processed raisins to competitors.

Flour

- [27] The Commission noted that Simba is not a large consumer of pretzel flour (white bread flour and wheat flour) input products as it is only used in its pretzel snack products which account for a minimal portion of Simba's savoury snacks portfolio, and in turn Pioneer's flour production.
- [28] It found that South Africa has various alternative flour millers that compete with Pioneer. The biggest suppliers in the industry are Pioneer's Sasko Milling (Sasko and Duens bakeries), Tiger Brands' Tiger Milling (Albany bakeries), Premier Foods' Premier Milling (Snowflake and Blue Ribbon flour and bakeries), RCL Foods' Ruto Mills (Sunbake bakeries) and Pride Milling. In addition, the Commission noted that the following competitors are also active in the flour milling market in competition with Pioneer, VKB Flour Mills (Pty) Ltd t/a Kromdraai's Flour Mills, Algoa Roller Mills CC, AFGRI Operations (Pty) Ltd and Godrich Flour Mills (Pty) Ltd, amongst others.
- [29] The merged entity therefore would not have the ability to foreclose Simba's downstream competitors from accessing flour because there are various viable alternative players in the market that can supply flour to Simba's competitors. This leads to the conclusion that the proposed Transaction is unlikely to result in any input foreclosure concerns in relation to flour.

Customer Foreclosure

- [30] The Commission did not identify any customer foreclosure concerns in relation to the raisins or flour markets because Simba already procures these inputs from Pioneer pre-merger.
- [31] The Commission further found that the proposed Transaction is unlikely to result in customer foreclosure because Pioneer does not manufacture soft drink products that compete with the PepsiCo brands. In light of this, the Commission was of the view that there is no credible risk that the current business arrangement between LGB and PepsiCo will be terminated as a result of the merger.
- [32] PepsiCo's soft drink brands account for less than 1% of the NABs supplied in South Africa. On the other hand, the Commission noted that LGB accounts for approximately 7% of the NAB market.⁶ Accordingly, PepsiCo's business does not account for a substantial portion of LGB's business given the small market share attributable to PepsiCo's NABs. Considering the above, the Commission concluded that the proposed Transaction was unlikely to substantially harm LGB's business because PepsiCo's soft drink brands do not account for a substantial portion of LGB's production or revenue.
- [33] It bears further mention that the Commission assessed whether the merging parties had an innovation pipeline of products that would potentially compete with each other, absent the merger. The Commission found that the merging parties do not have any products in their innovation pipeline that could be considered potentially competing products.
- [34] We concur with the Commission's finding that the proposed Transaction is unlikely to substantially prevent or lessen competition in any relevant market either from a horizontal or vertical perspective.

⁶ As sourced by the Commission in the merger *The Beverage Company Bidco Proprietary Limited and SoftBev Proprietary Limited* case no. 2018Apr0030 [2018] ZACT 28.

PUBLIC INTEREST

[35] Prior to the notification of the Transaction, in July 2019, the merging parties proactively approached the Minister responsible for Trade, Industry and Competition (the **Minister**) regarding public interest issues. The merging parties subsequently notified the Transaction to the Commission on 6 September 2019.

[36] During its investigation, the Commission engaged with both the Minister's office and the merging parties on elements of the Transaction and, in particular, the proposed merger conditions to address the public interest. The Commission in its referral of the merger to the Tribunal recommended the conditional approval of the merger, subject to public interest merger conditions, including:

- a. no retrenchments for a period of five years post-merger, and the creation of 500 additional jobs at the merged entity;
- b. an investment of approximately R5 billion in the local economy, especially impacting historically disadvantaged individuals (**HDIs**); and
- c. the implementation of a Broad-Based Black Economic Empowerment (**B-BBEE**) transaction that will increase the equity level of HDIs and worker participation to approximately 12.9%.

[37] Subsequent to the Commission's recommendation to the Tribunal, the Minister and the merging parties continued to engage on public interest conditions, and finally reached agreement before the Tribunal hearing.

TRIBUNAL HEARING

[38] The contentious issue before us related to the public interest aspects of the Transaction. The Minister participated in the proceedings to make representations on the newly implemented section 12A(3)(e) of the Competition Act, 89 of 1998, as amended (the **Act**).

[39] The Food and Allied Workers' Union (**FAWU**) also made representations before us regarding employment conditions and the contemplated B-BBEE Plan which would be established post-merger.

[40] In the final instance, the merging parties and the Minister reached agreement and presented revised conditions on the day of the hearing. This obviated the need for us to hear the five witnesses due to be called by the parties and to make a finding regarding the disputes between them.

[41] FAWU's concerns were also addressed by strengthening the conditions as discussed later.

[42] First, we turn to the Minister's concerns, which were:

- a. the level of shareholding by black entities in Pioneer pre- and post-merger and its impact on a "greater spread of ownership";
- b. board representation by workers who are shareholders; and
- c. the entity in which the shareholding would be held post-merger (i.e. an offshore entity or local one).

The Spread of Ownership

[43] Section 12A(3)(e) provides:

"When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or Competition Tribunal must consider the effect that the merger will have on—

- (e) *the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market."*

[44] In the version of the conditions that were ultimately presented to the Tribunal during the hearing, the merging parties proposed to undertake to present a B-BBEE plan to the Minister, within a year of implementation of the merger. It was proposed that the B-BBEE plan would involve the establishment of a

workers' trust which would, for a period of five years, hold, for the benefit of Pioneer's broad-based workers, shareholding in PepsiCo to the value of R1.6 billion (representing 12.9% of equity in Pioneer). This five year period, whereby the workers' trust holds equity in PepsiCo, is referred to as the "reorganisation period".

- [45] The PepsiCo shares in question would be unencumbered and not funded by way of loans. The workers trust, would be able to exercise the equivalent of 12.9% of the votes that may be cast at the local merged entity's shareholder level (ensured through contractual cession from Simba to the trust) and participate in the control of the merged firm through entitlement to the appointment of at least one non-executive board member.
- [46] During the re-organisation period, PepsiCo will ensure that Pioneer remains an operating subsidiary of PepsiCo in a manner similar to the pre-merger period. Following the re-organisation period, the equity holding in PepsiCo shall be converted into ordinary shares in Pioneer Foods up to 13% of its total issued share capital. The shares will be valued on a fair market basis at the end of five years; and, should the value of the equity held by the Trust in PepsiCo be less than 13%, the Trust will arrange funding which must be reasonably acceptable to PepsiCo.

Pioneer's pre- and post-merger B-BBEE shareholding

- [47] The merging parties contended that the pre-merger shareholding directly held by B-BBEE and HDI entities at 31 March 2019 was 9.28%, and therefore the 12.9%, as per the tendered conditions, was an improvement to the shareholding.
- [48] The Commission contended that the shareholding pre-merger was higher than what the merging parties submitted, i.e. 14.4%. The Commission was of the view that while the shareholding post-merger would be lower at 12.9% the difference between the pre- and post-merger figures was immaterial given that the workers' trust envisages greater worker participation.

[49] The Minister's contention, as we elaborate below, was that pre-merger, Pioneer's shareholding by B-BBEE entities and HDIs was significantly higher than what the merging parties submitted, i.e. 20.5%. The merger would thus result in a diminution of this shareholding since the post-merger equity holding by B-BBEE and HDI entities would be 12.9% as contained in the conditions recommended by the Commission.

The Minister's view

[50] The difference between the Minister and the merging parties' calculations was accounted for in two ways. Firstly, the Minister took account of a share buy-back by Pioneer of shares previously held by B-BBEE and HDI entities pre-merger (amounting to 5.2% of the shares) which occurred shortly before PepsiCo's offer to acquire shares in Pioneer (*circa* 15 March 2019).

[51] In this regard, Pioneer had a B-BBEE scheme which had been consummated in January 2012 with a termination date on the seventh anniversary of the subscription date, being March 2019. In 2012, the B-BBEE scheme resulted in 13.54% of Pioneer shares being issued to three categories of B-BBEE shareholders.⁷

[52] The Minister was of the view that the 5.2% shareholding of the share buy-back should be taken into account in calculating the B-BBEE shareholding pre-merger. This was because the share buy-back that occurred shortly before PepsiCo's offer to Pioneer was merger-specific, as it facilitated PepsiCo's intention to acquire the entire issued share capital in Pioneer. Part of the purchase price also included an *ex gratia* payment to the B-BBEE participants to the share buy-back, signalling a merger-specific event.

⁷ (i) As to 8.25%, the "BEE Partners" (comprising Thembeke Capital (now Dipeo Capital), Identity Partners, KZN Women's Trust, Sekunjalo Investments and Riparian Investments, through various special purpose vehicles);

(ii) as to 0.29%, "Specified BEE Directors" (including former and current black directors of Pioneer Foods, being Mr ZL Combi, Dr M I Survé, Prof A S M Karaan, Mrs N S Mjoli-Mncube, Mr A H Sangqu, and Dr F A Sonn); and

(iii) as to 5%, the "Pioneer B-BBEE Trust" (the sole beneficiary of the BEE Trust is the Pioneer Foods Education and Community Trust). (Carstens witness statement, p3.)

[53] Secondly, Pioneer's B-BBEE certificate for the relevant period included indirect shareholding, which constituted 5.67% of the shares. Therefore, the Minister argued for the inclusion of these indirect shareholding amounts in Pioneer's calculation of the pre-merger position resulting in a pre-merger B-BBEE figure of 20.15% (comprised of the pre-merger 9.28% direct shareholding by B-BBEE entities, the 5.67% indirect shareholding, and the 5.2% from the share buy-back).

The merging parties' view

[54] On the other hand, the merging parties submitted that the relevant shareholding to take into account was the level as at 31 March 2019, being the last day of Pioneer's interim period prior to the public announcement of the PepsiCo offer and a date after the share buy-back. They contended that the share buy-back was not merger specific as it was a result of the B-BBEE scheme maturing on its anniversary date, after seven years. PepsiCo was not involved at all in Pioneer's decision to repurchase the share buy-back.

[55] Further to this, the merging parties submitted that only the direct shareholding of 9.28% should be reckoned and the indirect black shareholding through institutional shareholders or mandated investments (of 5.67%) should not form part of the calculation of the pre-merger position, for the purposes of satisfying section 12A(3)(e).

The Commission's view

[56] The Commission agreed with the merging parties that institutional investors and mandated investments should not be included because this may have the unintended consequences of inflating a firm's B-BBEE levels, which would obviate the objectives of the Act which requires a "*greater spread of ownership*".

[57] Regarding the merger-specificity of the share buy-back, the Commission considered a counterfactual, absent the merger, where the B-BBEE scheme would have been unwound; and a new phase of the scheme would have been

implemented to replace the 2012 scheme (evidenced by Pioneer's Board documents made available to the Commission during its investigation). The additional B-BBEE scheme, which would have replaced the current scheme, may have resulted in a B-BBEE holding as high as 7.2% (for employees, compared to the 5.2% occasioned by the share buy-back).

[58] In light of this, the Commission was of the view that, the share buy-back shareholding was relevant for assessing the impact of the merger on the spread of ownership as Pioneer was always going to have a level of direct B-BBEE shareholding absent the merger. According to the Commission, the pre-merger B-BBEE shareholding was 14.4% (a figure that excludes indirect holding but includes the level of B-BBEE ownership prior to the share buy-back).

[59] The Commission was of the view that, while on its version the pre-merger shareholding was 14.4%, its recommendation of a lower shareholding (12.9% in the conditions it proposed) was immaterial given the totality of the merging parties' tendered public interest conditions.

[60] We tested with the parties at the hearing the overall impact of the Transaction on the public interest issues raised, and in particular on the alleged diminution in the levels of ownership by HDIs and workers pre- and post-merger.

[61] Counsel for the Minister explained the settlement as follows:

“the Minister doesn't accept necessarily that [the final Pioneer workers' trust entitlement] represents an increase in the BEE ownership shareholding, ... but the Minister is satisfied importantly of two features. The one is that the fact that the shareholding is unencumbered is an improvement on the past. Whether it's an improvement of extent or of nature is a different point, but it is an improvement. The second point that the Minister is satisfied of is that, and this is an important point, Chair, because it represents the position that the Minister has taken. The question of whether there is an increase or a decrease in BEE ownership is one which in this particular instance is difficult to answer, but when that is taken into account together with the basket of enhancements, public interest enhancements, the Minister is satisfied that there has

been an overall enhancement in the public interest. The Minister's position is that a proper interpretation of the 12A provisions in relation to public interest are that these matters are matters that must be taken into account as a basket."⁸

- [62] On the broad principles circumscribing workers' trust beneficiaries, the Tribunal questioned the merging parties as to the guiding principles that would inform who would qualify. The concern was that potential limitations on who could qualify may inadvertently undermine the objective of "a greater spread of ownership" as contemplated in the Act.
- [63] FAWU submitted that it should have an opportunity to engage with the merged entity when documents such as the trust documents are prepared. This point was addressed by amendment to clause 2.1.1 to the conditions, which provides that there must be consultation with the workers' representatives prior to the establishment of the workers' trust.
- [64] It was also noted that the majority of the trustees would be chosen by workers. The merging parties added that, in categorising qualifying employees under the trust, prioritisation would be given to HDIs and women.⁹
- [65] The union added value to proceedings by ensuring that the employees belonging to the three business divisions of Pioneer, which might be disposed of after the closing date, will receive and participate in the benefits allocated to the Pioneer workers' trust. This point was addressed by amending clause 2.1.1 of the conditions; making it clear that, for purposes of the trust, any employee who ceases employment pursuant to the disposals after the closing date will be deemed to be an employee for purposes of the Pioneer workers' trust and will then achieve the same benefits.¹⁰

⁸ Transcript, pp36-37.

⁹ Transcript, p32.

¹⁰ Transcript, p17.

Rights attaching to the shareholding

- [66] At the hearing, Counsel for the Minister accepted that the rights attaching to the shareholding were an improvement from the 2012 B-BBEE scheme in Pioneer as the shareholding held by the workers' trust will be unencumbered.
- [67] In addition, this shareholding includes the right to appoint at least one non-executive director on Pioneer's board and voting rights in proportion to shareholding. This will be by way of cession by Simba to the trust.¹¹ Upon reorganisation after five years, the workers' trust, PepsiCo and Pioneer will conclude a shareholders' agreement to entrench the trust's minority protections.

Entity in which ownership will be held

- [68] Prior to hearing, the Minister was concerned with ownership lying in an offshore company; particularly when the Act refers to a greater spread of ownership in firms in the market and the growth of the South African economy – as the merging parties' initially proposed merger condition only provided for holding at the PepsiCo level.
- [69] As mentioned above, the Minister and the merging parties however reached agreement; whereby the Pioneer workers' trust stock will be held in PepsiCo but must, after five years, be converted into a direct shareholding in Pioneer of up to 13%.
- [70] The period of five years for the offshore shareholding was regarded by the Minister and the parties as a reasonable compromise to realise both commercial and policy objectives. The commercial importance of the investment was taken into cognisance. Furthermore, according to the merging parties, the period allows sufficient time for the merged entity to grow the business in South Africa and to expand to the broader sub-Saharan Africa as it plans to do.

¹¹ Transcript, p11.

[71] This is consistent with the policy objectives of growing the South African economy and expanding exports.

[72] We find no basis to disagree with the submissions made in this regard.

Employment

[73] FAWU made submissions regarding the employment conditions.

[74] While the employment conditions provided that there would be no job losses for a period of five years post-merger and 500 additional jobs in the merged would be created; FAWU's concern was that the conditions did not adequately address potential job losses which may arise from the disposal of certain business divisions of Pioneer planned to take place post-merger.

[75] Counsel for FAWU confirmed at the hearing that this concern had been addressed. The condition provides for an aggregate number of employees and, in particular South African employees, to remain employed over five years. This will be monitored by the Commission as provided for in the conditions. The merging parties indicated during the hearing that job losses will be minimal.

[76] We strengthened the conditions in this regard by providing that to the extent that the disposals do not trigger a requirement by the parties to notify the disposals to the Commission, the merging parties should nevertheless inform the Commission of any disposals at the conclusion of the sale agreements; and not when the disposals are implemented as previously provided.

[77] We are satisfied that the tendered and recommended employment-related conditions address any employment concerns resulting from the proposed Transaction.

CONCLUSION

[78] We are satisfied with the Commission's competition analysis and agree with its conclusions.

- [79] In evaluating the public interest issues, we note that the agreement reached between the Minister and the parties is progressive and practical. To this, we clarified and further strengthened the public interest conditions in furtherance of equitable participation in the economy as contemplated in the amendments to the Act.
- [80] In light of the above, we concluded that the proposed Transaction was unlikely to substantially prevent or lessen competition in any relevant market. In addition, the imposed conditions satisfactorily address the public interest concerns raised.
- [81] Accordingly, the Tribunal approved the Transaction subject to the conditions attached hereto as “Annexure A”.


Ms Mondo Mazwai

15 May 2020
Date

Ms Yasmin Carrim and Mr Andreas W Wessels concurring

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