



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO119Nov24

In the matter between:

THE COMPETITION COMMISSION

APPLICANT

and

DN INVEST (PTY) LTD

RESPONDENT

Panel	:	I Valodia (Presiding Member)
	:	A Ndoni (Tribunal Member)
	:	T Vilakazi (Tribunal Member)
Heard on	:	26 November 2024
Order issued on	:	26 November 2024

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement concluded between the Competition Commission and DN Invest (Pty) Ltd annexed hereto.

Signed by: Imraan Valodia
Signed at: 2024-11-26 12:47:18 +02:00
Reason: Witnessing Imraan Valodia

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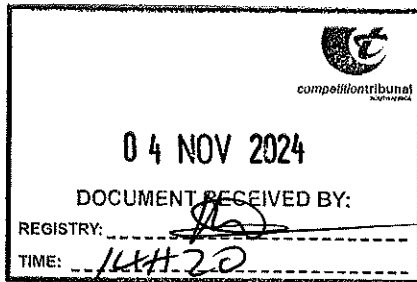
Presiding Member
Prof. Imraan Valodia

26 November 2024

Date

Concurring: Ms Andiswa Ndoni and Prof. Thando Vilakazi

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA



CT Case No: C0119NOV24

CC Case No: 2024OCTPMN0001

In the matter between

THE COMPETITION COMMISSION

Applicant

And

DN INVEST (PTY) LTD

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND DN INVEST (PTY) LTD, IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A(3) OF THE COMPETITION ACT

INTRODUCTION

The Competition Commission and DN Invest (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this consent agreement

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as an order of the Competition Tribunal in terms of section 49D read with section 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, between the Competition Commission and DN Invest (Pty) Ltd in respect of the Commission's allegation of a contravention of section 13A(3) of the Act, on the terms set out below.

1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

- 1.1. **"Agreement"** means this agreement duly signed and concluded between the Commission and DN Invest (Pty) Ltd that will be referred to the Tribunal for confirmation as a consent order;
- 1.2. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.3. **"Competition Act"** means the Competition Act, No. 89 of 1998, as amended;
- 1.4. **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Competition Act;
- 1.5. **"Confirmation Date"** means the date upon which the Tribunal confirms this Agreement as a consent order in terms of section 49D, read with section 58(1)(b) of the Competition Act;



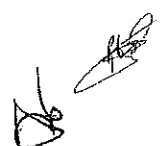
- 1.6. **"Day"** means any business day being a day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.7 **"DNI"** means DN Invest (Pty) Ltd, a private company duly registered and incorporated under the laws of South Africa, with its principal place of business situated at 25 Commerce Crescent, Kramerville, Johannesburg;
- 1.8. **"Parties"** means DNI and its current or erstwhile shareholders;
- 1.9. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. RECORDAL

- 2.1. This settlement agreement relates to the inclusion of the Budget Approval Clause (as defined below) in DNI's shareholders agreements between [REDACTED] and [REDACTED]

3. DNI'S SUBMISSIONS

- 3.1. On 3 October 2022, DNI voluntarily approached the Commission to advise that DNI had become aware of a mistake in its shareholders' agreement, relating to purported veto rights of certain shareholders.

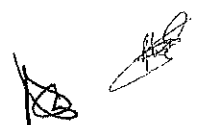


3.2. Until August 2019, the interests of the DNI Group were held by [REDACTED]
[REDACTED]. Given the expansion in the investments and activities of the group, it was determined that the interests of the group should be held through an [REDACTED]. As such, the shareholders of [REDACTED] "flipped up" their shareholdings from [REDACTED] into a [REDACTED]
[REDACTED], which became the [REDACTED]
[REDACTED].

3.3. In order to accommodate this restructure, the Parties entered into a new shareholders' agreement (the "**2019 SHA**") and an MOI for DNI. A template shareholders agreement was used as the basis for the new agreement. The template included a clause providing for the annual budget to be approved by a special majority of shareholders (the "**Budget Approval Clause**").

3.4. Had the Budget Approval Clause been agreed between the Parties and had it been intended to form part of the 2019 SHA, two shareholders at the time would have acquired the ability to veto the approval of the budget by virtue of having more than a 25% shareholding in DNI. DNI submits that none of the shareholders had any intention to enter into such agreement, at this point or at a later date. DNI submits that there is no evidence to indicate that the clause was anything more than a common mistake and therefore void in terms of contract law.

3.5. The mistake persisted in the next iterations of the shareholders' agreement and the current shareholders of DNI only became aware of the Budget Approval Clause during a further investment transaction where

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shareholdings would be changed amongst the shareholders, and competition law attorneys were requested to evaluate the merger control implications of those changes.

3.6. DNI rectified the constitutional documents in order to correct the mistaken inclusion of the Budget Approval Clause by way of a Record of Common Mistake and Rectification Agreement in which the Parties expressly and unequivocally confirmed that the Budget Approval Clause did not reflect the Parties' consensus.

3.7. However, given the likelihood that any future transactions undertaken by DNI might come before the Competition Commission, DNI considered it appropriate to notify the Commission of the mistake. DNI submits that, since the *bona fide* error did not reflect the intention or consensus of the Parties, and did not, in fact or law, become part of the shareholders' agreements between the Parties, no merger had taken place.

4. THE COMMISSION'S INVESTIGATION AND FINDINGS

4.1. The Commission acknowledged that the error in the Shareholders Agreement had been corrected and that no shareholder of DNI currently holds any control over DNI. On this basis, it did not call for a merger notification to be filed.

4.2. However, the Commission considered that a failure to notify may have occurred in particular having regard to the fact that the relevant clause



potentially gave shareholders concerned control and there are instances where the budget actually served at the shareholders meeting for approval. Therefore, the inclusion of the Budget Approval Clause appeared, on text, to confer minority protection.

5. SETTLEMENT TERMS

5.1. The Commission and DNI have therefore agreed to settle the complaint on the following terms.

5.2. FUTURE CONDUCT

5.2.1. DNI agrees and undertakes to:

5.2.1.1 notify the Commission of any future transactions that constitute a notifiable merger as defined in section 12(1) read together with section 11(5) of the Competition Act; and

5.2.1.2. refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Competition Act.

5.3.ADMISSION

5.3.1. DNI does not admit that a merger occurred.



5.4. ADMINISTRATIVE PENALTY

5.4.1. Payment by DNI of an administrative penalty of **R330,000 (three hundred and thirty thousand Rand)** to avoid the time and costs of protracted litigation. This amount does not exceed 10% of DNI's annual turnover.

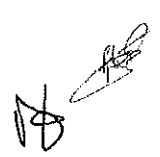
5.4.2. The administrative penalty shall be paid within 30 Days from the Confirmation Date.

5.4.3. The administrative penalty will be paid into the Commission's bank account, with the following banking details:

Bank name	:	ABSA Bank
Name of Account:		The Competition Commission
Branch name	:	Pretoria
Branch Code	:	632005
Account number:		40-8764-1778
Reference	:	DN Invest settlement

5.4.4. The Commission will provide DNI with a banking confirmation letter for the abovementioned bank account within 10 Days from the Confirmation Date.

5.4.5. The administrative penalty will accrue interest in terms of the provisions of section 80(1) of the Public Finance Management Act



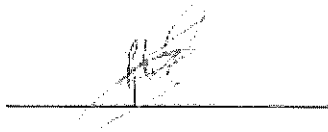
1 of 1999 for any amounts not paid within a year from the Confirmation Date.

5.4.6. The amount will then be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Competition Act.

6. FULL AND FINAL SETTLEMENT

6.1. This Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and DNI relating to the alleged contravention of section 13A(3) of the Competition Act by DNI and/or its shareholders.

Dated and signed at Kramerville on the 21st day of October 2024



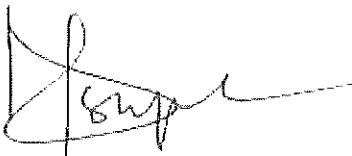
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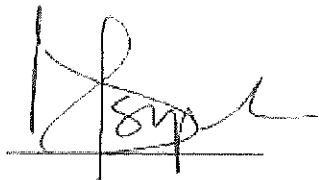
DN Invest (Pty) Ltd

Name in Full: Ryan Nataniel Noach

Authority: Director

Dated and signed at Pretoria on the 28th day of October 2024



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Doris Tshepe

Commissioner

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