

SOUTH AFRICA / JUDGMENT

Gutsche Family Investment (Pty) Ltd v Fairfield (Pty) Ltd (LM180Sep17) [2018] ZACT 43 (21 February 2018) [2018] ZACT 43

COURT

Competition Tribunal

BEFORE

Enver Daniels, Andiswa Ndoni, Imraan I Valodia

CASE / FILE NUMBER

LM180Sep17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM180Sep17

In the matter between

GUTSCHE FAMILY INVESTMENT (PTY) LTD

Acquiring Firm

And

FAIRFIELD (PTY) LTD

Target Firm

Panel

: Mr Enver Daniels (Presiding Member)

: Ms Andiswa Ndoni (Tribunal Member)

: Prof Imraan I Valodia (Tribunal Member)

Heard on : 24 January 2018

Order Issued on : 25 January 2018

Reasons

Issued on : 21 February 2018

PUBLIC REASONS FOR DECISION

Approval

[1] On 25 January 2018, the Competition Tribunal conditionally approved the large merger between Gutsche Family Investments (Pty) Ltd and Fairfield (Pty) Ltd.[1]

[2] The reasons for the approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[3] The primary acquiring firm is Gutsche Family Investments (Pty) Ltd ("GFI"), a holding company for a number of investments. GFI is jointly controlled and co owned by Gutsche Trust and P.R Gutsche Holdings (Pty) Ltd.

[4] GFI has a controlling interest in Woodlands Dairy (Pty) Ltd ("Woodlands"). Woodlands manufactures and supplies dairy and dairyrelated products in South Africa and is based in the Eastern Cape. Woodlands produces products for retailers' house brands

and for sale under its own brand, 'First Choice'.

Primary target firm

[5] The primary target firm is Fairfield (Pty) Ltd ("Fairfield"). Fairfield is controlled by the trustees of the Fairfield Trust.

[6] Fairfield manufactures dairy, dairyrelated and shortlife fresh juice products for retailers and for sale under its own brand, 'Fairfield', throughout South Africa. Fairfield is based in Kwa Zulu Natal.

[7] Fairfield owns a majority interest in Fairfield Farming Company (Pty) Ltd ("FarmingCo"), a dairy farming company that supplies dairy exclusively to Fairfield. Fairfield obtains the majority of their dairy needs from these farms. FarmingCo does not form part of the proposed transaction it will be owned by the Fairfield Trust and will continue to supply Fairfield exclusively postmerger.

Proposed transaction and rationale

[8] In terms of the Share Purchase Agreement, GFI intends to acquire 100% of the shareholding interest of Fairfield from the current holders in three tranches. GFI will exercise joint control over Fairfield from the completion of the first stage of the transaction until the exercise of the first call option, after which it will exercise sole control.

[9] The acquiring firm's rationale for its purchase of Fairfield was to expand its presence in the South African market. The divestment by the Fairfield Trust is due to the beneficiaries wishing to focus on the hospitality industry.

- [10] The parties initial proposed transaction is as follows: at the first stage GFI obtains shareholding of Fairfield and certain minority shareholder rights, granting it joint control with the current owners. Approximately two years later, GFI would acquire a further shareholding in Fairfield. Thereafter, GFI will continue to exercise joint control due to the minority shareholder protections. The final stage would involve GFI acquiring the remaining shareholding and sole control over Fairfield. This final stage was to happen approximately two years after the purchase of the further shareholding.
- [11] The parties sought approval for all three stages of the transaction simultaneously. The Commission was concerned with providing approval to a transaction with such lengthy periods of time between the date of approval and the change from joint control to sole control. The Commission submitted that market conditions may change in that time and in order for the Commission to assess the transaction properly it would require notification in terms of the Competition Act when there is a change from joint to sole control.
- [12] To address the Commission's concerns, the merging parties submitted that they will alter the structure of the transaction and acquire sole control within a two year period. This will be done by removing minority shareholder protections held by the remaining of shares.
- [13] The transaction is approved subject to the condition that if sole control will be acquired within two years of approval the merged entity would not be required to notify. If however, sole control is acquired after two years from implementation the merged entity would be required to notify in terms of the Act.

Relevant market and impact on competition

- [14] The Commission considered the activities of the Merging parties and found a number of Horizontal overlaps. Both of the merging parties are active in the national markets for the manufacture and supply of butter, cheese, cream, flavoured milk, and amasi ("the dairy related products") as well as in the regional market for the procurement of raw milk.
- [15] For dairy related products, the Commission's investigation revealed that the structure of the market is unlikely to change significantly due to the small market share accretions and overall relatively low market share of the postmerger entity.
- [16] When evaluating the market for the procurement of raw milk, the Commission found that in the broad regional market (consisting of both the Eastern Cape and KwaZulu Natal), the post merger entity will still hold less than 25% market share and continue to face strong competition from rival firms such as Clover Milkyway (Pty) Ltd and Parmalat SA (Pty) Ltd.

Coordination Assessment

- [17] In light of past cartel investigations into collusion in the market for the procurement of raw milk, the Commission assessed whether the proposed transaction strengthens conditions that facilitate coordination between players.

[18] The Commission found that the merger is unlikely to alter the structure of the market or increase buying power in any material way. This was due to the relatively small size of Fairfield and the strong incentives for the merging parties to continue to operate independently to avoid the increased costs of transporting raw milk over long distances. Consequently, the Commission was of the view that the proposed transaction does not increase the potential for cartel conduct. We accordingly agreed with the Commission's

analysis.

Public Interest

[19] The merging parties submitted that the facilities of Woodlands and Fairfield will continue to operate independently using all existing staff and thus no duplication will occur and no retrenchments will be implemented. Furthermore, the parties stated that their intention was to expand the product offerings and operations post merger and retrenchments would be counterproductive in respect of this goal. Both the Commission and the relevant trade unions were satisfied with representations made by the Merging Parties that there would be no loss of employment resulting from the merger.[2]

[20] However, for the sake of assurance and certainty on any employment concerns, the merged entity agreed on a condition that restrains it from any merger specific retrenchments for a period of two years from the date of approval of the proposed transaction.

Conclusion

[21] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no further public interest issues arise from the proposed transaction apart from those addressed above which are adequately safeguarded by the proposed condition. Accordingly, we approve the proposed transaction with conditions

21 February 2018

Mr Enver Daniels

Ms Andiswa Ndoni and Prof Imraan I Valodia

Tribunal Researcher: Ms Aneesa Ravat

Mr Jonathan Thomson

For the merging parties Mr Judd Lurie of Bowmans

For the Commission: Mr Billy Mabatamela

ANNEXURE A· CONFIDENTIAL

Gutsche Family Investments Proprietary Limited

Fairfield Dairy Proprietary Limited

CC Case Number: 2017Sep0007

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meaning assigned to them below and cognate expressions bear corresponding meaning:

1.1 "Acquiring Firm" or "GFI" means Gutsche Family Investments Proprietary Limited, a company incorporated in accordance with the laws of the Republic of South Africa;

1.2 "Approval Date" means the date referred to in the Tribunal's clearance certificate (Notice CT 10);

1.3 "Business Day" means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;

1.4 "Commission" means the Competition Commission of South Africa;

1.5 "Competition Act" means the Competition Act 89 of 1998, as amended;

1.6 "Conditions" mean these conditions;

1.7 "Fairfield" means Fairfield Dairy Proprietary Limited;

1.8 "Fairfield Trust" means the Trustees for the time being of the Fairfield Trust;

1.9 "First Option" means the first call option granted by the Fairfield Trust to GFI, or the first put option granted by GFI to the Fairfield Trust, for the purchase by GFI of approximately 30% of the issued share capital of Fairfield at any time on or after 1 June 2020, but before 30 September 2020, in terms of the SSA;

1.10 "Implementation Date" means the date on which the Merger is implemented i.e. the date on which the first tranche referred to in paragraph 2.3 becomes effective;

1.11 "LRA" means the Labour Relations Act 66 of 1995;

1.12 "Merging Parties" means GFI and Fairfield;

1.13 "Merger" means the acquisition of control of Fairfield by GFI, resulting in GFI eventually acquiring unfettered sole control over Fairfield;

1.14 "Minority Protections" means the minority protections numbered 31 and 32 and contained in Schedule 2 (Matters Requiring a Special Resolution) of Fairfield's Memorandum of Incorporation. For the sake of clarity, these minority protections stipulate that a special resolution is required with respect to: (i) the appointment and dismissal from employment of any of the following key staff of Fairfield: the managing director, the financial director and the operational director; and (ii) the approval of the strategic plans and annual budgets of Fairfield (including capital

expenditure) or a deviation of more than 10% if the budgeted capital expenditure,

1.15 "Sellers" means the Fairfield Trust which currently holds a shareholding of 97.3% in Fairfield, and Barry David Glanz who holds a shareholding of 2.7% in Fairfield;

1.16 "Second Option" means the second call option granted by the Sellers to GFI, or the second put option granted by GFI to the Sellers, for the purchase by GFI of approximately 30% of the issued share capital of Fairfield at any time on or after 1 June 2022, but before 30 September 2022, in terms of the SSA;

1.17 "SSA" means the Sale of Shares and Option Agreement entered into between the Sellers and GFI on 13 June 2017 (as amended as contemplated in clause 3.2 herein);

1.18 "Target Firm" means Fairfield Dairy Proprietary Limited, a company incorporated in accordance with the laws of the Republic of South Africa; and

1.19 "Tribunal" means the Competition Tribunal of South Africa,

2. RECORDAL

2.1. On 04 September 2017, the Commission received notice of a large merger whereby GFI intends to acquire control of Fairfield over a period of time, resulting in GFI eventually acquiring unfettered sole control over Fairfield (ie, the Merger), The Merger will take place in tranches or portions. The first tranche involves GFI acquiring an initial 40% of the issued share capital of Fairfield as well as the Minority Protections. The second tranche involves the exercise of the First Option, The third and final tranche will see the exercise of the Second Option. On completion of the above mentioned tranches, GFI will wholly own and control Fairfield.

2.2. The Merging Parties submit that with this notification they seek approval for all three tranches.

2.3. The first tranche, will give GFI de facto control of Fairfield. When the First Option is exercised, GFI will cross the bright line (50% plus of Fairfield's issued share capital) to acquire a total shareholding in Fairfield of approximately 70%. Initially, notwithstanding the exercise of the First Option (I.e. the second tranche), GFI would have joint control of Fairfield as the Fairfield Trust would retain the Minority Protections, (and therefore de facto control of Fairfield). This then made the exercise of the Second Option a notifiable transaction.

2.4. However, during the investigation, the Merging Parties decided to change the structure of the transaction such that upon the exercise of the First Option (i.e. the second tranche), GFI will then acquire unfettered sole control (i.e. both de Jure and de facto control) of Fairfield. This means that the Minority Protections afforded to the remaining 30% shareholders of Fairfield will now be removed to allow GFI to have unfettered sole control after the exercise of the First Option. This then makes the notification of the Second Option immaterial as GFI would already have unfettered sole control after the exercise of the First Option.

2.5. The Commission is of the view that if the First Option is exercised timeously, the Merging Parties will not need to renotify the exercise of the First Option to the Commission. In other words, if the First Option is exercised within two (2) years of the Approval Date, the Commission is of the view that the Merging Parties will not need to renotify the exercise of the First Option to the Commission. This is because the Commission has analysed the Merger as if it entails the acquisition by GFI of both de Jure and de facto control. Further, the Commission is of the view that within this period, it is unlikely that market conditions could substantially change.

3. CONDITIONS

3.1. Exercise of the First Call Option

3.1.1. Should the First Option be exercised within a period of 2 (two) years from the Approval Date, GFI shall inform the Commission of its decision within 10 (ten) Business Days of exercising the First Option by way of an affidavit deposed to by the CEO of the Acquiring Firm.

3.1.2. Should the First Option be exercised after a period of 2 (two) years from the Approval Date, GFI shall notify the exercise of the First Option in the form of a new merger filing in the form prescribed by the Competition Act, provided that at the time the relevant merger notification thresholds are met.

3.2. Amended documents

3.2.1. The Merging Parties shall submit signed amended transaction documents which includes, but is not limited to, the amended Memorandum of Incorporation and Shareholders Agreement of Fairfield, clearly reflecting that the exercise of the First Option will provide GFI with unfettered sole control over Fairfield (i.e. the removal of the relevant Minority Protections), within 10 (ten) Business Days of the Approval Date.

3.3. Employment conditions

3.3.1. The Merging Parties shall not retrench any employees as a result of the Merger for a period of two (2) years from the Implementation Date.

3.3.2. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

4. MONITORING OF COMPLIANCE WITH THE EMPLOYMENT CONDITIONS

4.1. The Merging Parties shall circulate a copy of the Conditions to all their employees and their relevant trade unions or employee representatives within 5 (five) business days of the Approval Date.

4.2. As proof of compliance thereof, the Chief Executive Officers of the Merging Parties shall within 10 (ten) business days of circulating the Conditions, submit affidavits attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees, respectively.

4.3. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) business days of it becoming effective.

4.4. The Merging Parties shall, for a period of two (2) years, on each anniversary of the Implementation Date submit an affidavit confirming compliance with Condition 3.3.

4.5. Any individual who believes that the Merging Parties have not complied with or have acted in breach of these Conditions may approach the Commission.

5. BREACH

5.1. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of any of the above Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules For the Conduct of Proceedings in the Tribunal.

6. VARIATION

6.1. The Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

7. GENERAL

7.1. All correspondence in relation to the Conditions must be submitted to the following e mail address: mergerconditions@compcom.co.za

[1] Conditions to the approval of the merger attached as Annexure A.

[2] Page 897 of the Commissions Record

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Prepared on 11 October 2026 · Esheria