

SOUTH AFRICA / JUDGMENT

Foschini Retail Group (Pty) Ltd v BMT StreetFever (Pty) Ltd (LM173Jan23) [2023] ZACT 48; [2023] 3 CPLR 40 (CT) (19 May 2023) [2023] ZACT 48

COURT

Competition Tribunal

BEFORE

G Budlender, F Tregenna, T Vilakazi

CASE / FILE NUMBER

LM173Jan23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM173Jan23

In the matter between:

Foschini Retail Group (Pty) Ltd Primary Acquiring Firm

and

That Portion of the Business Conducted Under the Street Fever Business Name Out of Retail
Stores in South Africa (As a Going Concern and Income

Earning) by BMT StreetFever (Pty) Ltd Primary Target Firm

Panel: G Budlender (Presiding Member)

F Tregenna (Tribunal Member)

T Vilakazi (Tribunal Member)

Heard on: 21

April 2023

Order issued on: 21 April 2023

Reasons

issued on: 19 May 2023

REASONS

FOR DECISION

Introduction

- [1] On 21 April 2023, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger in which Foschini Retail Group Proprietary Limited (“Foschini”) intends to acquire the business conducted under the “Street Fever” business name from BMT Street Fever (Pty) Ltd (“Target Business”).
- [2] Post-merger, the Target Business will be solely controlled by Foschini, and by extension, The Foschini Group (“TFG”).

Primary acquiring firm

- [3] Foschini is a private company duly incorporated under the laws of the Republic of South Africa. Foschini is a wholly owned subsidiary of TFG, a company publicly listed on the Johannesburg Stock Exchange. As its shares are widely held, TFG is not controlled by any single firm or individual.
- [4] TFG is an independent chain-store group in South Africa with a diverse portfolio of fashion and lifestyle retail brands, offering clothing (apparel, footwear and accessories), cosmetics, jewellery, sporting apparel and equipment, cell phones, mobile technology products, homeware and furniture, from value to upper market segments. TFG’s retail offering is available in-store and online.
- [5] In South Africa, TFG operates 25 retail chains which target customers from value to upper market segments. Relevant to the proposed transaction are TFG’s lifestyle fashion retail chains comprised of Totalsport, Sports Scene, Archive and Sneaker Factory.

Primary target firm

- [6] The primary Target Business, Street Fever, is a wholly owned division of BMT Street Fever (Pty) Ltd (“BMT”), which is a private company incorporated under the laws of South Africa.
- [7] The Target Business comprises approximately 114 lifestyle fashion retail stores active within South Africa. The stores trade as “Street Fever”.
- [8] The Target Business is a South African retailer of branded lifestyle and sports- inspired, “athleisure” footwear, apparel and accessories, presently conducted under the business name “Street Fever”. Customers of Street Fever are in the value to mid-market segment. Street Fever currently has 114 stores across South Africa, primarily located on shopping streets in central business districts as well as in shopping centres. Street Fever’s retail offering is also available online.

Competition Assessment

- [9] The proposed transaction raises a horizontal overlap in the retail of (i) branded footwear, (ii) branded apparel and (iii) branded accessories.
- [10] Furthermore, the proposed merger raises a vertical overlap in that the Seller, BMT, intends to continue supplying the transferring stores with the Starter brand as it has been doing pre-merger because it is vertically integrated insofar as the wholesaling and retailing of the Starter brand. [...].
- [11] However, the Commission was of the view that this vertical overlap is unlikely to raise any concerns as the Seller will continue to supply Starter to the Target Business as before. [...].
- [12] The Commission further noted that TFG leases retail space from the Sellers' retail properties. The merging parties submit that these leases will continue unabated post-merger as they are unrelated to the proposed transaction. The Commission took the view that these vertical dimensions of the merger are unlikely to raise any foreclosure concerns, and as such did not raise anything further on the vertical overlap.

Relevant product market

- [13] Without necessarily concluding on the definitive relevant product market, the Commission assessed the activities of the merging parties in the market for the retailing of athleisure branded footwear; the market for the retailing of athleisure branded apparel; the market for the retailing of athleisure branded accessories; and the broad market for the retailing of athleisure branded footwear, apparel and accessories.

Relevant geographic market

- [14] The merging parties submitted that the scope of the markets is national as their retail chains are operated across the national market.
- [15] The Commission considered the retail stores of the merging parties and found that they are spread across all the provinces within South Africa.
- [16] In addition, the Commission observed that a number of Street Fever outlets are located in small towns and less upmarket areas including townships, with a few outlets near upmarket areas.
- [17] In line with previous Tribunal decisions,[1] the Commission assessed the effects of the merger within a national market, without necessarily concluding on a definitive geographic market. The Commission further considered local geographic markets consisting of a distance of a 0-5 km radius from each of the Target Business's stores.
- [18] Therefore, the effects of the proposed transaction were analysed in the following markets, without necessarily concluding on the definitive relevant market:

18.1. the national market for the retail of athleisure branded footwear;

18.2. the national market for the retail of athleisure branded apparel;

18.3. the national market for the retail of athleisure branded accessories;

18.4. the broad national market for the retail of athleisure branded footwear, apparel and accessories; and

18.5. the local market (0 to 5km) for the retail of athleisure branded footwear; apparel and accessories.

Market shares

[19] The Commission noted that although the markets for the retailing of athleisure branded products could be defined broadly, there appears to be some segmentation. This is because the retail chains that offer athleisure branded footwear, apparel and accessories may also focus on narrow categories of the market, differentiated according to affordability and functionality. Accordingly, the stores of the merging parties may be positioned along different pricing points within the athleisure branded fashion market.

[20] For instance, the stores of the Acquiring Group, namely Archive and Sportscene, fall under tiers 1 and 2, respectively, of the athleisure

branded product market as defined by TFG based on price points and other store and product range characteristics.[2] Sneaker Factory falls under the lowest level, tier 3, which is the same level as the target stores, Street Fever. Totalsport is not a typical retailer of athleisure branded products.

[21] The Commission found that the merged entity accounts for relatively large shares of each of the affected markets (defined in terms of revenues), particularly (i) the broad national market for the retail of athleisure branded footwear, apparel and accessories (between 25 to 35%), (ii) the national market for the retail of athleisure branded footwear (between 25 to 35%), (iii) the national market for the retail of athleisure branded apparel (between 25 to 35%) and (iv) the national market for the retail of athleisure

branded accessories (between 15 to 20%).

[22] However, the Commission further found that the market share accretion in each of these markets is below 2% and thus not significant in terms of a change in the structure of the market.

Unilateral effects of the merger

[23] In terms of local markets (0 to 5km)[3] for the retailing of athleisure branded footwear; apparel and accessories, the Commission found that there are seven markets wherein the merger results in the reduction of competitors from three to two. These are in Cavendish, Kirkwood, N1 City Mall, Springs, Thaba Nchu, Tokai and uMzimkhulu. However, in Kirkwood, Springs, Tokai and Cavendish, the retail chains of the merging parties may not be direct competitors as Sneaker Factory competes more closely with Street Fever in the lower

end of the market. The other chains, namely Totalsport, Sportscene and Archive, are not direct competitors of Street Fever.

[24] The Commission further found that, although there is an overlap in terms of Street Fever and Sneaker Factory stores in the Thaba Nchu, uMzimkhulu and Cavendish local areas, they will each face competition from either Studio88 or Footgear, which are also in the same, lower end of the market segments. Therefore, the Commission took the view that the merged entity will continue to face competition in these local areas where there are overlaps post-merger.

[25] The Commission however found that in two of the local areas (defined using a 0- 5kms radius), namely Middelburg and Richmond, do not have third party stores which would compete against those of the merged entity. The merging parties submit that their stores in Richmond (Street Fever/Totalsport) and Middelburg (Street Fever/Sportscene) are not direct competitors. This is because Totalsport falls into a category of technical performance products where end-use is the primary consideration, given product type and range, as opposed to fashion or leisure, and is positioned at the tier 2 level; whereas Street Fever is at tier 3 level in terms of pricing points.

[26] Further, the merging parties identified Dunn's store in Richmond as an alternative competing store which stocks athleisure branded products. Richmond residents also commute daily between Richmond and Pietermaritzburg and may consider the latter as an alternative shopping area. In addition to the brick-and-mortar athleisure outlets, the merging parties submit that consumers in smaller retail nodes like Richmond have the option to purchase their desired athleisure products online (i.e., competitors such as Tekkie Town, Footgear, Studio 88, and Skipper Bar all support online purchases in addition to their in-store offerings). This, in turn, imposes some competitive constraint on the merged entity in Richmond by large national retailers without the need for a physical presence in Richmond.

[27] Regarding Middelburg, the merging parties submit that they identified four competitors' stores, namely

(i) Ons Handelshuis, (ii) Ronel's Quality Clothing, (iii) Nommerpas, and (iv) Dress Like Me, which stock products in the athleisure category and which exert a competitive constraint on the merged entity.

[28] Overall, the Commission was of the view that the merger is unlikely to lead to a substantial lessening of competition in the local markets where the stores of the parties overlap, although the merger reduces competition in seven local areas (from three to two competitors) and from two to one competitor in two local areas. This is because the stores of the merging parties may not be direct competitors in the identified local areas of overlap and that the merged entity applies uniform pricing and promotions across the national markets, regardless of the state of competition within a specified local area. The merged

entity is to some extent constrained by online sales (as confirmed by a competitor of the merging parties).

- [29] As noted above, the market share accretion in each of the relevant markets is below 2% and thus not significant. In addition, some third parties indicated to the Commission that the market for branded goods is a competitive one since there are multiple routes to market and competing offerings.
- [30] Furthermore, the Commission noted that most of the Street Fever outlets are located in smaller towns and in townships. According to strategy documents of TFG, it appears that the Acquiring Group is leveraging the merger to increase its geographic footprint and gain traction in those smaller towns, which it regards as falling within the value to mid-market segment.
- [31] Having considered the above, the Tribunal agreed that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition in the implicated markets.

Creeping merger assessment

- [32] The Acquiring Group has acquired 10 firms between 2020 and 2022 but none of these firms are in the same line of business as Street Fever. Instead, they focus on (i) retail of apparel, homeware, cellphones, cosmetics, (ii) design and manufacturing of clothing, (iii) apparel manufacturing assets, (iv) software engineering, (v) retail of luxurious bedding linen, duvets and related accessories, (vi) textile manufacturing, (vii) digital on-demand shopping platform, and (viii) manufacture of textile and mattresses.
- [33] Based on the Commission's assessment, it does not appear that the present transaction raises creeping merger concerns as none of the previous acquisitions relate to athleisure branded footwear, apparel or accessories. The Commission has indicated that it will continue to monitor future acquisitions by TFG.

Public Interest

Effect on employment

- [34] The merging parties submitted that [...] been closed recently due to poor performance related to the difficult economic environment including power outages, weakened currency and a rise in the costs of doing business.
- [35] The merging parties further submitted that the closure of [...] Street Fever early in 2023 has resulted in the retrenchment of [...] ("Retrenched Employees") due to the poor performing stores in which they were employed. Further, [...] been temporarily transferred to the other stores of Street Fever and will eventually be absorbed by TFG stores within the vicinity of the closed Street Fever stores where they were based, post-merger.

- [36] The merging parties submit that the proposed transaction will not result in any further retrenchments or job losses within South Africa. Rather, the merging parties submit that a successful implementation of the proposed transaction will provide job security for all personnel currently employed by Street Fever as they will continue to be employed post-merger.
- [37] The Commission contacted the employee representative for the Target Business, as the employees are not represented by a trade union. The employee representative confirmed that the proposed transaction will not result in further retrenchments [...] whether the retrenchments of the Retrenched Employees are merger specific.
- [38] The Commission found that on 1 June 2022, the TFG Board considered the acquisition of Street Fever stores and indicated that this strategy can help it to expand Sneaker Factory [...] stores by the end of 2022. There is mention in these documents that a few of the stores would be closed but TFG does not mention any retrenchments as a result of these store closures. Instead, the Sale of Business Agreement indicates that employees will be transferred in terms of section 197(2) of the Labour Relations Act (“LRA”).
- [39] The Commission found that the performance of the [...] poor within the past five years, as reflected in the company financial statements, which led to the closure of the non-performing stores.
- [40] The Retrenched Employees constitute [...] Street Fever and of the merged entity, respectively. According to the Commission, these are relatively small proportions and the Retrenched Employees have to be viewed in the context of the further [...] jobs in the counterfactual scenario.
- [41] Accordingly, given the employment concerns above, the Commission and the merging parties agreed on the imposition of a three-year employment moratorium as a condition for the approval of the merger.
- [42] We accepted this condition as an appropriate remedy.

Effect on the spread of ownership

- [43] The merging parties submitted that 25.90% of TFG’s interest is held by historically disadvantaged persons (“HDP”)

shareholders and TFG’s broad-based black economic empowerment (“B-BBEE”) procurement recognition is 110%, which gives it a Level 3 B-BBEE Status.[4]

- [44] On the other hand, 33.33% of Street Fever’s shares are held by HDPs, with a B- BBEE procurement recognition of 10%. The Target Business’s B-BBEE Status is Level 8.

- [45] The merging parties submitted that although the proposed transaction results in a marginal decrease in HDP share ownership from 33.33% to 25.90%, it improves the B-BBEE Status of the Target Business from Level 8 to Level 3.
- [46] In view of the 7.43% HDP share dilution resulting from the proposed transaction, the Commission requested the merging parties to either establish an employee share ownership programme (“ESOP”) or alternatively to quantify the envisaged import substitution which will occur due to several brands currently being imported by the Street Fever going to be replaced by the Sneaker Factory house brand, which is locally manufactured.
- [47] The merging parties submitted that TFG is unable to accede to the Commission’s request to establish an ESOP to ameliorate the 7.43% HDP share dilution attributable to the proposed transaction based on firm-specific reasons.
- [48] Therefore, the merging parties submitted that TFG is committed to and has invested substantially in its local supply chain through its supply chain strategy founded upon a “fast, flexible local supply chain capability”, and investment in and support to local supply chain development and enhancement.
- [49] Furthermore, the merging parties submit that the successful implementation of the proposed transaction will attract additional local procurement expenditure [...] (“CTFL”) sector. manufacturers and suppliers including the small business category owned by HDPs, provided that if such percentage cannot be achieved in relation to the integrated Target Business, the shortfall will be made up in the procurement of apparel and footwear products by the merged entity. This is in addition to employment and job security which will be realised following a successful implementation of the proposed transaction.
- [50] The Commission noted that the impact of import substitution is indefinite for as long as TFG operates Sneaker Factory and will grow annually from an initial amount [...] during the financial year 2023/24. Therefore, the Commission and the merging parties agreed to confirm the commitments relating to import substitution into a condition for approval of the merger, noting specifically that the merging parties will invest an initial amount of annually. The [...] annual growth of this amount will track the annual consumer price index (“CPI”) in South Africa.

Other public interest issues

- [51] The proposed transaction raised no other public interest concerns.

Conclusion

- [52] Having considered the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and approve the proposed transaction subject to the public interest conditions annexed hereto as “Annexure A”.

Date: 19 May 2023

Mr. Geoff Budlender SC

Dr. Thando Vilakazi and Prof. Fiona Tregenna concurring

Tribunal Case Manager: Juliana Munyembate

For the Merging Parties: Mark Garden, Aidan Scallan and Tayla Theron

Of ENSafrica

For the Commission: Rakgole

Mokolo and Grashum Mutizwa

[1] Tribunal Decision, Case No. 53/LM/Aug02 and Tribunal Decision, Case No. 21/LM/Mar05.

[2] Merger Record at page 453.

[3] The parties argue that the radius applied should be broader for athleisure purchases that are typically not impulse purchases with consumers prepared to travel further and wait longer for the desired products.

[4] Merger record at para 8.2.6 on page 82.

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Prepared on 10 October 2026 · Esheria