

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 1493

12 November 2021



MEMORANDUM OF UNDERSTANDING
("MoU")

Between

THE COMPETITION COMMISSION OF SOUTH AFRICA
("the Commission")

A juristic person established in terms of section 19 of the Competition Act, No 89 of 1998 as amended ("**the Competition Act**") and herein represented by **Mr Tembinkosi Bonakele** in his capacity as the Commissioner of the Competition Commission of South Africa

and

THE NATIONAL EMPOWERMENT FUND
("NEF")

A statutory body established in terms of the National Empowerment Fund Act No. 105 of 1998 herein represented by **Mr Mziwabantu Dayimani** in his capacity as **General Counsel** and **Mr Phumudzo Siphuma** in his capacity as **Acting Chief Financial Officer** and duly authorised.

(Hereinafter jointly referred to as "the Parties")

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1. PREAMBLE

WHEREAS the Commission is a juristic person established in terms of section 19 of the Competition Act No. 89 of 1998, as amended ("the Competition Act");

WHEREAS the Commission is mandated to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries; and to promote the efficiency, adaptability and the development of the South African economy;

WHEREAS the NEF is a trust established in terms of section 2 of the National Empowerment Fund Act No. 105 of 1998 ("the NEF Act");

WHEREAS the purpose of the NEF in terms of section 3 of the NEF Act is to facilitate the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons (HDPs); by (a) providing HDPs with the opportunity of, directly or indirectly, acquiring shares or interest in State Owned Commercial Enterprises that are being restructured or in private business enterprises; (b) encouraging and promoting savings, investments and meaningful economic participation by HDPs; (c) promoting and supporting business ventures pioneered and run by HDPs; (d) promoting the universal understanding of equity ownership among HDPs; (e) encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic of South Africa; (f) contributing to the creation of employment opportunities; and (g) generally employing such schemes, businesses and enterprises as may be necessary to achieve the objects of the NEF Act:

WHEREAS the NEF implements and develops innovative investment and transformation solutions to advance sustainable black economic participation; providing financial and non-financial support to black-owned and managed businesses;

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WHEREAS the Parties recognise that their respective mandates are mutually reinforcing and should thus encourage the optimal utilisation of the most effective remedies available between them, as the case may be;

WHEREAS the Parties recognise the potential to leverage on areas of convergence and mutual interest;

WHEREAS the purpose of this MoU is to outline the collaboration between the Parties in consulting one another on matters of mutual interest and effectively carry out their powers and duties ensuring entry and participation of HDPs in industries;

AND WHEREAS the Parties acknowledge that the content of this MoU is in the context of and subject to all legislation, as amended from time to time, applicable to a Party;

THEREFORE, the Parties agree to enter into this MoU and record the terms of their agreement as follows:

2. INTERPRETATION

In the interpretation of any terminology used in this MoU, any word or expression to which a meaning is assigned in the Competition Act and the NEF Act has the meaning assigned to it unless otherwise specified.

In this MoU, unless inconsistent with the context, the following words and expressions shall bear the meanings set out below and derivative expressions and words will have corresponding meaning:

- 2.1 **“Commission”** means the Competition Commission of South Africa, a juristic entity established in terms of section 19 of the Competition Act;

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- 2.2 **“Competition Act”** means the Competition Act, No 89 of 1998 as amended;
- 2.3 **“NEF Act”** means the National Empowerment Fund Act No. 105 of 1998;
- 2.4 **“MoU”** means this Memorandum of Understanding;
- 2.5 **“NEF”** means a trust established in terms of section 2 the National Empowerment Fund Act No. 105 of 1998;
- 2.6 **“Parties”** means the NEF and the Commission;

3. OBJECTIVE AND SCOPE OF THE MOU

- 3.1 The Parties have identified three (3) areas of mutual interest and co-operation; namely (i) merger control (ii), development fund management, and (ii) market research in South Africa.
- 3.2 This MoU is entered into to establish the manner in which the Parties will interact and cooperate with each other to enable them to, *inter alia*:
- 3.2.1 **Consult on mergers and acquisitions:** provide each other with the necessary information, advice and inputs during merger investigations, establish merger remedies development funds for HDPs;
- 3.2.2 **Development funds:** facilitate the administration and management of funds for developmental purposes, referred by the Competition and to be managed by the NEF; and
- 3.2.3 **Share market research:** promote co-operation and collaboration between them in devising a strategy for funding transactions and enterprise and supplier development programmes to meet identified needs; including sharing of data and sector-specific information collected from industry players and market intelligence (such as market structure, opportunities for HDPs in specific markets and barriers to entry and participation of HDPs, such as access to finance) with each other.

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- 3.3 This MoU does not affect the independence of the Parties in respect of fulfilling their mandates in terms of the respective legislation with which they must comply.

4. PRINCIPLES OF COOPERATION

- 4.1 In order to achieve the purposes of this MoU, the Parties have adopted and will comply with the principles of co-operation set out below:

- 4.1.1 the Parties will cooperate with each other in mutual trust and good faith;
- 4.1.2 the Parties will assist and support each other in respect of agreed upon services and commitments between them in terms of this MoU;
- 4.1.3 the Parties will consult each other, transfer knowledge and share information on matters of mutual interest, subject to the applicable provisions of the Protection of Personal Information Act 4 of 2013 ("POPI");
- 4.1.4 the Parties will interact on the areas of cooperation outlined in clause 3.2 of this MoU, in an advisory capacity or obtain the other's input on an aspect within the technical competence of the other;
- 4.1.5 the Parties will share each other's available resources in order to bring the provisions of this MoU into full effect, provided that such a process is reasonable, shall not compromise the independence of either of the Parties and does not contravene any statute with which the Parties must conform; and
- 4.1.6 the Parties will avail to each other the necessary support for the successful performance of the tasks and programmes envisaged in this MoU.

- 4.2 When the Parties interact with each other or obtain each other's inputs in the areas of cooperation as contemplated in clause 4.1.4 and clause 3.2, they shall do so at no cost to each other and they shall act as expeditiously as circumstances permit.

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5. DEVELOPMENT FUNDS

- 5.1 The Parties shall enter into specific co-operation for scoping and creating development funds for increased market competitiveness of HDPs and enterprise development. The Parties have adopted and shall comply with the principles and process for establishing development funds set out in Annexure A of this MoU.
- 5.2 When the Parties co-operate to establish development funds, the Parties shall share information with each other and jointly agree on:
- 5.2.1 the specific activities to be carried out by the Parties, individually and/or jointly, to disburse, administer and manage the funds;
 - 5.2.2 the investment period;
 - 5.2.3 the source of the investment; and
 - 5.2.4 scoping and alignment of the development funds with Government policy in respect of identified community needs for increased competition and commodities in high demand, broad-based black economic empowerment, and small to medium enterprise development.

6. INTELLECTUAL PROPERTY RIGHTS

- 6.1 Each Party agrees that it shall not use the name, logo and trademarks of the other Party or any abbreviation thereof without the other Party's prior written consent, which consent shall not be unreasonably withheld.
- 6.2 When making reference to this MoU, each Party undertakes to use the other's name in good faith, reflecting accurately the agreed upon nature of the collaboration contemplated in this MoU, and only in relation to or furtherance of this MoU.
- 6.3 All intellectual property rights, which may be developed pursuant to or in connection with a project or specific event, shall be jointly owned by the Parties.

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- 6.4 For avoidance of conflict, Intellectual Property created by either of the Parties prior to, or independent of, this partnership (including any pre-existing methodology and/or tools used by the Parties) will remain the property of the Party responsible for the creation of the Intellectual Property.

7. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

- 7.1 A Joint Working Committee ("the Committee") constituted by at least three (3) representatives, respectively, from the Commission and the NEF, as nominated by each of the Parties, shall be established pursuant to this MoU and shall function on an on-going basis.

- 7.2 The functions of the Committee shall be to:

7.2.1 manage and facilitate co-operation and consultation in respect of matters dealt with by each Party in terms of this MoU;

7.2.2 facilitate and manage development funds undertaken in terms of this MoU;

7.2.3 propose, when necessary, any amendment of or supplementation to this MoU;

7.2.4 advise management of both the Commission and the NEF on issues relating to the provision of financial and non-financial support to black owned and managed businesses, and make recommendations on how to deal with same.

- 7.3 The Committee shall meet regularly, but no less than once per quarter, to ensure both Parties are aware of developments in areas of common interest.

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8. INSTITUTIONAL CONTACT PERSONS**8.1 For purposes of this MoU:**

8.1.1 The Divisional Manager: Advocacy will be the main contact person at the Commission.

8.1.2 The General Counsel will be the main contact person at the NEF.

8.2 Should the Parties have to exchange information, as a result of discussions at the Committee, the processes set out in this MoU shall be followed.

9. EXCHANGE OF INFORMATION

9.1 The Parties may, in the manner set out below, request assistance from each other and exchange information as may be necessary to give effect to this MoU.

9.2 The Parties may inform each other of any decision or judgment that either of them has taken in respect of anticompetitive practices or conduct involving the same respondent, in so far as it pertains to competition and development fund matters.

9.3 To facilitate communication and to ensure continuity in co-operation between the Parties, each Party has designated the contact person as set out in clause 8, for communications under this MoU.

9.4 A Party requesting assistance shall make its request for assistance in writing by sending it to the contact person of the other Party. The request must provide:

9.4.1 a description of both the subject matter of the request and the purpose for which the information is sought and the reasons why this information will be of assistance;

9.4.2 any information in the possession of the requesting party that might assist in identifying such information; and

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9.4.3 the desired period of time for the reply.

10. CONFIDENTIALITY

- 10.1 Any information shared by the Commission and the NEF pursuant to this MoU shall be used only for lawful supervisory or statutory purposes.
- 10.2 Any request made by either Party for confidential information in the possession of the other, shall be dealt with in accordance with the procedures set out in the Parties' respective enabling legislation or policies or procedures.
- 10.3 The Party providing confidential information pursuant to this MoU shall clearly indicate what information is identified as confidential to the requesting party.
- 10.4 The Parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 10.5 To the extent permitted by law, the Commission and the NEF shall hold confidential all information received from each other pursuant to this MoU and shall not otherwise disclose such information to any third party, without the written consent of the other Party, except in the following circumstances:
- 10.5.1 when required to do so by the law or an order of a Court or a Tribunal;
or
 - 10.5.2 where the information is required to be disclosed to government or regulatory bodies, including Parliament or the Department of Trade, Industry and Competition; or
 - 10.5.3 where the information, prior to disclosure to the third party requesting it, has become available to the public without any act, default or omission of any Party of its obligations hereunder.

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- 10.6 The Commission and the NEF shall, prior to disclosing confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.
- 10.7 The sharing of confidential information, in accordance with this MoU, relies on the assurances given in 10.1, 10.2, 10.3, 10.4 and 10.5 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.
- 10.8 Where confidential information is disclosed either by the Commission or NEF in contravention of this MoU, such disclosing Party shall be solely liable in law for such disclosure.
- 10.9 Either of the Parties may in its discretion decline a request for confidential information made in terms of this MoU.

11. GENERAL PROVISIONS

- 11.1 Each Party will, with regard to the implementation of this MoU and any activities arising from it, bear its own expenses, unless otherwise agreed upon by the Parties.
- 11.2 The provision of, or request for information under this MoU may be denied:
- 11.2.1 where compliance would require the Commission or the NEF to act in a manner that would violate the applicable law;
- 11.2.2 under circumstances where there is an imminent risk to national security; or
- 11.2.3 when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

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- 11.3 No provision of this MoU shall give rise to a right on the part of any person, entity or organ of state other than the Commission and the NEF directly or indirectly, to obtain any information or to challenge the execution of a request for information under this MoU.
- 11.4 The provisions set forth under clauses 9 and 10 must prevail with respect to any information provided or actions taken under this MoU prior to its termination.
- 11.5 The Parties shall consult each other before either of them issues a media statement concerning any matter emanating from this MoU.

12. NON-VARIATION

- 12.1 This MoU constitutes the whole of the agreement between the Parties relating to the subject matter hereof.
- 12.2 No amendment or consensual cancellation of this MoU or any term thereof, including this clause shall be binding unless recorded in a written document signed by duly authorised representatives of both Parties.

13. COMMENCEMENT AND TERMINATION

- 13.1 This MoU comes into effect on the date on which it is last signed by the persons authorised to act on behalf of the Parties.
- 13.2 This MoU shall remain in force until it is amended or repealed by both Parties acting jointly.

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- 13.3 The termination of this MoU will not prejudice the completion, in accordance with their terms, of any ongoing projects or activities under this MoU unless otherwise agreed to by the Parties at or after termination of this MoU.

14. REVIEW OF THE MOU

- 14.1 This MoU shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the Parties. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

15. DISPUTE RESOLUTION

- 15.1 Any dispute or difference arising from the interpretation, application and/or implementation of this MoU, shall be resolved amicably through consultation or negotiations between the Parties. In the event of such dispute, the representatives of the Parties as stated in clause 8 shall meet with the view of resolving the impasse.

16. DOMICILIUM CITANDI ET EXECUTANDI

- 16.1 The Parties choose the following addresses as their respective domicilium citandi et executandi for purposes of this MoU:

The Competition Commission

The DTI Campus

Mulayo (Block C)

77 Meintjies Street,

Sunnyside, Pretoria

Contact person: Ms Khanyisa Qobo

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**NEF**

West Block

187 Rivonia Road

Morningside

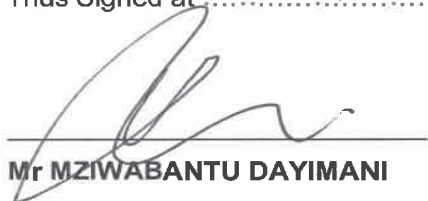
Sandton

Contact person: Mr Mziwabantu Dayimani

17. SIGNATURES

17.1 The signatories hereof, being duly authorised thereto, by their signatures hereto confirm their acceptance of the contents hereof and recommend the adoption thereof, for and on behalf of the parties represented by them.

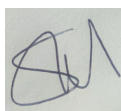
Thus Signed at Sandton on this the 28th day of September 2021.


Mr MZIWABANTU DAYIMANI**For and on behalf of the National Empowerment Fund**

In the presence of witnesses:

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Mr PHUMUDZO SIPHUMA**For and on behalf of the National Empowerment Fund**

In the presence of witnesses:

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Thus Signed at PRETORIA on this the 6TH day of OCTOBER 2021.

MR TEMBINKOSI BONAKELE

For and on behalf of the Competition Commission of South Africa

In " "

Daniela Bove
07/10/2021 16:49:34(UTC+02:00)
1. Signed by Daniela Bove,
DanielaB@compcom.co.za SIGNIFLOW.COM

2.

Siphon Mtombeni
07/10/2021 17:03:00(UTC+02:00)
Signed by Siphon Mtombeni,
SiphonM@compcom.co.za SIGNIFLOW.COM

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Annexure A

1. THE PROCESS FOR ESTABLISHING DEVELOPMENT FUNDS

- 1.1. The NEF is a fund administrator, promoting and supporting business ventures pioneered by small and medium enterprises (SMEs) and HDPs. Through these initiatives, it identifies the developmental needs of industries.
- 1.2. One of the ways the Commission deals with the structure of markets is through the control of mergers and acquisitions. A merger may occur when a firm amalgamates with or buys a controlling stake in another firm. It may also occur when a firm sells its business assets to another firm. The Commission is required to assess all mergers that meet the required threshold before they are implemented. When mergers are being evaluated, the Commission investigates, amongst other things, the effects of the merger on the competitiveness of SMEs and HDPs, and can also insist on remedies to proposed mergers. These include the cooperation and creation of development funds for increased enterprise development and market competitiveness of SMEs and firms owned by HDPs in the markets impacted by the merger.
- 1.3. Where a merger investigated by the Commission requires the establishment of a development fund, the Commission may consult NEF for the purpose of administering the fund and evaluating the manner in which the fund may be designed and managed.
- 1.4. The following process shall be followed by the Parties to establish a development fund:
 - 1.4.1. The Commission shall inform the NEF of its purpose to establish a development fund;
 - 1.4.2. The NEF may decide to administer the fund;
 - 1.4.3. The Commission and the NEF shall jointly discuss and agree on the terms for the fund, which shall include, but will not be limited to:

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- a. The aggregate amount of investment required;
- b. The source of the investment by the Merged Firm;
- c. The investment period;
- d. The development objectives for investment in relevant programmes;
- e. The industry, relevant markets and supply chains targeted for investment;
- f. The identification of beneficiaries of the fund;
- g. The terms for NEF's administration, management and monitoring of the fund, including administration fees applicable.

1.5. In doing this, the Parties shall have regard to the principle of promoting and maintaining competition in South Africa, ensuring that SMEs and HDPs have an equitable opportunity to contribute to the growth and development of the economy.

1.6. After engaging with the NEF on the rationale and terms of the fund, the Commission shall engage with and make recommendations to the Merged Firm on the implementation of the fund, including the mechanisms to achieve the objectives of the fund and how the funds will be disbursed.

1.7. The Commission shall incorporate the merger commitments regarding the development fund in a consent order agreement that shall be confirmed as an order by the Competition Tribunal to be effective.

1.8. The Commission shall receive reports and presentations from the Merged Firm and the NEF relating to investments made by the fund from time to time, as shall be agreed upon in the establishment of the fund.

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