

**IN THE MATTER BEFORE THE BOARD
OF THE COMPETITION AND CONSUMER
PROTECTION COMMISSION**

Case No. MERG/27/01/2023/00009

BETWEEN

**AGRI OPTIONS LIMITED AND
NYIMBA MILLERS LIMITED**

APPLICANTS

AND

**COMPETITION AND CONSUMER
PROTECTION COMMISSION**

RESPONDENT

BEFORE:

Commissioner Angela Kafunda

- Chairperson

Commissioner Stanford Mtamira

- Member

Commissioner Sikambala M. Musune

- Member

Commissioner Emmanuel M. Mwanakatwe

- Member

Commissioner Derrick Sikombe

- Member

DECISION

Below is a summary of the facts and findings presented by the Commission to the Board of the Commission following investigations carried out in the above case.

Introduction

It was submitted that:

1. The Competition and Consumer Protection Commission (“the Commission”) on 1st February 2023, received a merger application regarding the proposed sale of assets by Agri Options Limited (Agri Options) to Nyimba Millers Limited (Nyimba Millers). Specifically, the parties submitted that the proposed transaction was such that Agri Options intended to sell some of its fixed and moveable assets to Nyimba Millers; inclusive of landed property and some of its machinery and equipment. It was submitted that the parties had executed three (3) discrete Agreements as follows:
 - i. *Sale of moveable and fixed assets Agreement dated 14th December 2022.*
 - ii. *A Contract of Sale relating to Subdivision A of Farm No. 291, Mkushi Central Province; and*
 - iii. *A Contract of Sale relating to Farm No. 11728, Mkushi Central Province.*
2. The merger filing was processed separately by the parties with Agri Options Limited being represented by Theotis Mutemi Legal Practitioners and Nyimba Millers being represented by Central Chambers.
3. The seller, Agri Options is a company duly incorporated in Zambia.
4. The acquirer, Nyimba Millers is a company duly incorporated in Zambia.

Legal Provisions and Assessment Tests

Legal Provisions

It was submitted that:

5. Section 8 of the Act provides that:

“Any category of agreement, decision or concerted practice which has its object or effect, the prevention, restriction or distortion of competition at an appreciable extent in Zambia is anti-competitive and prohibited”.
6. Section 25 (1) of the Act states that a merger is subject to the provisions of this Part if it is reviewable by the Commission. Section 25(2) states that the Commission shall review a merger if-
 - (a) *The merger is subject to prior authorisation in accordance with Section twenty-six;*
 - or*
 - (b) *The Commission elects or reviews the merger in accordance with Section twenty-seven*

7. Section 26(1) states that; “Parties to a merger transaction that meet the prescribed thresholds under subsection (5) shall apply to the Commission for authorisation of the proposed merger in the prescribed manner and form”.

Assessment Tests

It was submitted that:

8. In the investigation and assessment of potential and/or likely violations of the competition provisions of the Act, the Commission takes a multiple assessment approach, i.e., carries out a number of tests to ascertain whether the alleged violations have or are likely to result in any negative effects on the market, to the consumer, fair trade or the economy in general.

(i) Substantial Lessening of Competition or “Effect” Test - Section 30(1)

9. The Commission shall, in considering a proposed merger, assess whether the merger is likely to prevent or substantially lessen competition and take into account the likely and actual factors that affect competition in a defined market in Zambia.

(ii) Dominance Test - Section 30(2)(h)

10. Whether the transaction, through abuse or acquisition of a dominant position of market power, would or is likely to limit access to markets or otherwise unduly restrain competition, or has or is likely to have adverse effect on trade or the economy in general.

(iii) Public Interest Test - Section 31

11. The Commission may authorise any act which is not prohibited by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of the Act. In consideration of such matters, the Commission is required to apply public benefit tests. The Commission generally may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including

- a) *the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;*
- b) *the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia*

- c) *the saving of a failing firm;*
- d) *the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;*
- e) *the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests, of micro and small business enterprises in Zambia;*
- f) *the extent to which the proposed merger may affect the ability of national industries to compete in international markets;*
- g) *socio-economic factors as may be appropriate; and*
- h) *any other factor that bears upon the public interest.*

Investigations conducted

It was submitted that:

12. The report was based on information that was submitted by the parties in the CCPC Form 1 of Statutory Instrument No. 97 of 2011, literature reading obtained using reports submitted by the parties, desktop research, and other information in the possession of the Commission on the market(s). In addition, the Commission wrote to third parties in accordance with Section 29 of the Act, requesting for their comments regarding the proposed transaction.

The Parties

Agri Options Limited (Agri Options) – The Seller

It was submitted that:

13. Agri Options is a company duly incorporated in Zambia. The principal business activities of Agri Options included grain storage, handling, wheat processing and trading.

Nyimba Millers Limited (Nyimba Millers) – The Acquirer

It was submitted that:

14. Nyimba Millers is a company duly incorporated in Zambia. The principal business activity of Nyimba Millers was the distribution and supply of milling products. It was submitted that Nyimba Millers was currently supplying and distributing maize meal, and had intentions of starting the production and supply of wheat flour and stock feed in Zambia.

Findings

Competition Analysis

Consideration of the Relevant Market

It was submitted by the Technical Committee (TC) of the Board of Commissioners that:

15. The relevant markets were found to be;
 - i. The production and sale of wheat flour in Zambia;
 - ii. The production and sale of maize meal in Zambia; and
 - iii. The production and sale of stock feed in Zambia.

Consideration of Substantial Lessening of Competition or “Effect” Test

Market Concentration

It was submitted by the TC that:

16. The estimated CR₃ for the relevant market for the production and sale of wheat flour in Zambia was found to be 59%. The CR₃ showed that the relevant market was concentrated. This indicated that the market had few players and as such, there was a likelihood of collusion in this market. However, it was observed that the market being concentrated was not as a result of the proposed transaction; neither would the likelihood of collusion be as a result of the proposed transaction.
17. The estimated CR₃ for the market for the production and sale of maize meal in Zambia was found to be 50.1%. The CR₃ showed that the relevant market was not highly concentrated. This indicated that the likelihood of collusion in this market was low.
18. The estimated CR₃ for the market for the production and sale of stock feed in Zambia was found to be 79%. The CR₃ showed that the relevant market was highly concentrated. This indicated that the likelihood of collusion in this market was high. However, it was observed that the market being concentrated was not as a result of the proposed transaction; neither would the likelihood of collusion be as a result of the proposed transaction.

Barriers to Entry

It was submitted by the TC that:

19. The major barrier to entry in the market for the production and sale of wheat flour in Zambia was Government intervention in the wheat market. Further, commercial wheat milling involved high start-up costs in setting up the business. The market for wheat and wheat products was also likely to be characterised by behavioural

barriers to entry like collusive practices which would result in effects such as customer foreclosure.

20. There were minimal barriers to entry in the market for the production and sale of maize meal in Zambia, such as government regulatory requirements, high startup costs and investments, Government policy on Genetically Modified Organisms (GMO) and Government intervention in the price of maize.
21. There were minimal barriers to entry in the market for the production and sale of stock feed in Zambia such as legislative and licensing requirements.

Import Competition

It was submitted by the TC that:

22. There was insufficient import competition in the identified relevant markets.

Countervailing Power

It was submitted by the TC that:

23. There was little to no bargaining power by customers in all the identified relevant markets. In this regard, there was insufficient countervailing power in these markets.

Removal of a vigorous competitor

It was submitted by the TC that:

24. The transaction was not likely to result in the removal of a vigorous competitor in the identified relevant markets.

Consideration of Dominance

It was submitted by the TC that:

25. Post transaction and based on production capacity, Nyimba Millers would have an estimated market share of less than 1% in the production and sale of maize meal in Zambia; and 2% in the production and sale of wheat flour in Zambia. The market shares for Nyimba Millers in the production and sale of stock feed could not be established due to the unavailability of data. The Commission noted that the proposed transaction would not result in the creation of a dominant player in any of the identified relevant markets because the Acquirer in the identified relevant

markets would likely have market shares below the dominance threshold of 30% prescribed under the Act.

Public Interest consideration

It was submitted by the TC that:

26. There were no public interest concerns arising from the transaction. The parties submitted that post transaction, about 30 to 40 jobs would be created.

Board of Commissioners (the Board) Deliberations

Relevant market

27. The Board deliberated that the relevant markets were -
- i. The production and sale of wheat flour in Zambia;
 - ii. The production and sale of maize meal in Zambia; and
 - iii. The production and sale of stock feed in Zambia.

Substantial Lessening of Competition

28. The Board deliberated that the proposed transaction would not change the market structure nor would it result in, or enhance market concentration in all the identified relevant markets. It was also deliberated that the proposed transaction would not lead to the removal of a vigorous competitor as Agri Options was no longer operational in the relevant markets identified. The Board further deliberated that there was interlocking directorship and shareholding between Nyimba Millers and African Milling through Mr. Zaeed Patel. Therefore, there was a possibility of coordinated effects between Nyimba Millers and African Milling.

Abuse of Dominance

29. The Board deliberated that the proposed transaction was not likely to result in the creation of a dominant player in the identified relevant markets and as such, abuse was unlikely.

Public Interest Consideration

30. The Board deliberated that the transaction had no public interest concerns. It was noted that the proposed transaction would create employment opportunities of about 30 to 40 jobs.

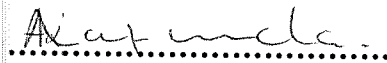
Board Decision

31. Given the foregoing analysis and conclusions, the Board decided that there was a likelihood of coordinated effects between Nyimba Millers and African Milling transaction resulting from interlocking directorship and shareholding. The Board

Board Decision on the proposed sale of milling assets by Agri Options Limited to Nyimba Millers Limited
noted that the transaction was unlikely to raise any adverse public interest concerns. The Board of Commissioners hereby grants the parties **Conditional Final Authorisation**. The authorisation of this transaction is based on the following conditions:

- I. Nyimba Millers and African Milling do not engage in any anticompetitive conduct due to the privileged position they find themselves in, that of interlocking directorship and shareholding.
- II. The authorisation of this transaction will not preclude the parties from obtaining any other relevant regulatory approvals pursuant to Section 36 of the Act.

Dated 19th October 2023


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Chairperson
Competition and Consumer Protection Commission