



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM150Dec23

In the matter between:

Sentraal-Suid Co-Operative Limited

Primary Acquiring Firm

And

Die Humansdorpse Landbou Koöperasie Beperk

Primary Target Firm

| | | |
|--------------------|---|--|
| Panel | : | Andreas Wessels (Presiding Member) |
| | : | Prof Thando Vilakazi (Tribunal Member) |
| | : | Adv Anisa Kessery (Tribunal Member) |
| Heard on | : | 28 March 2024 |
| Last submission on | : | 31 March 2024 |
| Order issued on | : | 31 March 2024 |
| Reasons issued on | : | 13 May 2024 |

REASONS FOR DECISION

Introduction

[1] On 31 March 2024, the Competition Tribunal (“Tribunal”) conditionally approved a large merger in terms of which Sentraal-Suid Co-Operative Limited (“SSK”) intends to acquire the entire issued share capital in Die Humansdorpse Landbou

Koöperasie Beperk (“HLK”) and the properties owned by HLK through its subsidiaries (“Target Properties”).

Merging parties and their activities

- [2] The primary acquiring firm is SSK, a limited liability primary agricultural co-operative. It has 1 829 members and as such is not controlled by any individual member.
- [3] SSK’s core business is the supply of agricultural inputs and implements required by farmers. Its business includes the supply of a range of general goods and services including pet care products and food, gas, swimming pool equipment, fertiliser, fuel and lubricants, spare parts and baling material, chemicals, irrigation and gardening supplies, building materials, fencing material, grain sales, storage and handling, packing materials, outdoor clothing, garden furniture, tools and hardware supplies, household goods, workwear, workshop and mechanical services, steel and steel construction works, short-term insurance and credit supply.
- [4] The target firm is HLK, a limited liability primary agricultural co-operative. It has 1 844 members and as such is not controlled by any individual member.
- [5] HLK controls the following firms: (i) Chicory SA (Pty) Ltd; (ii) Die Koop Finansiering (Pty) Ltd; (iii) Elandsrivier Heuning (Pty) Ltd; (iv) Friedshelf 1722 (Pty) Ltd; and (v) Umtiza Farmers Corporation Limited (“Umtiza”). Umtiza conducts its business in the rural areas of the Eastern Cape where it sells farming input goods and supporting services to small scale and subsistence farmers.
- [6] HLK and its subsidiaries will collectively be referred to as the HLK Group.
- [7] The HLK Group’s core business is the supply of agricultural inputs and implements required by farmers. Its activities include the supply of a range of general goods and services such as workwear, fertiliser, fuel, gas, oil and lubricants, animal feeds, spare parts and baling materials, grain seeds (for the

production of crops for grazing), chemicals, irrigation and gardening implements, building materials, fencing material, veterinary, agricultural netting, packing material, tools and hardware (including paint), electrical goods, ammunition and firearms, automotive materials (including tyres), credit supply and livestock brokerage services.

[8] SSK and HLK will collectively be referred to as the merging parties.

Proposed transaction

[9] In terms of the proposed transaction, SSK will acquire the entire issued share capital in HLK and the Target Properties. The proposed transaction will occur in three steps, that can broadly be described as follows:

- (i) SSK will advance a loan facility to HLK to provide HLK with urgently needed cash flow to avoid any further legal proceedings;
- (ii) SSK will acquire the Target Properties and Umtiza from HLK; and
- (iii) SSK will acquire HLK.¹

[10] We note that the Competition Commission (“Commission”) assessed the proposed acquisition of HLK and the Target Properties as an indivisible transaction because HLK and the Target Properties are owned by common shareholders and, in addition, the Target Properties house HLK’s business operations. We concur with this approach.

Competition assessment

[11] SSK has its head office in Swellendam in the Western Cape, and it conducts its core business in the southern region of the province, where its products and services are mainly provided to its members and other customers by means of retail outlets, grain storage facilities and animal feed manufacturing plants. SSK also has some stores in the Eastern Cape.

¹ This will require HLK to convert into a private company as a co-operation cannot sell its shares to a third-party.

- [12] HLK has its head office in Humansdorp in the Eastern Cape, and it conducts its core business primarily in that province from retail outlets. It also has retail outlets in the Western Cape, in particular in Paarl and Wellington (with trade being limited to fertiliser and chemicals).
- [13] The Commission noted that there is no overlap between the retail stores of SSK and Umtiza.
- [14] The Commission found that the proposed transaction results in horizontal overlaps between the merging parties' activities in the following areas: (i) the retail supply of agricultural input products in the Langkloof area, which includes the supply of farming requisites, animal health and handling products, packaging materials, fencing products, lubricants, hardware and gardening products and seeds, amongst others; (ii) a national market for the provision of retail agricultural finance; and (iii) the provision of short-term insurance.
- [15] We note that the Commission did not analyse the market for the provision of short-term insurance in any detail because this is an ancillary service to the merging parties' main business activities and furthermore, they compete with a number of players in this market. We concur with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in this market and we do not deal with this overlap any further in these reasons.

National market for the provision of retail agricultural finance

- [16] The merging parties estimate their combined national market share to be less than 1% based on all domestic credit extended, and less than 2% of all agricultural related debt.
- [17] The Commission found that the merging parties are small players in this market and that they compete with various other players including the Land Bank and commercial banks such as ABSA, Nedbank, Standard Bank and FNB. The

Commission further noted that the credit terms extended by HLK to its members are higher than those of SSK.

- [18] Considering the above, the Commission concluded that proposed transaction is unlikely to result in a substantial prevention or lessening of competition in this market. We concur with this conclusion.

Regional retail supply of agricultural input products

- [19] The merging parties submitted that their activities geographically overlap in one local area where they both have farming requisite stores located within 50km of each other.
- [20] The Commission found that the relevant geographic market is the Langkloof area, where HLK has a trade store in Louterwater while SSK has trade stores in Haarlem, Misgund, Krakeel and Twee Riviere, all of which fall within a 68.5km stretch.
- [21] We leave the exact parameters of the relevant geographic market(s) open since it does not alter our ultimate conclusion in this matter.
- [22] In relation to market concentration, the merging parties submitted best estimates of their regional market shares for each product category that they supply, as reflected in **Table 1** below.

Table 1 Merging parties' estimates of their market shares in the geographic area

| Player | Fertiliser | Animal Feeds | Chemicals (including agricultural pesticides) | Irrigation & gardening | Fencing materials | Veterinary | Packing Materials | Tools and Hardware |
|-----------------|----------------------|--------------------|---|------------------------|-------------------|------------|-------------------|--------------------|
| SSK | 28% | 40% | 10% | 10% | 15% | 30% | 30% | 25% |
| HLK | 8% | 5% | 5% | 5% | 30% | 10% | - | 10% |
| Combined | 33% | 45% | 15% | 15% | 45% | 40% | 30% | 35% |
| Kaap Agri | 20% | 10% | 10% | 10% | 30% | 25% | 30% | 25% |
| 4pack | - | - | - | - | - | - | 10% | - |
| spectra | - | - | - | - | - | - | 10% | - |
| Others | 47% | 45% | 75% | 75% | 25% | 25% | 20% | 40% |
| Con... | | | | | | | | |
| Player | Clothing (Work wear) | Building Materials | General Goods (including Petcare) | Household goods | Outdoor | - | - | - |
| SSK | 20% | 20% | 40% | 20% | 25% | - | - | - |
| HLK | 10% | 10% | 7% | 3% | 5% | - | - | - |
| Combined | 30% | 30% | 47% | 23% | 30% | - | - | - |
| Kaap Agri | 20% | 35% | 20% | 20% | 25% | | | |

[23] The Commission found it difficult to confirm or obtain market share estimates in these sub-markets due to the paucity of publicly available information and the diverse number of market participants per category. Notwithstanding the above, the Commission engaged with competitors and customers of the merging parties to get a sense of the level of competition in the relevant market.

[24] Kaap Agri Bedryf Limited (“Kaap Agri”), a competitor, indicated that in the broader Western Cape and Eastern Cape geographical area, the agricultural landscape varies immensely and that no market information is readily available. Kaap Agri trades as Agrimark and has 26 operating retail outlets collectively in the Western Cape and Eastern Cape. It raised a concern that the proposed transaction will result in limited supplier options of packaging material storage space available to competitors, resulting in limited competition in the Langkloof area. The Commission noted that the agricultural packaging materials sold in the geographic overlap area in the Langkloof (and in the greater Langkloof area)

consist mainly of packaging used by fruit farmers as the Langkloof area is primarily known for the production of apples and stone fruit. The merging parties submitted that HLK does not sell agricultural packaging material from its retail outlet in the geographic overlap area (i.e. HLK's farming requisites outlet in Louterwater) nor does it lease any storage infrastructure to third parties in this area, or anywhere else in its greater service area. On the other hand, SSK does sell agricultural packaging material from its farming requisites outlets in the geographic overlap area and has one rented facility in Haarlem. SSK uses its own infrastructure to store the products sold from these outlets and does not lease any storage infrastructure to third parties in this area, or anywhere else in its greater service area.

[25] Giraffe Vrugteboerdery (Pty) Ltd ("Giraffe"), which procures irrigation equipment from HLK, submitted that there is no nearest alternative to the merging parties in the relevant geographic market. The Commission however found that there is a competing store, Agrimark Langkloof, in the Langkloof / Louterwater area which also sells irrigation equipment.

[26] Although the merging parties have relatively high market shares in certain of the sub-markets in **Table 1** above, the Commission recommended that the proposed transaction should be conditionally approved after considering the merging parties' further submissions regarding HLK (as discussed next).

Failing firm arguments raised by HLK

[27] HLK submitted that it is a failed firm which, for some time, has been in a state of severe financial distress, unable to meet its obligations to its creditors according to terms or to reach a positive cash flow position. It further submitted that the continuation of HLK and Umtiza is of vital importance to the communities and towns where they operate as well as to the agricultural industry in the Eastern Cape. Considering the above, the merging parties submitted to the Commission that the rationale for the transaction is to save HLK from liquidation.

- [28] The Commission assessed HLK's claims and concluded that HLK is failing or is likely to fail. Considering liquidity ratios, the Commission confirmed that HLK is unable to meet its obligations to its creditors. The Commission also confirmed that the creditors have already taken steps to liquidate HLK. However, due to this proposed (rescue) transaction, the creditors decided to halt any foreclosure action pending the outcome of the proposed merger. The Commission after further engagement with the creditors, found that absent the proposed merger HLK is likely to be liquidated and its assets could be sold in an auction. All relevant facts considered, the Commission found that HLK is failing in the broad sense.
- [29] The Tribunal requested the merging parties to put up a representative of HLK to speak to its above claims and provide an update regarding the financial status of HLK. Mr Rikus Vorster, the current CEO of HLK, spoke to these issues and answered questions from the Tribunal, addressing issues such as HLK's cash flow, debt levels and the repayment of debt, financiers' interest rates, stock levels, revenues, profitability, the impact on the communities in which HLK operates, as well as the future prospects of HLK.²
- [30] Based on the Commission's investigation and findings, documentary evidence and the oral submissions of HLK, we have no reason to disagree with the Commission's assessment of HLK's position.

Conclusion on competition assessment

- [31] Considering the above, we decided to approve the proposed transaction subject to certain public interest conditions (discussed next).

² Transcript pages 14 to 21.

PUBLIC INTEREST

Effect on employment

- [32] The merging parties in their filing gave an undertaking not to retrench any employees as a result of the proposed merger for a period of three years.
- [33] In relation to past employment, we note that Commission found that due to HLK's financial position, it had to retrench 8 employees during the financial year ended 28 February 2023 and a further 23 employees during the course of the current financial year. Further, 10 HLK employees accepted voluntary severance packages. In addition, HLK has lost 61 employees who resigned during the course of the current financial year because of the uncertainty regarding HLK's future.
- [34] HLK submitted that it must divest itself of its unsustainable business investments and that it is using its best efforts to dispose of such investments. Should suitable buyers not be found, inevitably such businesses would have to be collapsed, with resultant job losses due to operational reasons. Further, the merging parties submitted that if HLK exits the market, all 835³ of its employees will lose their employment. However, if the proposed merger proceeds 735 jobs will be saved.
- [35] Further, the merging parties argued that as the business of the HLK Group recovers, there will be prospects of increased employment. In this regard, the merging parties submitted to the Commission that they undertake that if any involuntary operational retrenchments are implemented, such retrenchments will be limited to 100.
- [36] The Tribunal prior to the hearing requested additional employment-related information and data from the merging parties. This included an explanation of how the abovementioned figure of 100 potential operational retrenchments has been determined and a breakdown of what it includes, as well as a list of the affected positions in HLK and the skills levels associated with each category /

³ This figure was updated / corrected in subsequent submissions to the Tribunal (as indicated below).

level of positions. Furthermore, various employment-related data were requested as well as an indication of the steps taken and/or to be taken by HLK to mitigate employment losses.

[37] The merging parties submitted data indicating *inter alia* the employment numbers in respect of each HLK Group business unit where operational retrenchments are expected to potentially occur. They furthermore identified certain ‘going concern disposals’ where HLK is reasonably convinced that it could potentially be successful in the disposal of the businesses / units. They also confirmed their undertaking to limit potential operational retrenchments to 100 employees, at most. They further indicated that HLK currently employs 870 employees⁴.

[38] After receiving the additional submissions from the merging parties and them answering questions at the hearing, and the Tribunal raising certain concerns, we ultimately approved the proposed transaction subject to *inter alia* the following employment conditions:

38.1. The merger parties shall not make any merger specific retrenchments⁵ of any Employees⁶ (other than, for the avoidance of doubt, Affected Employees, as defined) during the period from the approval date to expiry of a period of three years from the date of implementation of the last merger step as set out in clause 1.16 of the conditions. “Affected Employees” means a maximum of 100 employees of HLK Group that may be retrenched by HLK for operational reasons.⁷ It is important to note that after

⁴ As defined in the Labour Relations Act, No. 66 of 1995, as amended or replaced from time to time (“LRA”).

⁵ Merger specific 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 LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a fixed term contract of a contract worker or Employee taken in the ordinary course of business.

⁶ As defined in the LRA.

⁷ Such operational retrenchments exclude (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vi) any decision not to renew or extend a fixed term contract of a contract worker or employee taken in the ordinary course of business.

queries from the Tribunal, the merging parties agreed that the abovementioned figure of a maximum of 100 potential retrenchments by HLK for operational reasons include any potential voluntary operational retrenchments.

- 38.2. In addition, prior to any retrenchments of Affected Employees being implemented by HLK, SSK shall give first preference to HLK employees that are to be retrenched for any vacancies within the ranks of its employees.⁸
- 38.3. For a period of 24 months after the retrenchment of the Affected Employees by HLK, SSK and HLK shall furthermore give first preference to the Affected Employees for any vacancies within the ranks of their respective employees.⁹
- 38.4. SSK and HLK shall each maintain a database of the names and contact details of all the Affected Employees and, should any vacancies arise within the ranks of their respective employees, undertake to communicate available vacancies to the Affected Employees through their last known contact details such as email and/or cell phone numbers.

Spread of ownership

[39] SSK submitted that it has a Historically Disadvantaged Person (HDP) shareholding / membership of 6.68% and HLK submitted that 4.1% of its members are HDPs. To increase the number of HDPs holding membership of SSK, the merger parties committed to taking certain steps.

[40] After raising certain issues with the merging parties regarding the above commitments, we approved the proposed transaction subject to SSK taking the

⁸ Provided that the HLK employees that are to be retrenched have the requisite qualifications, skills, know-how and experience for those specific vacancies and, at all times, subject to the employment equity plan and transformation requirements of SSK.

⁹ Provided that the Affected Employees have the requisite qualifications, skills, know-how and experience for those specific vacancies and, at all times, subject to the employment equity plan and transformation requirements of SSK and HLK respectively.

following steps in an attempt to increase the number of HDPs holding membership of SSK –

- 40.1. SSK will take all reasonable steps to identify as many suitable candidates as possible, in the service area of SSK and also in the service areas of HLK and Umtiza. These steps will be conducted: (i) in respect of the historical SSK service area, with effect from the approval date for a period of three years from the approval date; (ii) in respect of the historical service area of Umtiza, with effect from the implementation of the Umtiza Transaction¹⁰ for a period of three years from the date of implementation of the Umtiza Transaction; and (iii) in respect of the historical service area of HLK, with effect from the date of implementation of the HLK PL Transaction¹¹ for a period of three years from the date of implementation of the HLK PL Transaction.
- 40.2. Upon the implementation of the Umtiza Transaction, SSK will for a period of three years from the date of implementation of the Umtiza Transaction, appropriately extend its retail services to reach even farmers who may be described as marginalised, particularly in the historical service area of Umtiza, in an attempt to promote to such farmers the benefits of being a member of a co-operative and incentivise them to apply to become members of SSK.
- 40.3. SSK will, at least three times per year, conduct membership drives amongst those farmers identified as a result of the efforts described in 40.1 and 40.2 above.¹²

¹⁰ The acquisition by SSK of the business conducted by Umtiza.

¹¹ The acquisition by SSK of the entire issued share capital in HLK PL consequent upon the registration, by the Registrar, of HLK as a private company with limited liability in terms of the Companies Act, No. 71 of 2008, and the simultaneous cancellation of the registration of HLK pursuant to the provisions of section 62 of the Co-operatives Act, No. 14 of 2005.

¹² These membership drives will be conducted: (i) in respect of farmers identified or to be identified in the historical SSK service area, with effect from the approval date for a period of three years from the approval date; (ii) in respect of farmers identified or to be identified in the historical service area of Umtiza, with effect from the implementation of the Umtiza Transaction for a period of three years from the date of implementation of the Umtiza Transaction; and (iii) in respect of farmers identified or to be identified in the historical service area of HLK, with effect from the date of implementation of the HLK PL Transaction for a period of three years from the date of implementation of the HLK PL Transaction.

40.4. In respect of 40.1 to 40.3 above, SSK will encourage suitable candidates to apply for membership in SSK and create conducive conditions for them to do so (by, for instance, assistance with completion and delivery of application forms and supporting documents and/or information).

40.5. In respect of 40.1 to 40.3 above, SSK will provide funding to qualifying candidates by means of the SSK Membership Assistance Fund¹³.

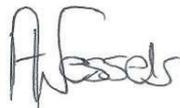
40.6. SSK will publish details of the above transformation initiatives on its website.¹⁴

Other public interest

[41] The proposed transaction raises no other public interest concerns.

Conclusion

[42] We approve the proposed transaction subject to public interest conditions attached hereto as “**Annexure A**”.



Presiding Member

Andreas Wessels

13 May 2024

Date

Concurring: Professor Thando Vilakazi and Advocate Anisa Kessery

Tribunal Case Manager: Ofentse Motshudi

¹³ A fund set up by SSK to assist HDPs with the acquisition of the requisite 4,000 shares in SSK if they qualify for membership in SSK.

¹⁴ Such publication to be effected as follows: (i) in respect of farmers identified or to be identified in the historical SSK service area, with effect from two business days after the approval date; (ii) in respect of farmers identified or to be identified in the historical service area of Umtiza, with effect from the date of implementation of the Umtiza Transaction; and (iii) in respect of farmers identified or to be identified in the historical service area of HLK, with effect from the date of implementation of the HLK PL Transaction.

For the Merger Parties: Paula Neethling of Vanderspuy Attorneys
For the Competition
Commission: Billy Mabatamela and Themba Mahlangu