

SOUTH AFRICA / JUDGMENT

Competition Commission v Shashe Trading (Pty) Ltd and Another (FTN154Nov20) [2021] ZACT 87 (3 June 2021)

[2021] ZACT 87

COURT

Competition Tribunal

BEFORE

AW Wessels, E Daniels, A Ndoni

CASE / FILE NUMBER

FTN154Nov20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: FTN154Nov20

In the matter between:

The Competition Commission

Applicant

And

Shashe Trading (Pty) Ltd

First Respondent

Devenco 44 (Pty) Ltd

Second Respondent

Panel : AW Wessels (Presiding Member), E Daniels (Tribunal Member), A Ndoni (Tribunal Member)

Heard on : 02 June 2021

Decided on : 03 June 2021

SETTLEMENT AGREEMENT

The Tribunal hereby confirms the settlement agreement concluded between the Competition Commission, Shashe Trading (Pty) Ltd and Devenco 44 (Pty) Ltd, annexed hereto.

Presiding Member Mr Andreas Wessels

Concurring: Mr Enver Daniels and Ms Andiswa Ndoni

DATE: 03 June 2021

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

CT CASE NO: FTN154Nov20 CC

CASE NO: 2019DEC0001

THE COMPETITION COMMISSION Applicant

and

SHASHE TRADING (PTY) LTD First

Respondent

DEVENCO 44 (PTY) LTD Second

Respondent

SETTLEMENT AGREEMENT IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The Competition Commission and Shashe Trading (Pty) Ltd and Devenco 44 (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 27(1)(d) read with section 59(1)(d) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below.

1. DEFINITIONS

For the purposes of this Settlement Agreement, the following definitions shall apply:

1.1. "Act means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2. "Acquiring Group" means Shashe Trading (Pty) Ltd, the Cannan Development Trust and the OC Zaayman Development Trust;

1.3. "CAC" means the Competition Appeal Court, a court established in terms of section 36 of the Act;

1.4. "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 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.5. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.6. "Devenco" means Devenco 44 (Pty) Ltd which used to trade as Mopani SuperSpar;

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

1.8. "Respondents" means Shashe Trading (Pty) Ltd and Devenco 44 (Pty) Ltd;

1.9. "Settlement Agreement" means this agreement duly signed and concluded between the Commission and the Respondents;

1.10. "Shashe" means Shashe Trading (Pty) Ltd;

1.11. "Spar Group" means the Spar Group (Pty) Ltd; and

1.12. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2.

BACKGROUND

2.1. On 29 November 2019, the Commission received a notice of an intermediate merger between Shashe and Devenco in respect of Mopani SuperSpar supermarket business. In the merger notification documents, Shashe indicated that the merger had already been implemented, i.e., Shashe already took control of Devenco's Mopani SuperSpar on 6 June 2019.

2.2. Shashe is controlled by two business trusts in equal shares, namely, the Connan Development Trust and the OC Zaayman Development Trust ("the Trusts"). Shashe was incorporated by the Trusts for the purpose of acquiring Devenco's supermarket business, i.e., Mopani SuperSpar, and as such does not control any other firm. Shashe and the Trusts form the Acquiring Group.

2.3. The Acquiring Group is active in the retail market, where it sells general household merchandise such as fruit and vegetables, household cleaning, frozen foods, pet care under Spar branded franchise supermarkets. The Acquiring Group controls 10 Spar supermarkets located in the Northern region of the Limpopo province.

2.4. Devenco is wholly owned by the MAS Family Trust. Devenco does not control any other firm. Prior to the merger, Devenco was also involved in the retail market where it carried on a supermarket business under the name and style of Mopani SuperSpar. Mopani SuperSpar sells a wide variety of fresh and processed foodstuff and other household products to the general public.

2.5. The circumstances which led to the purchase by Shashe of Devenco's Mopani SuperSpar were explained as follows in the merger notification documents.

2.6. Devenco used to purchase its trading stock for the running of Mopani SuperSpar from the Spar Group. As security for its indebtedness to the Spar Group, Devenco had executed written deeds of suretyship, i.e., various General Notarial Bonds (bonds) which were registered in the Spar Group's favour over the assets of Devenco, which included Mopani SuperSpar.

2.7. The bonds conferred on the Spar Group the following rights:

2.7.1 Take possession of all the corporeal and incorporeal movable property and to retain such possession for so long as the Spar Group may deem fit, and/or sell and dispose thereof in such manner and on terms that the Spar Group may decide and to convey valid title to the purchaser and to collect in all monies due/owed to Devenco in respect of the property.

2.7.2 At its sole discretion, and should it elect, to carry on the business of Mopani SuperSpar relating to the movable property in the name of and at the expense of Devenco and for that purpose to purchase goods and to do whatever else the Spar Group deemed necessary.

2.7.3 Sign and complete all forms, declarations, agreements and the like as might be necessary or desirable to record the sale, disposal and/or transfer of the movable property.

2.7.4 Take possession of and to realise by public auction or by private treaty or otherwise all or any of the movable property.

2.8 Devenco's debt to the Spar Group for the purchase of its trading stock, which Devenco could no longer service, ultimately ended up being approximately R 20 million. As a result of Devenco's inability to service its debt, the Spar Group filed an urgent application with the Pietersburg (Polokwane) High Court, for the perfection of the various General Notarial Bonds registered in the Spar Group's favour over the assets of Devenco. The Spar Group was granted the Perfection Application on 4 June 2019 ("the perfection order").

2.9 Once the perfection order was granted by the High Court on 4 June 2019, the MAS Family Trust (which at that time controlled Devenco) was allowed by the Spar Group to continue managing Mopani SuperSpar until the Spar Group secured a purchaser for the business. The Spar Group, using the authority granted to it by the perfection order, subsequently sold Mopani SuperSpar to Shashe on 6 June 2019. Shashe and the Spar Group concluded a sale of business agreement in respect of the sale of Mopani SuperSpar on 27 June 2019.

3 THE COMMISSION'S FINDINGS

3.1 Shashe purchased Devenco's Mopani SuperSpar from the Spar Group and started operating the business on 6 June 2019. This purchase by Shashe constituted a merger in terms of section 12(1)(a), read with section 12(2) of the Act. Shashe, however, only notified the Commission of the acquisition on 29 November 2019, namely 5 months after Shashe took control of Mopani SuperSpar.

3.2 In the merger notification documents, Shashe was identified as the primary acquiring firm, whilst Devenco in respect of Mopani SuperSpar was identified as the primary target firm. It was therefore Shashe's responsibility as the primary acquiring firm, as well as Devenco's responsibility as the primary target firm in respect of Mopani SuperSpar, to notify the Commission of Mopani SuperSpar acquisition by Shashe.

3.3 Accordingly, Shashe and Devenco failed to notify the transaction to the Commission at the time when Shashe acquired Mopani SuperSpar business, in contravention of section 13A(1) of the Act. They also implemented the merger transaction without the approval of the Commission in contravention of section 13A(3) of the Act.

3.4 In its assessment of the transaction, the Commission found that the merger was unlikely to substantially prevent or lessen competition in the market for the retail of grocery and general merchandise in Giyani, Limpopo province. In relation to public interest, the Commission found that the merger was likely to have a positive impact on employment as absent the merger, the employees of Mopani SuperSpar would have been negatively affected. The transaction was accordingly approved by the Commission without conditions on 26 February 2020.

4 ADMISSION

4.1 Shashe and Devenco admit that they entered into a merger transaction without notifying the Commission and implemented the merger without the approval of the Commission in terms of section 14(1)(b), or the Tribunal in terms of section 16(2) or the CAC in terms of section 17, as required by section 13A of the Act, and as such are in contravention of the Act.

5 AGREEMENT CONCERNING RESPONDENT'S FUTURE CONDUCT

5.1 The Respondents agree to:

5.1.1 Not undertake in any contravention of the Act;

5.1.2 Develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act; and

5.1.3 Submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Settlement Agreement as an order by the Tribunal.

6 ADMINISTRATIVE PENALTY

6.1 Having regard to the provisions of sections 27(1)(d) as read with sections 59(1)(d), 59(2) and 59(3) of the Act, the Respondents accept that they are jointly and severally liable to pay an administrative penalty, the one paying, the others to be absolved.

6.2 The parties have agreed that the Respondents will pay an administrative penalty in the amount of R 350 000 (three hundred and fifty thousand rands).

6.3 This amount does not exceed 10% of the Respondents' total annual turnover in the Republic and its exports from the Republic for its 2019/2020 financial year.

6.4 The Respondents will pay the amount set out in paragraph 6.2 above to the Commission within 30 days from the date of confirmation of this Settlement Agreement by the Tribunal.

6.7 The penalty must be paid into the Commission's bank account which is as follows:

NAME: THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER: [...]

BRANCH CODE: 323 345

REF: 2019DEC0001

6.8 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

7 FULL AND FINAL SETTLEMENT

7.1 This Settlement Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and the Respondents relating to any alleged contravention of the Act by the Respondents, that is the subject of the Commission's investigation referred to the Tribunal under CT Case No. FTN154Nov20.

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