

SOUTH AFRICA / JUDGMENT

Competition Commission v Old Mutual Life Assurance Company (SA) Ltd (016808) [2013] ZACT 49 (12 June 2013) [2013] ZACT 49

COURT
Competition Tribunal

BEFORE
N Manoim, T Madima, A Ndoni

CASE / FILE NUMBER
016808

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 016808

In the matter between:

The Competition CommissionApplicant
and

Old Mutual Life Assurance Company (SA) LtdFirst Respondent

Panel:

N Manoim (Presiding Member), T Madima

(Tribunal Member) and A Ndoni (Tribunal

Member)

Heard on:

12 June 2013

Decided on:

12 June 2013 Order

Momentum Group Ltd (as it was then) Second Respondent

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents, annexed hereto marked "A".

Presiding Member

N Manoim

Concurring: T Madima and N Ndoni

BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO:

CC CASE NO: 2011Apr0030

COMPETITION COMMISSIONApplicant

OLD MUTUAL LIFE ASSURANCE COMPANY

(SOUTH AFRICA) LIMITEDFirst Respondent

MOMENTUM GROUP LIMITED (as it was then)Second Respondent

FILING SHEET

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED AND MOMENTUM GROUP LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A(3) OF THE COMPETITION ACT NO. 89 OF 1998, (AS AMENDED).

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No:

THE COMPETITION COMMISSIONApplicant

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENTS IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

The Competition Commission and the Respondents hereby agree that application be made to the Competition Tribunal for this agreement to be confirmed as a consent order of the Competition Tribunal in terms of section 49D as read with section 58(1)(b) and section 59(1)(d)(i) of the Competition Act 89 of 1998, as amended.

1. DEFINITIONS

For the purpose of this agreement, the following definitions apply -

1.1. "Act" means the Competition Act, 89 of 1998 (as amended);

1.2. "Commission" means the Competition Commission of South Africa, a statutory body, established in terms of section 19 of the Act, with its principal

place of business at Building C, Mulayo Building, dti Campus, corner Meintjies and Esselen Streets, Sunnyside, Pretoria, Gauteng;

1.3. "Consent Agreement" means this agreement signed by the Parties;

1.4. "Futuregrowth" means the wholly owned subsidiary of OMIGSA, with its principal business address at third floor, Great Westerford Building, 240 Main Road, Rondebosch, a registered financial services provider and a specialised asset manager with notable expertise in fixed income and social responsibility assets;

1.5. "Futuregrowth Merger" means the merger in terms of which OMIGSA acquired the entire shareholding and business of Futuregrowth so that it became a subsidiary of OMIGSA, which transaction was unconditionally approved by the Tribunal on 28 August 2008 under case number 71/LM/Jun08;

1.6. "FSB" means the Financial Services Board responsible for the regulation of, amongst others, long-term insurance business under the Long-Term

Insurance Act;

1.7. "Long-Term Insurance Act" means the Long-Term Insurance Act of 1998 as amended;

1.8. "Momentum" means Momentum Group Limited (now known as MMI Group Limited), with its principal business address at 268 West Avenue, Centurion, Pretoria, a registered long-term insurer under the Long-Term Insurance Act;

1.9. "OMIGSA" means Old Mutual Investment Group (South Africa) Limited, with its principal business address at Mutual Park, Jan Smuts Drive, Pinelands, Western Cape. OMIGSA is a registered financial services provider providing asset management services to the investment market and mandated to perform certain functions on behalf of OMLACSA and other companies forming part of the Old Mutual group of companies;

1.10. "OMLACSA" means Old Mutual Life Assurance Company (South Africa) Limited, with principal business address at Mutual Park, Jan Smuts Drive,

Pinelands, Western Cape. OMLACSA is a registered long-term insurer under the Long-Term Insurance Act;

1.11. "Parties" means the Commission and the Respondents;

1.12. "Policyholders" means the policyholders of the Transfer Policies;

1.13. "Respondents" means OMLACSA and Momentum collectively;

1.14. "Section 37(2) Transfer" means the transfer of the Transfer Assets and Transfer Policies from Momentum to OMLACSA pursuant to the Transfer Agreement;

1.15. "Transfer Agreement" means the agreement entered into between the Respondents on 1 April 2009 under section 37(2) of the Long-Term Insurance Act, in terms of which OMLACSA would assume Momentum's rights and obligations to the Policyholders in respect of the Transfer Policies and accept delivery of the Transfer Assets;

1.16. "Transfer Assets" means the assets held to meet the obligations of the relevant Respondent/long-term insurer towards the Policyholders in terms of the Transfer Policies and managed by Futuregrowth;

1.17. "Transfer Policies" means the linked long-term insurance policies which are the subject of the Transfer Agreement; and

1.18. "Tribunal" means the Competition Tribunal of South, a statutory body established in terms of section 26 of the Act, with its principal place of business at Building C, Mulayo Building, DTI Campus, corner Meintjies and Esselen Streets, Sunnyside, Pretoria, Gauteng.

2.

BACKGROUND

2.1. The circumstances and context under which the merger was implemented prior to its approval

2.1.1. At all relevant times Futuregrowth was the portfolio manager appointed to manage the Transfer Assets in accordance with the investment mandate relating to the Transfer Policies.

2.1.2. The Futuregrowth Merger allowed OMIGSA to extend its asset management skills in fixed income capability and certain specialised

products (i.e. by acquiring Futuregrowth's business), and facilitated Futuregrowth's access to the Old Mutual group of companies' retail distribution channels and a long-term insurance licence with linked policy capacity. 2.1.3. In the Futuregrowth Merger, the Commission and the Tribunal understood the relevance of the linked policy capability of Old Mutual and the prospect that an Old Mutual long-term insurance licence would be used to underwrite the Transfer Policies per the rationale for and as recorded in the Tribunal's reasons for its approval of the Futuregrowth Merger. 2.1.4. Competition in the market involving linked long-term insurance policies occurs mainly at the asset management / investment level. Investors generally prioritise the identity and capabilities of the asset manager, who will manage their investment via a linked policy issued by an established long-term insurer, when making investment choices. In contrast, competition in the non-linked long-term insurance market is driven almost entirely by an assessment of the insurers' ability. 2.1.5. At all relevant times, OMIGSA, Futuregrowth and Momentum considered the Policyholders' investments represented by the Transfer Policies and the Transfer Assets as managed by Futuregrowth to form part of the business of Futuregrowth, and that the Section 37(2) Transfer was an implementation of the Futuregrowth Merger. 2.1.6. It was not discussed nor contemplated by any of the persons involved in the Futuregrowth Merger that the Section 37(2) Transfer could be a merger under the Act. 2.1.7. The only part of the business of Momentum over

which OMLACSA acquired control under the Section 37(2) Transfer was the Transfer Assets and the Transfer Policies. The Respondents' failure to comply with section 13A of the Act was a bona fide and reasonable mistake, taking into account the circumstance that the Section 37(2) Transfer occurred in the context of compliance

with the Long-Term Insurance Act in relation to the Futuregrowth Merger and with the consent of the FSB and Policyholders. 3. COMMISSION'S INVESTIGATION AND FINDINGS The

Commission's investigation established the following - 3.1. An implemented merger 3.1.1. The Section 37(2) Transfer resulted in the acquisition of control, within the meaning of section 12(1) of the Act, by OMLACSA over part of the business of Momentum comprising the Transfer Assets and Transfer Policies. This merger also met the thresholds of a large merger and was therefore notifiable. 3.1.2. The Respondents implemented the merger prior to its notification to the Commission and approval by the Tribunal in terms of section 13A of the Act. 4. ADMISSION The Respondents admit that - 4.1. The Section 37(2) Transfer constituted a notifiable large merger under section 12(1)(c) of the Act read together with the schedule for determining thresholds. 4.2. The merger was implemented prior to its notification to the Commission and approval by the Tribunal as prescribed by section 13A of the Act. 4.3. They were responsible for notifying the merger under the Act. 5. AGREEMENT CONCERNING FUTURE CONDUCT 5.1. The Respondents agree and undertake - 5.1.1. To not implement any transaction, which constitute mergers as defined in the Act and meet the threshold for notification without obtaining the prior approval from the competition authorities; 5.1.2. Develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, a copy of which shall be submitted to the Commission within 60 days of the date of confirmation of this consent agreement as an order of the Tribunal. 6. ADMINISTRATIVE PENALTY 6.1. Having regard to the provisions of section 58(1)(a)(iii), read with sections 59(1)(d), 59(2) and (3) of the Act, the Respondents accept that they are liable to pay an administrative penalty for the contravention of section 13A(3) of the Act. 6.2. The Parties agree that an administrative penalty of R175,000 (one hundred and seventy five thousand Rand) shall be imposed on each of the Respondents. 6.3. The amount of each administrative penalty is less than 10% of the annual turnover of each Respondent as stipulated in section 59(2) of the Act. 6.4. Each Respondent shall pay the penalty amount to the Commission within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal, 6.5. The said amount shall be paid into the following Commission's bank account- Bank ABSA Bank Account Name Competition Commission Account Number 4050778576 Branch Code 323345 6.6. The Commission will pay the administrative penalties into the National Revenue Fund as stipulated in section 59(4) of the Act. 7. FULL AND FINAL SETTLEMENT Upon confirmation of the Consent Agreement as a consent order by the Tribunal, all proceedings between the Commission and the Respondents in relation to their failure to comply with section 13A(3) of the Act investigated under the Commission's case number 2011 Apr0030, shall be concluded. Date and signed at PINELANDS on this the 5th day of MAY 2013 MR ABRAHAM PAUL NAUDE OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED Date and signed at CENTURION on this the 10th day of APRIL 2013 MR FRANCOIS JOOSTE GROUP COMPANY

SECRETARY MOMENTUM GROUP LIMITED Date and signed at PRETORIA on this the 21th day of MAY 2013 Shan Ramburuth The Commissioner, Competition Commission

2.1.1. At all relevant times Futuregrowth was the portfolio manager appointed to manage the Transfer Assets in accordance with the investment mandate relating to the Transfer Policies.

2.1.2. The Futuregrowth Merger allowed OMIGSA to extend its asset management skills in fixed income capability and certain specialised

products (i.e. by acquiring Futuregrowth's business), and facilitated Futuregrowth's access to the Old Mutual group of companies' retail distribution channels and a long-term insurance licence with linked policy capacity.

2.1.3. In the Futuregrowth Merger, the Commission and the Tribunal understood the relevance of the linked policy capability of Old Mutual and the prospect that an Old Mutual long-term insurance licence would be used to underwrite the Transfer Policies per the rationale for and as recorded in the Tribunal's reasons for its approval of the Futuregrowth Merger.

2.1.4. Competition in the market involving linked long-term insurance policies occurs mainly at the asset management / investment level. Investors generally prioritise the identity and capabilities of the asset manager, who will manage their investment via a linked policy issued by an established long-term insurer, when making investment choices. In contrast, competition in the non-linked long-term insurance market is driven almost entirely by an assessment of the insurers' ability.

2.1.5. At all relevant times, OMIGSA, Futuregrowth and Momentum considered the Policyholders' investments represented by the Transfer Policies and the Transfer Assets as managed by Futuregrowth to form part of the business of Futuregrowth, and that the Section 37(2) Transfer was an implementation of the Futuregrowth Merger.

2.1.6. It was not discussed nor contemplated by any of the persons involved in the Futuregrowth Merger that the Section 37(2) Transfer could be a merger under the Act.

2.1.7. The only part of the business of Momentum over which OMLACSA acquired control under the Section 37(2) Transfer was the Transfer Assets and the Transfer Policies.

The Respondents' failure to comply with section 13A of the Act was a bona fide and reasonable mistake, taking into account the circumstance that the Section 37(2) Transfer occurred in the context of compliance

with the Long-Term insurance Act in relation to the Futuregrowth Merger and with the consent of the FSB and Policyholders.

3. COMMISSION'S INVESTIGATION AND FINDINGS

The Commission's investigation established the following -

3.1. An implemented merger

3.1.1. The Section 37(2) Transfer resulted in the acquisition of control, within the meaning of section 12(1) of the Act, by OMLACSA over part of the business of Momentum comprising the Transfer Assets and Transfer Policies. This merger also met the thresholds of a large merger and was therefore notifiable.

3.1.2. The Respondents implemented the merger prior to its notification to the Commission and approval by the Tribunal in terms of section 13A of the Act.

4. ADMISSION

The Respondents admit that -

4.1. The Section 37(2) Transfer constituted a notifiable large merger under section 12(1)(c) of the Act read together with the schedule for determining thresholds.

4.2. The merger was implemented prior to its notification to the Commission and approval by the Tribunal as prescribed by section 13A of the Act.

4.3. They were responsible for notifying the merger under the Act.

5. AGREEMENT CONCERNING FUTURE CONDUCT

5.1. The Respondents agree and undertake -

5.1.1. To not implement any transaction, which constitute mergers as defined in the Act and meet the threshold for notification without obtaining the prior approval from the competition authorities;

5.1.2. Develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, a copy of which shall be submitted to the Commission within 60 days of the date of confirmation of this consent agreement as an order of the Tribunal.

6. ADMINISTRATIVE PENALTY

6.1. Having regard to the provisions of section 58(1)(a)(iii), read with sections 59(1)(d), 59(2) and (3) of the Act, the Respondents accept that they are liable to pay an administrative penalty for the contravention of section 13A(3) of the Act.

6.2. The Parties agree that an administrative penalty of R175,000 (one hundred and seventy five thousand Rand) shall be imposed on each of the Respondents.

6.3. The amount of each administrative penalty is less than 10% of the annual turnover of each Respondent as stipulated in section 59(2) of the Act.

6.4. Each Respondent shall pay the penalty amount to the Commission within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal,

6.5. The said amount shall be paid into the following Commission's bank account-

Bank ABSA Bank Account Name Competition Commission Account Number 4050778576 Branch Code 323345

6.6. The Commission will pay the administrative penalties into the National Revenue Fundas stipulated in section 59(4) of the Act.

7. FULL AND FINAL SETTLEMENT

Upon confirmation of the Consent Agreement as a consent order by the Tribunal, all proceedings between the Commission and the Respondents in relation to their failure to comply with section 13A(3) of the Act investigated under the Commission's case number 2011 Apr0030, shall be concluded.

Date and signed at PINELANDS on this the 5th day of MAY 2013

MR ABRAHAM PAUL NAUDE

OLD MUTUAL LIFE ASSURANCECOMPANY (SOUTH AFRICA) LIMITED

Date and signed at CENTURION on this the 10th day of APRIL 2013

MR FRANCOIS JOOSTE

GROUP COMPANY SECRETARY

MOMENTUM GROUP LIMITED

Date and signed at PRETORIA on this the 21th day of MAY 2013

Shan Ramburuth

The Commissioner, Competition Commission

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Prepared on 12 October 2026 · Esheria