

SOUTH AFRICA / JUDGMENT

Foodcorp (Pty) Ltd v Sunshine Bakery Holdings (Pty) Ltd (LM089Aug22)

[2022] ZACT 92 (5 December 2022)

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COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Imraan Valodia, Fiona Tregenna

CASE / FILE NUMBER

LM089Aug22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM089Aug22

Foodcorp (Pty) Ltd (Primary
Acquiring Firm)

And

Sunshine Bakery Holdings (Pty) Ltd (Primary Target Firm)

REASONS

FOR DECISION

- [1] On 04 August 2022 the Competition Commission (“Commission”) received a notice of a large merger whereby RCL Foods Limited (“RCL”) intends to acquire sole control over Sunshine Bakery Holdings Proprietary Limited (“SBH”).
- [2] The ultimate Acquiring Firm is Foodcorp Proprietary Limited (“Foodcorp”), a private company and wholly owned subsidiary of RCL. RCL is controlled by Remgro Limited (“Remgro”). Remgro's only investment that is relevant to the proposed transaction, is its indirect control in Lupo Bakery Proprietary Limited (“Lupo Bakery”). Lupo Bakery supplies baked goods (including bread and bread rolls) across the country.
- [3] RCL is a manufacturer of a wide range of branded and private label food products. Of relevance to the proposed transaction are:

3.1. Sunbake, a bakery business that supplies bread and bread rolls at the wholesale level in Gauteng, Limpopo, Mpumalanga, North West, the Free State and North- Western KZN (Vryheid and surrounds); and

3.2. Supreme Flour, a manufacturer and supplier of wheat flours (i.e., white bread flour, brown bread flour and cake flour), specialist flours for professional bakers and prepared baking mixes.

[4] The primary target firm is Sunshine Bakery Holdings Proprietary Limited ("SBH"). SBH, is an investment holding company and does not have any business activities. SBH wholly owns and controls Scenic Route Trading 412 Proprietary Limited ("Sunshine Pietermaritzburg") and Sunshine Bakery Durban Proprietary Limited ("Sunshine Durban"). Sunshine Pietermaritzburg and Sunshine Durban operate the Sunshine Bakery Business which is a wholesale supplier of bread to customers predominantly in KwaZulu-Natal ("KZN") as well as certain parts of the Free State and Eastern Cape.

[5] In terms of this transaction, Foodcorp will acquire 100% of the issued share capital of SBH. Thus, RCL through Foodcorp will exercise control over SBH.

[6] The Competition Commission assessed the activities of the merging parties and found that they overlap horizontally as the merging parties both provide bread into the South African market. In addition, the Commission found that the proposed transaction gives rise to a vertical overlap as the Acquiring Group sells bread flour to the Target Group, which the Target Group uses in its bakeries in KwaZulu-Natal.

[7] The Commission therefore assessed the effects of the proposed transaction in the following markets:

7.1. The upstream market for the supply of bread flour in KwaZulu-Natal; and

7.2. The downstream market for the supply of bread products in KwaZulu-Natal, as well as parts of the Free State and Eastern Cape.

[8] The Commission found that the four leading bread flour suppliers in KwaZulu-Natal are Pioneer Foods, Tiger Brands, Premier Foods and Azam, with market shares of between 15% to 20% each. The Acquiring Group has a market share of approximately 5%. In addition, the Commission found that the merged entity will have a market share of less than 20% in the supply of bread in each of the KwaZulu-Natal, Free State and Eastern Cape provinces. Based on these figures, the Commission was of the view that that the merged entity has a relatively low market share in the supply of bread in these provinces.

[9] With regards to the vertical overlap, the Commission considered if the merged entity will have the ability to foreclose the competitors of SBH, from an input (bread flour), post the implementation of the proposed transaction. In this regard, the Commission noted that the Acquiring Group only supplies bread flour to the Target Group in KwaZulu- Natal.

- [10] The merging parties submitted to the Commission that [...]. In addition, the merging parties state that [...]. Thus, the Commission found there are no other downstream firms to be foreclosed as a result of the proposed merger. As such, the proposed transaction is unlikely to lead to input foreclosure of any firm in KwaZulu- Natal.
- [11] With regards to customer foreclosure concerns, the Commission received concerns from two flour suppliers of the Target firm, namely Just Flour CC (“Just Flour”) and Shemuel Flour Mills Proprietary Limited (“Shemuel”). The firms stated that the bread flour market is dominated, as to 80%, by vertically integrated firms such as Tiger Brands, Pioneer Foods and Premier Foods whose integrated mills supply their own bakeries. Independent flour mills compete for the remaining 20% of the market and the proposed transaction will thus have a notable impact on their business.
- [12] The Commission noted that the Target Group has a market share of between 1% and 17% in the supply of bread in KwaZulu-Natal and surrounding areas in Eastern Cape and Free State. The Commission conclude that by virtue of market shares alone it was unlikely that the merged entity will have the ability to foreclose upstream rivals of a customer with significant anticompetitive effect. However, the Commission noted that Just Flour and Shemuel are independent flour millers that are not vertically integrated and do not control their own bakeries. The firms stated that the Target Firm accounts for 64% of Just Flour’s bread flour sales and 37% of Shemuel’s bread flour sales. Both firms were concerned that RCL will become SBH’s sole flour supplier post -merger.
- [13] The Commission found that there are other downstream independent bakeries such as: Sunfresh Bakery, Grant's Baking Solutions CC, Kara Nichha's Bakery, Ozzie's Bakery, Kinds Bread, Miguel’s Bakery, Butterfields Bakery who are currently supplied flour by Just Flour and Shemuel. However, these alternative independent bakeries are relatively small especially in comparison to SBH.
- [14] With regards to the incentives of the merged entity to foreclose, the merging parties submitted that [...].
- [15] However, the Commission noted that SBH does not have any supply agreements with any of its bread flour suppliers. There is therefore no security of supply governing the relationship with concerned bread flour suppliers such as Just Flour and Shemuel.
- [16] Therefore, in order to remedy these foreclosure concerns, the Commission was of the view that the proposed transaction should be approved subject to bread flour procurement conditions for a period of two (2) years.
- [17] Prior to the hearing of this matter, the Tribunal requested the Commission to canvass its procurement condition with the concerned third parties, particularly Just Flour and Shemuel.

[18] Shemuel submitted that it was satisfied with the Commission's proposed, whereas Just Flour made written submissions requesting the Commission to extend the period of the procurement condition to three years (to enable it to restructure its business), it also requested that the condition be modified to stagger the procurement on a quarterly basis. This would prevent the merged entity from fulfilling the procurement condition in one quarter or in a concentrated period of time wheat milling is a monthly activity with standard monthly production volumes, and any concentration of supply in a few months will negatively impact the ability of the independent bread flour suppliers to supply insuring.

[19] The Tribunal considered the submissions of Just Flour, and:

19.1. Regarding the proposal to extend the condition to three years, we found that this was inappropriate based on the submissions of the merging parties to the Commission on this issue. The merging parties submitted that the longer the conditions are, the greater the merging exposure would be to the risk of adverse market changes and volatility in the market. They further submitted that two years is sufficient for the independent bread flour suppliers sufficient time to adapt to potential changes that might or might not happen after the condition period.[1]

19.2. Regarding the proposal to stagger the procurement condition on a quarterly basis, the Commission nor the merging parties opposed this proposal. We therefore accepted this staggering of the procurement condition.

[20] Given the above, we found that the proposed transaction is unlikely to substantially prevent or lessen competition in any of the relevant markets. We are further of the view that the procurement condition, annexed hereto as to Annexure "A", will remedy any potential foreclosure concerns.

[21] The transaction does not have any adverse effect on employment.

[22] RCL has Broad Based Black Economic Empowerment ("B-BBEE") ownership of 21.49%. The primary target firm has B-BBEE ownership of 13.6%. Accordingly, the merging parties state that the proposed transaction will result in an increase in B-BBEE ownership of approximately 8%. The proposed transaction will therefore result in a positive impact on the public interest grounds set out in section 12A(3) of the Competition Act.

[23] There are no other public interest concerns.

[24] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market, or to have a negative impact on the public interest, and accordingly approve it subject to the conditions contained in Annexure "A".

Date: 05 December 2022

Ms Yasmin Carrim

Prof. Imraan Valodia and Prof. Fiona Tregenna concurring

Tribunal Case Manager: Kameel Pancham

For the Merging Parties: Desmond Rudman of Webber Wentzel

For the Commission: Nolubabalo Myoli and Grashum Mutizwa

ANNEXURE "A"

Foodcorp Proprietary Limited

Sunshine Bakery Holdings Proprietary Limited

CT Case No: LM089Aug22

CONDITIONS

1.1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

1.1.1. "Acquiring Firm" means Foodcorp Proprietary Limited;

1.1.2. "Approval Date" means the date referred to on the Tribunal's merger Clearance Certificate (Notice CT10) in terms of the Competition Act;

1.1.3. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

1.1.4. "Competition Act" means the Competition Act, No. 89 of 1998, as amended;

1.1.5. "Commission Rules" mean the Rules for the Conduct of Proceedings in the Commission;

1.1.6. "Conditions" mean these Conditions that shall be in place for a period of 2 (two) years from the Implementation Date;

1.1.7. "Days" mean any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;

1.1.8. "Implementation Date" means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.1.9. "Independent Bread Flour Suppliers" means Bakhresa Holding Limited, Just Flour CC, and Shemuel Flour Mills Proprietary Limited but does not exclude other independent bread flour suppliers that may supply the Merging Parties with bread flour;

1.1.10. "Merger" means the acquisition of control by the Acquiring Firm over the Target Firm;

1.1.11. "Merging Parties" means collectively the Acquiring Firm and the Target Firm;

1.1.12. "RCL" means RCL Foods Limited, the controlling firm of the Acquiring Firm;

1.1.13. "Target Firm" means Sunshine Bakery Holdings Proprietary Limited and its subsidiaries;

1.1.14. “Tribunal” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and

1.1.15. “Tribunal Rules” mean the Rules for the Conduct of Proceedings in the Tribunal.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

Procurement commitment

2.1. For a period of 2 (two) years from the Implementation Date, the Target Firm shall procure at least 50% of its quarterly bread flour requirements from Independent Bread Flour Suppliers subject to the parties reaching agreement on reasonable commercial terms for supply of bread flour.

3. MONITORING

3.1. The Acquiring Firm shall inform the Commission in writing of the Implementation Date, within 5 (five) Days of it becoming effective.

3.2. The Acquiring Firm shall, within 10 (ten) Days from the Approval Date, circulate a copy of the Conditions to the Independent Bread Flour Suppliers.

3.3. As proof of compliance thereof, the Merging Parties shall within 5 (five) Days of circulating the Conditions, provide the Commission with an affidavit by a senior official of the Merging Parties attesting to the circulation of the Conditions and attach a copy of the notice sent.

3.4. The Acquiring Firm shall submit a report to the Commission indicating its compliance with respect to these Conditions. These reports must be lodged 5 (five) Days after each anniversary of the Implementation Date for a period of 2 (two) years.

3.5. Each report submitted in terms of paragraph 3.4 shall be accompanied by an affidavit deposed to by a senior official of the Acquiring Firm confirming the accuracy of the information contained in the report and attesting to the compliance with the Conditions.

3.6. The Commission may request any additional information from the Merging Parties which the Commission from time to time may deem necessary for purposes of monitoring the extent of compliance with these Conditions.

4. APPARENT BREACH

4.1. An apparent breach by the Merger Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Commission Rules and Rule 37 of the Tribunal Rules.

5. VARIATION

5.1. The Merger Parties and/or the Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted.

6. GENERAL

6.1. All correspondence in relation to the Conditions must be submitted to the following e-mail addresses: mergerconditions@compcom.co.za and Ministry@thedtic.gov.za.

[1] Record page 1357.

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