

## DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 5384

4 October 2024

## COMPETITION COMMISSION

## NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

PICK N PAY RETAILERS (PTY) LTD

AND

MASHIBE GROUP (PTY) LTD T/A PICK N PAY GERMISTON (IN BUSINESS RESCUE)

CASE NUMBER: 2023JUL0016

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission', that it has approved the transaction involving the abovementioned firms subject to conditions set out below:

**Background**

1. On 11 July 2023, the Competition Commission ("the Commission") received notice of an intermediate merger whereby Pick n Pay Retailers (Pty) Ltd ("PnP Retailers") intends to acquire Mashibe Group (Pty) Ltd, trading as Pick n Pay Germiston ("PnP Germiston") (in Business Rescue). Post-merger, PnP Germiston will be controlled by PnP Retailers. PnP Germiston is currently under business rescue.

**The transaction**

2. The primary acquiring firm, PnP Retailers, is a company duly incorporated under the laws of the Republic of South Africa. PnP Retailers is a wholly owned subsidiary of PnP Stores Limited ("PnP"), which is publicly listed on the Johannesburg Stock Exchange. Accordingly, its shares are widely held, and PnP is not directly or indirectly owned by a single firm or individual. However, for the sake of completeness, each of the shareholders owning at least 5% of PnP's shares include Newshelf 1321 (Pty) Ltd, (25.3%), Government Employees Pension Fund (20.2%) and Fidelity Series Emerging Markets Opportunities (5.3%).

3. PnP controls several firms. Relevant for the purposes of assessing the proposed transaction are its Pick n Pay retail network (which include Pick n Pay Hypermarkets, Pick n Pay Supermarkets and Pick n Pay Express) and its Boxer network (Boxer and Boxer Punch).
4. Approximately 20.27% of PnP shares are held by historically disadvantaged persons (“HDPs”) while black women hold 8.12% of the shares. PnP Retailers, PnP and all its subsidiaries will henceforth be referred to as the Acquiring Firm, Acquiring Group or “PnP Group”.
5. The primary target firm, PnP Germiston, is a company duly incorporated under the laws of the Republic of South Africa and is solely controlled by Mr Kwakwa in his personal capacity. PnP Germiston is operated as a franchise business in terms of a Franchise Agreement between Pick n Pay and Mr Kwakwa.
6. PnP Germiston is currently in a business rescue and is managed by PnP through a suite of agreements entered between PnP Franchisor and the Business Rescue Practitioner (“BRP”).
7. Prior to entering into business rescue, PnP Germiston’s shares were 100% held by HDPs. Henceforth, PnP Germiston will be referred to as PnP Germiston or the Target Firm and its owner, Mr Kwakwa will be referred to as “the Seller”.

#### **Description of the transaction**

8. In terms of the proposed transaction, PnP Retailers intends to acquire PnP Germiston as a going concern. Post-merger, PnP Germiston will be solely controlled by PnP Retailers.

#### **Overlapping markets**

9. The Commission considered the activities of the merging parties and found that their activities overlap horizontally as they both operate supermarkets and liquor stores which offer products or services that can be regarded as interchangeable.
10. The Commission further found that the activities of the merging parties have a vertical overlap in that the Target Firm purchases stock from the suppliers which are approved and recommended by Pick n Pay as well as from the Pick ‘n Pay distribution centres.

### Competitive assessment

11. In assessing the merger, the Commission considered the market for (i) the retailing of grocery products within a 3km radius of the target firm and (ii) the market for the retailing of liquor within a 3km radius of the target firm.
12. The Commission found that the nearest PnP corporate-owned store (PnP Primrose) is located 4.2km from PnP Germiston. Therefore, if the strict 3km radius is applied, there is no geographic overlap between the activities of the merging parties. For the sake of completeness, other PnP supermarkets or liquor stores within 15km of the Target Store are PnP Redruth (10.km), PnP Hyper Boksburg (10.8km) and PnP Sunward Park (14.7km).

### *Vertical assessment*

13. PnP Germiston purchases stock from the suppliers which are nominated, approved and/or recommended by the Acquiring Group as well as the Acquiring Group's distribution centres. The merging parties submit that the stock procured by franchisees from PnP Franchisor is in the form of dry bulk which constitute approximately **[CONFIDENTIAL]**% of the franchisee's total stock. Franchisees are allowed to procure additional stock, including perishables stock, from suppliers nominated and/or approved by the PnP Franchisor.
14. The Commission is of the view that the transaction is unlikely to result in any foreclosure concerns as more than **[CONFIDENTIAL]**% of the products sold in PnP franchise stores are procured in-house pre-merger (as they are purchased from the Pick 'n Pay distribution and supply centres approved by Pick n Pay) while the remaining **[CONFIDENTIAL]**% of stock is sourced from external suppliers nominated and approved by PnP Franchisor who will continue to supply the Target Store post-merger.

### *Failing firm*

15. The merging parties submitted that PnP Germiston is a failing firm.

*Creeping mergers assessment*

16. The Commission found that PnP has acquired some franchise stores within the recent past. The Commission will continue to monitor the effect of these acquisitions on both competition and public interest grounds.
17. In all, the Commission is of the view that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition within any relevant market.

**Public interest***Employment*

18. The merging parties submit that the proposed transaction will not have a negative effect on employment but will instead secure the continued employment of at least **[CONFIDENTIAL]** employees. The Commission contacted the employee representative of the target firm, and she did not raise any concerns.

*The ability of small and medium sized businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market.*

19. The Commission is concerned that the acquisitions by PnP raise a negative public interest effect in the retail sector in terms of section 12A(3)(a) and the ability of SMMEs or firms owned by HDPs to effectively participate in or expand within the market, in terms of section 12A(3)(c).

*Promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons (HDPs) and workers and workers in firms in the market. (section 12A(3)(e) of the Competition Act No. 89 of 1998 (as amended) (the "Act")*

20. The Acquiring Group is 20.27% owned by HDPs and 8.12% of its shares are held by black women. The target firm is 100% owned by a historically disadvantaged person. Noting that the proposed transaction results in a significant dilution of HDP ownership in the target firm by more than 79.78%, the merging parties were requested to implement an HDP and/or ESOP as ways to promote a greater spread of ownership by HDP and workers.

21. Following numerous engagements with the Commission, the PnP offered a condition that, after a specified period of time, PnP shall sell Germiston to an HDP franchisee at a market related price. The Commission accepts this offered condition.

### **Conclusion**

22. The Commission approves the proposed merger subject to conditions in **Annexure A**.

**ANNEXURE A****PICK N PAY RETAILERS (PTY) LTD****AND****MASHIBE GROUP (PTY) LTD T/A PICK N PAY GERMISTON (IN BUSINESS RESCUE)****CASE No: 2023JUL0016**

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**CONDITIONS TO THE APPROVAL OF THE MERGER**

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**1 DEFINITIONS**

The following terms have the meaning assigned to them below, and cognate expressions have corresponding meanings –

- 1.1. **"Acquiring Firm"** means Pick n Pay Retailers (Pty) Ltd, a company incorporated in accordance with the laws of South Africa;
- 1.2. **"Approval Date"** means the date on which the Commission issues a Clearance Certificate in terms of the Competition Act;
- 1.3. **"Commission"** means the Competition Commission of South Africa;
- 1.4. **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission issued in terms of section 21 of the Competition Act;
- 1.5. **"Competition Act"** means the Competition Act No. 89 of 1998, as amended;
- 1.6. **"Conditions"** means these conditions;
- 1.7. **"Days"** means business days, being any day other than a Saturday, Sunday or official public holiday in South Africa;
- 1.8. **"HDPs"** means historically disadvantaged persons within the meaning of the Competition Act;
- 1.9. **"HDP franchisees"** means HDPs who own a majority interest in a Pick n Pay franchise store.

- 1.10. **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merger Parties;
- 1.11. **"Merged Entity"** means the merged entities of Pick n Pay Retailers (Pty) Ltd and the Target Firm following the implementation of the Merger;
- 1.12. **"Merger"** means the acquisition of sole control over the Target Firm by the Acquiring Firm;
- 1.13. **"Merger Parties"** means the Acquiring Firm and the Target Firm;
- 1.14. **"South Africa"** means the Republic of South Africa;
- 1.15. **"Target Firm"** means the Mashibe Group (Pty) Ltd t/a Pick n Pay Germiston (In Business Rescue);
- 1.16. **"Tribunal"** means the Competition Tribunal of South Africa; and
- 1.17. **"Tribunal Rules"** means Rules for the Conduct of Proceedings in the Tribunal.

## 2 CONDITIONS TO THE APPROVAL OF THE MERGER

- 2.1. The Acquiring Firm shall, after a specified period of time, offer to sell the store to any existing HDP franchisees or any new HDP franchisee at a market related price.

## 3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1. The Acquiring Firm shall inform the Commission in writing of the Implementation Date of the Merger within 5 (five) Days of its occurrence.
- 3.2. The Acquiring Firm shall submit an affidavit to the Commission within 1 (one) month after the second anniversary of the Implementation Date attesting to its compliance with clause 2.1.
- 3.3. The Commission may request such additional information from the Acquiring Firm which the Commission from time to time regards as necessary for the monitoring of compliance with these Conditions.

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#### **4. APPARENT BREACH**

- 4.1. An apparent breach by the Acquiring Firm of the Conditions shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

#### **5. VARIATION**

- 5.1. The Commission or the Acquiring Firm may at any time, on good cause shown, apply to the Tribunal for the Conditions or any part thereof to be lifted, revised or amended.

#### **6. GENERAL**

- 6.1. All correspondence in relation to the Conditions must be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za) and [ministry@thedtic.gov.za](mailto:ministry@thedtic.gov.za)

Enquiries in this regard may be addressed to the Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298