



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM046Jul23

In the matter between:

Pick n Pay Stores Ltd

Acquiring Firm

and

**Various assets and the businesses belonging
to the Tomis group of companies**

Target Firm

Panel:	Sha'ista Goga (Presiding Member) Fiona Tregenna (Tribunal Member) Andiswa Ndoni (Tribunal Member)
Heard on:	05 September 2023
Order issued on:	05 September 2023
Reasons issued on:	02 October 2023

REASONS FOR DECISION

Approval

- [1] On 5 September 2023, the Competition Tribunal ("Tribunal") conditionally approved the large merger whereby Pick n Pay Stores Ltd intends to acquire all the various assets and the businesses belonging to the Tomis Group of companies ("Tomis"). Post-merger, Pick n Pay will control Tomis.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The acquiring firm is Pick n Pay Stores Limited, through its wholly-owned subsidiaries, Pick n Pay Retailers (Pty) Ltd and Socius Trading (Pty) Ltd ("Pick

n Pay"). Pick n Pay is a public company listed on the Johannesburg Stock Exchange.¹

- [3] Pick n Pay is a national retail grocery chain selling food, groceries, clothing, health and beauty products, general merchandise, and value-added services. Pick n Pay's network of stores includes Pick n Pay Hypermarkets², Pick n Pay Supermarkets³, Pick n Pay Express⁴, Pick n Pay Liquor⁵, Pick n Pay Clothing⁶, Boxer⁷, Boxer Punch⁸, Boxer Build⁹, Boxer Superliquors¹⁰. In South Africa, Pick n Pay currently operates 2 018 stores, including 1 039 Supermarkets, 330 clothing, 621 liquor, and 31 Boxer Build stores.

Primary target firm

- [4] Tomis is held by the Tomis Group

¹ Shareholders that held more than 5% of Pick n Pay as at 27 February 2023 are Newshelf 1321 (Pty) Ltd, a wholly owned subsidiary of Ackermann Investment Holdings (Pty) Ltd, as to 25.3%; Government Employees Pension Fund as to 20.2%; and Fidelity Series Emerging Markets Opportunities Fund as to 5.3%.

² This is the largest store format operated by Pick n Pay. These stores retail fresh produce, butchery, groceries, deli, bakery, hot food counter, clothing, home appliances, kitchenware, home improvement, garden and pool accessories, toys, stationery, health and beauty products, and general merchandise.

³ These stores retail a wide range of groceries, a targeted range of clothing, general merchandise, fresh produce, butchery, in-store bakery, deli, and hot food counter.

⁴ These stores are located at BP petrol station forecourts and are the smallest store format in the Pick n Pay network. These stores stock a targeted convenience range stocking daily necessities and quick meal options. The Express format is operated on a 24-hour basis.

⁵ These stores are situated close to the Pick n Pay supermarkets, but with separate entrances, and stock a wide range of beers, cider, fruit alcohol beverages, wines, fortified wines, and spirits. In addition, ancillary goods are also sold such as glassware, coolers, and ice.

⁶ These stand-alone stores sell retail clothing and footwear for babies, children, men, and women including casual wear, sleep wear, and active wear.

⁷ These stores stock a range of groceries, fresh produce and have an in-store butchery, bakery, and hot foods counter.

⁸ These stores are smaller sized versions of the Boxer stores, selling local produce, pre-packed meat, and a limited range of bread and confectionaries.

⁹ These stores sell a diverse range of building and hardware supplies for homeowners and builders.

¹⁰ These stores are situated close to the Boxer supermarkets, but with separate entrances. The Boxer Superliquors stores retail a basic range of alcoholic beverages and ancillary goods such as ice.

- [5] Tomis is a vertically integrated meat supplier, headquartered near Wellington in the Western Cape. Tomis operates an abattoir through Tomis Abattoir (Pty) Ltd (“Tomis Abattoir”), where livestock from Tomis’ feedlot are slaughtered. In addition, Tomis Meat Packers (Pty) Ltd (“Tomis Meat Packers”) processes lamb and beef carcasses, primal cuts, and offal. These are processed, packed, and supplied to wholesalers, butchers, retailers, the food service industry, export customers and the general public. Lastly, Tomis Edel-Kompos (Pty) Ltd (“Tomis Edel-Kompos”) manufactures garden compost from the processes conducted by Tomis Abattoir and Tomis Meat Packers.

Proposed merger and rationale

Transaction

- [6] In terms of the proposed merger, Pick n Pay will acquire 100% of Tomis. Post merger, Pick n Pay will control Tomis.

Rationale

- [7] According to Pick n Pay, the proposed merger is likely to secure greater control over the supply chain of a proportion of its meat products, which will result in a more consistent quality of meat products for its retail grocery activities. This will be made possible through ensuring an uninterrupted cold-chain and improved traceability, which will result directly from the proposed merger. In addition, this centralised supply will also enable smaller and/or less profitable stores to reduce the costs of sourcing meat products.¹¹
- [8] The Competition Commission (“Commission”) had noted that recently, Pick n Pay’s rival Shoprite also acquired a meat processing plant, and Pick n Pay have themselves submitted that the proposed merger will allow Pick n Pay to compete more vigorously with its major competitors such as the Shoprite Group.¹²

¹¹ Joint Competitiveness Report, paras 3.1. – 3.1.1. (Merger Record, p78)

¹² Ibid.

- [9] From the perspective of Tomis, their business has been in financial distress and failing.

13

Competition assessment

Background

- [10] The merging parties' activities do not overlap from a horizontal perspective. However, the proposed merger raises a vertical overlap-

10.1 In this regard, Tomis is an upstream supplier of beef carcasses, lamb carcasses, processed/packaged beef products, and processed/packaged lamb products to retailers (including Pick n Pay), wholesalers, and butcheries, amongst others. Tomis operates within the livestock rearing¹⁴ to the meat production and packaging value chain.

10.2 Pick n Pay operates at the downstream level as it procures the abovementioned products from suppliers (such as Tomis). Pick n Pay then supplies the meat to end customers in different cuts and pack sizes to meet individual customers' demands.

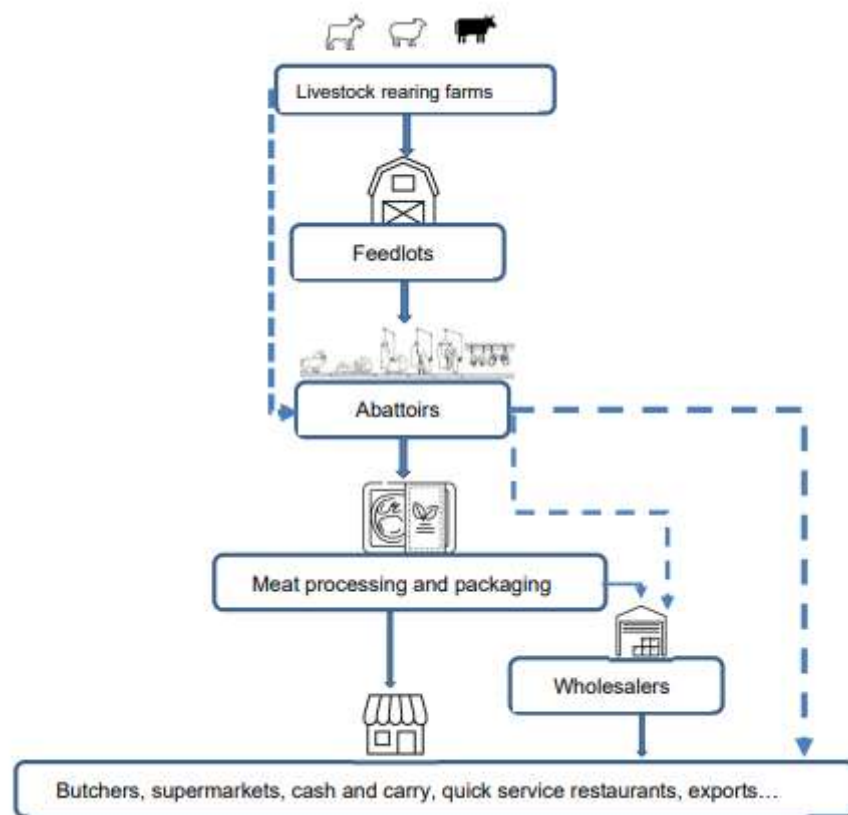
- [11] Tomis Meat Packers is also involved in the supply of pork sausages to a very limited extent. For example, in 2022, this segment made up approximately █% of Tomis' revenue. Given the fact that Tomis Abattoir and Meat Packers is halaal certified, the supply of pork sausages is very limited from the non-halaal section of the Meat Packers business. The Commission thus did not assess this overlap further.

- [12] The diagram of the value chain is illustrated as follows by the merging parties:

¹³ Joint Competitiveness Report, para 3.2. (Merger Record, p78)

¹⁴ The livestock rearing to meat production and packaging value chain consists of several levels with firms participating at the different levels. Livestock rearing takes place on farms and entails the process of raising, feeding, breeding and the attending to of animals for their meat, fibre, milk and other products.

Figure 1¹⁵



Product market

[13] The Tribunal has previously considered separate markets for the wholesale supply of beef and lamb products to wholesale and retail customers in *Karan Beef*¹⁶ as well as *Cavalier*¹⁷.

[14] Without necessarily concluding on the market in this instance, we consider the effects of the proposed merger in the upstream markets for the wholesale supply of:

- 14.1 beef carcasses;
- 14.2 processed/packaged beef products;

¹⁵ Merging parties Joint Competitiveness Report, (Merger Record p100)

¹⁶ *Karan Beef Feedlot and Karan Beef (Pty) Ltd and The business and properties of SK Cain Farming, Caine Farming (Pty) Ltd and Triple A Meat (Pty) Ltd* (LM059Jun22) ("*Karan Beef*")

¹⁷ *Cavalier Group of Companies (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd* (LM153Dec22)

- 14.3 lamb carcasses; and
- 14.4 processed / packaged lamb products.

[15] As regards the relevant downstream market, the Tribunal has previously¹⁸ assessed markets in relation to the retailing of grocery products. The Commission in this instance considered the downstream market for the retail of grocery products and delineated according to the retail sale of:

- 15.1 processed/package beef; and
- 15.2 processed/package lamb products.

Geographic market

[16] In *Karan Beef*, the Tribunal, without necessarily concluding on the relevant upstream geographic market, considered the market at both a regional (provincial) and national level – although beef products can be supplied nationally, there are notable regional dynamics that have to be considered.

[17] Tomis is based near Wellington in the Western Cape and supplies its customers from those facilities in the Western Cape. However, Tomis supplies its products to national retail chains such as Pick n Pay, which raised the possibility that Tomis' meat products may be distributed nationally by such retailers.

[18] However, submissions¹⁹ from other national retailers who have procured from Tomis, show that Tomis was only able to meet demand for their retail grocery operations within the Western Cape. Larger competitors of Tomis that include [REDACTED] are able to distribute their meat products nationally.

[19] The Commission therefore, did not conclude on the relevant geographic market but assessed the effect of the transaction regionally, in the Western Cape.

¹⁸ For instance, *Pick 'n Pay Retailers (Pty) Ltd and Trio Belville (Pty) Ltd* (LM242Mar15); *Spar Group Ltd / Fraqr 165 (Pty) Ltd and Northern Light Trading 128 (Pty) Ltd* (59/LM/Sep10); *Spar Group Ltd / Sparit Family Supermarkets (Pty) Ltd* (LM051Aug05).

¹⁹ [REDACTED]

[20] Since the assessment of this regional market revealed no competition concerns (as explained below), we do not find it necessary to conclude on the geographic scope.

Vertical assessment

Input foreclosure assessment

[21] Input foreclosure would arise in an instance in which the merged entity would be likely to restrict access to products that it would have otherwise supplied if the merger had not taken place. An assessment of vertical foreclosure therefore requires a consideration of the alternatives available to buyers if access was denied.

Beef carcasses

[22] Tomis has a market share of approximately [REDACTED] %²⁰ nationally, and [REDACTED] %²¹ in the Western Cape for the supply of beef.

[23] There are several other players supplying beef in the Western Cape including some large national players such as Sparta Beef, Karan Beef and Beefcor. Other suppliers include Excellent Meat, Delico Meat, Busy Corner Meat Wholesalers, Roelcor Malmesbury, Good Hope Meat Supply, Cartol Beleggings, Hessequa Abattoir, Blaauwberg Meat, Bonnievale, Bredasdorp Slagpale and Osdam amongst others.

[24] As such, input foreclosure is unlikely to be profitable in the market as buyers could switch to alternatives.

Processed/packaged beef products.

[25] The Commission was unable to obtain market share figures for processed/packaged beef products. However, they noted that the majority of the suppliers of beef carcasses are also active in the supply of processed/packaged

²⁰ Based on Statista's estimations of South African cattle production volumes, 2021.

²¹ Disaggregated from the Department of Agriculture, Land reform and Rural Development report titled "A profile of the South African beef market value chain" 2021, reporting that approximately 5% of the total national beef production is from the Western Cape.

beef products such as Sparta Beef, Karan Beef, Good Hope Meat Supply, Delico Meat and Busy Corner Meat Wholesalers.

[26] In addition, there are also firms that specialise in the supply of processed/packaged beef products only. For example, Cavalier produces [REDACTED] tons of processed/packaged beef weekly.²² This is significantly higher than the volumes produced by Tomis weekly (approximately [REDACTED] tons).

[27] Furthermore, [REDACTED]
[REDACTED]
[REDACTED] Customers of Tomis have confirmed that there are sufficient alternatives and no concerns have been raised.

[28] As such, it is unlikely that the proposed merger would result in input foreclosure in relation to processed/packaged beef products.

Lamb carcasses

[29] In relation to the supply of lamb carcasses, Tomis produces approximately [REDACTED] % of the lamb carcasses produced in the Karoo region and approximately [REDACTED] % of the lamb carcasses produced nationally.²³

[30] There are several players supplying lamb carcasses in the Western Cape including Williston Abattoir, KYTO Abattoir, SAFAM Abattoirs, KKK, Osdam, Good Hope Meat Supply, Delico Meat, Busy Corner Meat Wholesalers, Hessequa Abattoir, Excellent Meat, Cartol Beleggings, Roelcor Malmesbury and Bredasdorp Slagpale amongst others.

Processed/packaged lamb products

²² Submission from Cavalier dated 27 July 2023.

²³ Based on Statista's estimations of South Africa's sheep meat production volumes (2021) and Sihlobo (2023) *Sheep meat production in South Africa* <https://wandilesihlobo.com/2023/01/02/sheep-meat-production-in-south-africa/>.

- [31] The Commission was unable to determine market shares in relation to the supply of processed/packaged lamb products. However, the Commission found that, similarly to processed/packaged *beef* products, many of the suppliers of lamb carcasses are also active in the supply of processed/packaged lamb products – for example, Good Hope Meat Supply, Delico Meat, Busy Corner Meat Wholesalers, Blaauwberg Meat.
- [32] Customers of Tomis also similarly confirmed that there are sufficient alternative suppliers and raised no concerns.
- [33] Given the small share of the various markets in which Tomis competes and the range of available alternatives we find that the proposed merger is unlikely to give rise to input foreclosure concerns in the supply of beef carcasses; processed/packaged beef products; lamb carcasses; and processed/packaged lamb products in the Western Cape.

Customer foreclosure assessment

- [34] Customer foreclosure would occur in circumstances in which a merged entity does not buy from upstream competitors. In this instance it would occur if Pick and Pay no longer bought products from competitors to Tomis.
- [35] Suppliers of beef carcasses; processed/packaged beef products; lamb carcasses; and processed/packaged lamb products supply these products to the downstream market through various channels including retailers, wholesalers, and butcheries. As such, there are various channels through which suppliers can reach end customers. Furthermore, even if we were to only consider grocery stores, at the downstream level, Pick n Pay has a national market share of only [REDACTED] % for the retail of grocery products. Other downstream rivals with a national presence include Shoprite and Spar.
- [36] The Commission also found that it is unlikely that Pick n Pay will post-merger exclusively source beef and lamb from Tomis. Tomis at present, is unable to meet Pick n Pay's national demand (as described above). In this regard, the

Commission found that Tomis' total capacity only represents [REDACTED] % of Pick n Pay's total demand.

[37] Furthermore, Pick n Pay submitted that it is very risky to rely on one supplier only, due to various factors that may affect security of supply including disease outbreaks such as foot and mouth disease.

[38] No suppliers of Pick n Pay raised concerns with the proposed merger.

[39] Given the availability of alternative customers and the share of Pick n Pay in the downstream market, customer foreclosure does not seem plausible.

[40] Having regard to the above, the Tribunal concurs with the Commission's conclusions that the proposed merger is unlikely to give rise to any foreclosure and that the proposed merger is unlikely to substantially prevent or lessen competition in the markets assessed.

Counterfactual

[41] The merging parties submitted that Tomis is a failing or flailing firm, and that absent the proposed merger, its exit or continued decline and a significant downscaling of its current operations is very likely. This will lead to a loss of [REDACTED] jobs. The counterfactual scenario contemplated is one in which Tomis is likely to exit, or significantly reduce its operations, which would have detrimental effects on employment and other public interest considerations set out in section 12A(3) of the Competition Act.

[42] This is a result of a series of events that have led to Tomis working below capacity. [REDACTED]

[43] We therefore find that absent the proposed merger, Tomis would likely exit or significantly decrease the scale of its operations leading to a loss of jobs.

Public interest

Employment

[44] The merging parties submitted that absent the merger, Tomis will be liquidated due to its distressed financial position (as mentioned above), resulting in the loss of [REDACTED] employees at Tomis.

[45] The Commission in this regard was concerned about job security, to which the merging parties agreed to a condition in that there will be no retrenchments at Tomis for a period of 36 months post-merger.

[46] The Commission contacted the employee representative of Tomis who indicated that employees had required clarity about the proposed merger's impact on their provident fund. Subsequently, the employee representative then confirmed that the merging parties provided the employees with acceptable assurances that the provident fund will not be negatively impacted by the proposed merger.

[47] The Minister of Trade, Industry and Competition ("dtic") participated in this merger and was satisfied with the employment commitments made by the parties in this regard.

Effect on the spread of ownership

[48] The Commission found that Pick n Pay has 20.27% ownership by historically disadvantaged persons ("HDPs"). Tomis, on the other hand, does not have any HDP ownership.

[49] The Commission found that the proposed merger promotes a greater spread of HDP ownership through Pick n Pay.

[50] The dtic argued for the establishment of an employee share ownership scheme (“ESOP”), to which the merging parties submitted that the proposed merger is increasing the spread of ownership by virtue of Pick n Pay’s HDP shareholding. The dtic was content not to participate further, and the Commission concluded that no further intervention was required in this regard.

Investment

[51] The merging parties also committed to an investment of [REDACTED] at Tomis over a 5-year period.

Effect on SMMEs and HDPs

[52] The merging parties, dtic, and Commission were satisfied with, and agreed to the following commitments (which has been made a condition) in relation to SMMEs and HDPs in the beef and lamb sectors:

“The Acquiring Firm commits to increasing procurement spend with HDP owned wholesale meat suppliers by [REDACTED] from the Implementation Date. The Acquiring Firm’s annual procurement spend with HDP owned wholesale meat suppliers as at the Implementation Date, will be the applicable benchmark, for monitoring purposes.”

[53] The Commission was satisfied with the commitments outlined above and found that the merger is justified on public interest grounds.

[54] We agree that these conditions address the public interest concerns arising from the proposed merger.

Conclusion

[55] Considering the above, the Tribunal concluded that the proposed merger is unlikely to substantially prevent or lessen competition in any relevant market. The proposed merger has been approved subject to the abovementioned public

interest conditions which collectively address any public interest concerns.
Accordingly, we conditionally approved the proposed merger.

Signed by:shaista
Signed at:2023-10-02 13:26:15 +02:00
Reason:Witnessing shaista

Sha'ista Goga

Ms Sha'ista Goga

2 October 2023

Date

Concurring: Prof Fiona Tregenna and Ms Andiswa Ndoni

Tribunal case manager:

Leila Raffee

For the merging parties:

Avias Ngwenya, Anthony Norton, Anton Roets,
Nicci van der Walt, and Melissa Steele of
Nortons Inc.

For the Commission:

Raksha Darji and Wiri Gumbie