

SOUTH AFRICA / JUDGMENT

Clicks Retailers v H Mallach and Associates (LM183Feb23) [2023] ZACT 20 (12 April 2023) [2023] ZACT 20

COURT

Competition Tribunal

BEFORE

Sha'ista Goga, Imraan Valodia, Andiswa Ndoni

CASE / FILE NUMBER

LM183Feb23

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COMPETITION

TRIBUNAL OF SOUTH AFRICA

Case

No: LM183Feb23

In

the matter between:

Clicks
Retailers (Pty)
Ltd Acquiring
Firm
and
H Mallach &
Associates (Pty) Ltd t/a as M-Kem Pharmacy Target
Firm
Panel: Sha'ista
Goga (Presiding Member)
Imraan Valodia (Tribunal
Member)
Andiswa Ndoni (Tribunal
Member)
Heard
on: 24
March 2023
Order
issued on: 24
March 2023
Reasons
issued on: 12 April 2023

REASONS FOR DECISION

Approval

- [1] On 24 March 2023, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger whereby Clicks Retailers (Pty) Ltd (“Clicks Retailers”) intends to acquire the entire issued share capital of H Mallach & Associates t/a M-Kem Pharmacy.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The primary acquiring firm is Clicks Retailers, which is ultimately owned and controlled by Clicks Group Limited (“CGL”). CGL is a public company listed on the Johannesburg Stock Exchange[1]. [...] CGL and all the firms that it controls will be referred to as the “Acquiring Group”.
- [3] The Acquiring Group’s activities relevant to the proposed transaction include its pharmacy retail outlets, traded under the Clicks brand. These retail pharmacies dispense scheduled and unscheduled pharmaceuticals, as well as “front-shop products” which include non-pharmaceutical health, beauty, and wellness products. The Acquiring Group has 13 pharmacy retail outlets located within the vicinity of Bellville, Cape Town.
- [4] In addition, New Clicks South Africa (Pty) Ltd, a subsidiary of CGL, houses the United Pharmaceutical Distributors (“UPD”) division which conducts business as a pharmaceutical distributor and wholesaler. UPD supplies to Clicks Retailers [...] % of the medicines sold in Clicks stores.

Primary target firm

- [5] The primary target firm is H Mallach & Associates (Pty) Ltd (“HMA”), a private company incorporated in South Africa. HMA is controlled by Hylton Mallach[2]. The only firm under HMA’s control is the business trading as M-Kem Pharmacy (“M-Kem”).
- [6] M-Kem is a local pharmaceutical business which comprises of one retail outlet located in Bellville, Cape Town. M-Kem operates a 24-hour dispensary and offers scheduled and unscheduled pharmaceuticals as well as front-shop products, and baby, wellness and travel clinic services.

Proposed transaction and rationale

Transaction

- [7] In terms of the proposed transaction, the Acquiring Group will, through Clicks Retailers, acquire the entire issued share capital of HMA. Following the implementation of the transaction, HMA will be controlled by Clicks Retailers.

- [8] The merging parties submitted that M-Kem will continue to be operated by HMA as a stand-alone business and it is not intended that it will be rebranded to be a Clicks branded pharmacy.[3]

Rationale

- [9] The Acquiring Group submitted that the proposed transaction would allow the Acquiring Group to gain insight into HMA's business model, which runs M-Kem on a 24-hour schedule. According to the Acquiring Group, the knowledge and expertise gained from understanding the challenges in running a 24-hour pharmacy would be of benefit should they wish to introduce more 24-hour pharmacies in South Africa.
- [10] From the perspective of HMA, [...] intends to retire, and the proposed transaction allows [...] and HMA's remaining shareholders to realise their share value.

Relevant market and impact on competition

- [11] The Competition Commission ("Commission") considered the activities of the merging parties and found that the proposed merger raises a horizontal overlap as the parties are both active in the retail of scheduled and unscheduled pharmaceuticals, as

well as front-shop products. In addition, the Commission found a vertical overlap between the merging parties as the Acquiring Group, through UPD, supplies M-Kem with pharmaceutical products.

- [12] At the time of assessment, there was no horizontal overlap in all-round beauty therapy activities, however, the Acquiring Group has filed a separate merger[4] in which they attend to acquire control over Sorbet Holdings (Pty) Ltd ("Sorbet"), a franchisor of beauty therapy services and retailer of beauty therapy goods. While the Commission did not assess the effect of this transaction on beauty therapy activities given the lack of overlap at the time, the Commission noted that there are at least 26 alternatives of beauty therapy services within the overlap between M-Kem and a Sorbet Salon, in a 5km radius. As such, for the purposes of assessment for the proposed transaction before us, this market will not be considered further.

Horizontal assessment

Product market

- [13] Based on the horizontal overlap identified, the Commission considered Tribunal precedent[5] as well as the approach taken in recent small and intermediate mergers[6], and found that the market was segmented into two – the first being in respect of the market for the retail of dispensing of scheduled pharmaceuticals, and the second comprising of the market for the retail of unscheduled pharmaceuticals and front-shop products.

Geographic market

- [14] The Commission found that the Department of Health (“DoH”) regulations prescribe that pharmacy premises may not be situated less than 0.5km from an existing community pharmacy.[7]
- [15] Based on previous Tribunal decisions[8], the Commission found that the geographic market is local, and encompasses a radius up to 5km from the relevant pharmacies for the market of the retail of scheduled pharmaceuticals and the market for the retail of unscheduled pharmaceuticals and/or front-shop products.
- [16] Further, the type of settlement area to which the pharmacy in question is located, influences the substitutability of alternative pharmacies on a geographic level. The Commission found in this regard that a [0.5km - 5km] range may apply to urban areas however, in rural areas, the catchment area may be wider than 5km. As M-Kem and
- [17] Having regard to the above, the Commission therefore assessed the competitive effects of the proposed transaction in:
- (i) The local market for the retail of scheduled pharmaceuticals within a 5km radius of M-Kem; and
 - (ii) The local market for the retail of unscheduled pharmaceuticals and front-shop products within a 5km radius of M-Kem.

Horizontal impact

Local market for the retail of scheduled pharmaceutical products within a 5km radius of M- Kem

- [18] The Commission assessed the number of alternative competitors as well as the number of the Acquiring Group’s pharmacies located within this catchment, and found that there are 13 pharmacies which fall under the Acquiring Group[9] and at least 20 alternative competitors[10] within a 5km radius of M-Kem. These competing pharmacies include both the national retail pharmacy chains – Dis-Chem and Medi-Rite, as well as a number of independent pharmacies such as Kassbell Pharmacy, Belmedica Apteek, and Stellenberg Apteek, amongst others.
- [19] Moreover, the Commission found that Clicks Pharmacy Bellville[11] is the closest pharmacy of the Acquiring Group is located approximately 1.5kms away from M-Kem. However, there are 2 Dis-Chem pharmacies
- located within a closer proximity to M-Kem than the Acquiring Group’s pharmacies—the first Dis-Chem[12] being located 140m away from M-Kem and the second Dis-Chem[13] being 700m away from M-Kem.
- [20] The Commission noted that the Medicines Act regulates the maximum dispensing fee per pharmaceutical product and any price increase has to be approved by the Minister of Health. The Commission was of the view that competition on price is therefore constrained by these regulations.

Local market for the retail of unscheduled pharmaceutical and front-shop products within a 5km radius of M-Kem

- [21] The Commission found that unscheduled pharmaceuticals and front-shop products may be sold in pharmacies as well as ordinary retailers, and as such, retail pharmacies therefore face an additional constraint from supermarket retailers in this regard.
- [22] Based on the merging parties' data, the Commission found 10 Spar stores, 7 Woolworths stores, 14 Pick n Pay stores, 3 Shoprite stores and 3 Checkers stores located within a 5km radius from M-Kem.
- [23] The Commission therefore found that it is unlikely competition concerns will arise in this market as the merged entity will face competition from at least 37 supermarket retailers as well as the 20 other pharmacies (as mentioned above) for the sale of unscheduled pharmaceutical products and front-shop products.
- [24] Considering the above, we agree with the Commission's conclusion that the proposed transaction is unlikely to give rise to any significant unilateral concerns in these local markets.

Vertical assessment

- [25] As mentioned above, the Commission found a vertical overlap between the merging parties as the Acquiring Group, through UPD, supplies M-Kem with pharmaceutical products. In this regard, the Commission considered Tribunal precedent^[14] and assessed the effects of the proposed transaction in the upstream market for the wholesale distribution of pharmaceutical products.
- [26] In determining the geographic market, the Commission had regard to the same Tribunal precedent used in its product market assessment, which found that the market for the wholesale distribution of pharmaceutical products is national.
- [27] The Commission found that the dynamics of the geographic market have not changed significantly in this instant transaction, and therefore assessed the national upstream market for the wholesale distribution of pharmaceutical products.

Input foreclosure

- [28] The Commission, based on its findings in Clicks/Pick n Pay^[15] found that the Acquiring Group through UPD, has a market share of approximately [...] % upstream market for the wholesale distribution of pharmaceutical products.^[16]
- [29] Given this market share, the Commission was of the view that M-Kem's competitors are not reliant on the Acquiring Group as a route to market for purchasing pharmaceutical products and will continue to have numerous alternative upstream pharmaceutical distributors which include DSV (formerly UTI), AlphaPharm Distributors, Transpharm, Pharmed, Topmed, and Ring Pharmaceutical Distributors.

- [30] Other pharmaceutical chains, such as Dis-Chem perform their own distribution function and are, therefore, not reliant on third party distributors such as UPD. Furthermore, the merging parties submitted that independent pharmacies do not concentrate their entire purchases with one wholesaler. While pharmacies may purchase most of their medicines from a preferred or primary wholesaler, there are several wholesale alternatives available.
- [31] In addition to this, M-Kem has a national market share of less than % in the retail sale of scheduled pharmaceutical products and the Commission was therefore of the view that it is unlikely that the Acquiring Group would have any incentive to foreclose M- Kem's rivals from supply.
- [32] Given the above, the Commission concluded that the proposed transaction is unlikely to give rise to input foreclosure concerns.

Customer foreclosure

- [33] In the light of the fact that M-Kem is a single pharmacy outlet, the Commission was of the view that M-Kem is unlikely to enjoy market power in the downstream market and is not a significantly large customer. While it is likely that there will be a loss of future sales from other upstream wholesalers to M-Kem, the Commission found that upstream competitors to the Acquiring Group are likely to have alternative downstream customers that would include the 20 other retail pharmacies in the retail of scheduled pharmaceuticals and the 37 other retailers in the retail of unscheduled pharmaceuticals.
- [34] The Commission concluded that the proposed transaction is unlikely to raise any anti-competitive customer foreclosure concerns.

Concentration

- [35] The Commission has considered the trend by corporate retail pharmacies such as the Acquiring Group and its main rival, Dis-Chem in acquiring independent pharmacies. The Commission in its previous merger consideration of Clicks/Pick n Pay[17], implemented a condition which put an obligation on the Acquiring Group to notify all small mergers to the Commission. To date, the Acquiring Group has notified 2 mergers, which, save for this proposed transaction, include the small merger Clicks/MPH[18] and Clicks Investments (Pty) Ltd and Sorbet Holdings (Pty) Ltd[19], a large merger notified on 21 December 2022.
- [36] Having regard to the above, the Tribunal concurs with the Commission's conclusion that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest

Employment

- [37] The merging parties have provided an unequivocal undertaking that the proposed transaction will not result in any negative employment effects.

- [38] The Commission engaged a representative of M-Kem, who confirmed that no concerns had been raised by employees in relation to the proposed transaction.
- [39] The Commission found that the Acquiring Group will continue to operate M-Kem within its facilities and with the existing staff. As such, the merging parties provided an undertaking that there will be no retrenchments as a result of the proposed transaction.
- [40] Considering the above, and that the merging parties have provided an unequivocal statement that no job losses will arise as a result of the proposed transaction, the Tribunal agrees with the Commission's findings that the proposed merger is unlikely to have a negative effect on employment.

Spread of ownership

- [41] The Commission found that the Acquiring Group has a 15.05% ownership held by historically disadvantaged persons ("HDPs"), while HMA does not have any HDP shareholding.
- [42] The Commission found that the proposed transaction promotes a greater spread of HDP ownership through the Acquiring Group.
- [43] The Commission found that the proposed transaction does not raise any other public interest concerns, and the Tribunal concurs.

Conclusion

- [44] Considering the above, the Tribunal concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and does not raise any public interest concerns. Accordingly, we approve the proposed transaction unconditionally.

Date: 12 April 2023

Ms Sha'ista Goga

Concurring: Prof Imraan Valodia and Ms Andiswa Ndoni

Tribunal case manager: Leila Raffee

For the merging parties: Anton Roets, Marylla Govender,
and Nicci van der Walt of Nortons Inc.

For the Commission: Nomthandazo

Mndaweni and Wiri Gumbie

- [1] The largest shareholders of CGL as of 31 August 2022 include Public Investment Corporation as to 16.6%; and JP Morgan Asset Management as to 5.9%.

- [2] HMA's remaining shareholders include [...].
- [3] See CC4(2) on page 20 of the Merger Record.
- [4] Notified under Commission case number: 2022DEC0041 on 21 December 2022.
- [5] Dis-Chem Pharmacies Ltd and Mundel Gien (Pty) Ltd t/a Springbok Pharmacy (Tribunal Case Number: LM181Sep18); Clicks Retailers (Pty) Ltd and Netcare Pharmacies (Pty) Ltd and Netcare Pharmacies 2 (Pty) Ltd ("Clicks/Netcare") (Tribunal Case Number: LM055Jul16); Shoprite Checkers (Pty) Ltd and Transpharm (Pty) Ltd (Tribunal Case Number: 68/LM/Oct09)
- [5] Dis-Chem Pharmacies Ltd and Mundel Gien (Pty) Ltd t/a Springbok Pharmacy (Tribunal Case Number: LM181Sep18); Clicks Retailers (Pty) Ltd and Netcare Pharmacies (Pty) Ltd and Netcare Pharmacies 2 (Pty) Ltd
- ("Clicks/Netcare") (Tribunal Case Number: LM055Jul16);
- Shoprite Checkers (Pty) Ltd and Transpharm (Pty) Ltd (Tribunal Case Number: 68/LM/Oct09)
- [6] Clicks Retailers (Pty) Ltd and The business of the Medirite Pharmacy Hermanus (MPH) of Shoprite Checkers (Pty) Ltd ("Clicks/MPH")
- (Commission Case Number: 2021OCT0014); Clicks Retailers (Pty) Ltd and The retail pharmacy business carried on by Pick n Pay Retailers (Pty) Ltd ("Clicks/Pick n Pay") (Commission Case Number: 2021JUL0018); Arie Nel Pharmacy (Pty) Ltd and Pharmed Pharmaceuticals (Pty) Ltd (Commission Case Number: 2020Sep0016)
- [6] Clicks Retailers (Pty) Ltd and The business of the Medirite Pharmacy Hermanus (MPH) of Shoprite Checkers (Pty) Ltd ("Clicks/MPH")
- (Commission Case Number: 2021OCT0014);
- Clicks Retailers (Pty) Ltd and The retail pharmacy business carried on by Pick n Pay Retailers (Pty) Ltd
- ("Clicks/Pick n Pay") (Commission Case Number: 2021JUL0018);
- Arie Nel Pharmacy (Pty) Ltd and Pharmed Pharmaceuticals (Pty) Ltd (Commission Case Number: 2020Sep0016)
- [7] See Pharmacy Act (No. 53 of 1974): Proposed Criteria for the issuing of licenses for Pharmacy Premises. Government Notice No. R. 151 in Government Gazette No. 37399 of 28 February 2014.
- [8] Clicks/Netcare (Tribunal Case Number: LM055Jul16); Dis-Chem Pharmacies Ltd and Pure Pharmacy Holdings (Pty) Ltd ("Dis-Chem/Pure Pharmacy") (Tribunal Case Number: LM181Jan21) the Acquiring Group's pharmacy outlets are located in an urban area (Bellville, Cape Town), the Commission had regard to a geographic catchment of 5km.

[8] Clicks/Netcare (Tribunal Case Number: LM055Jul16);

Dis-Chem Pharmacies Ltd and Pure Pharmacy Holdings (Pty) Ltd (“Dis-Chem/Pure Pharmacy”) (Tribunal Case Number: LM181Jan21)

the Acquiring Group’s pharmacy outlets are located in an urban area (Bellville, Cape Town), the Commission had regard to a geographic catchment of 5km.

[9] See Table 1 of the Commission’s Merger Report for the list of the Acquiring Group’s stores.

[10] See Table 2 in the Commission’s Merger Report for the list of alternative competitors.

[11] located at 130 Voortrekker Road, Bellville Central

[12] Dis-Chem located at 8 John X Merriman St, Bellville

[13] Dis-Chem located at Tyger Valley Centre, 50 Willie van Schoor Dr, Bellville Park

[14] Dis-Chem Pharmacies Ltd and Quenets Pharmaceutical Wholesalers (Pty) Ltd, Brandwacht Marketing (Pty) Ltd (Tribunal Case Number: LM115Jul18) and Dis-Chem/Pure Pharmacy (Tribunal Case Number: LM181Jan21)

[14] Dis-Chem Pharmacies Ltd and Quenets Pharmaceutical Wholesalers (Pty) Ltd, Brandwacht Marketing (Pty) Ltd (Tribunal Case Number: LM115Jul18) and

Dis-Chem/Pure Pharmacy (Tribunal Case Number: LM181Jan21)

[15] Commission Case Number:2021JUL0018

[16] [....].

[17] Commission Case Number: 2021JUL0018

[18] Commission Case Number: 2021OCT0014

[19] Commission Case Number 2022DEC0041

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