

SOUTH AFRICA / JUDGMENT

K2020211444 (South Africa) (Pty) Ltd v Barrie Cline Clothing (Pty) Ltd (LM082Aug20.2020.) [2020] ZACT 70 (9 November 2020)

[2020] ZACT 70

COURT

Competition Tribunal

BEFORE

M Mazwai, Y Carrim, Fiona Tregenna

CASE / FILE NUMBER

LM082Aug20.2020.

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM082Aug20

In the matter between:

K2020211444 (South Africa) (Pty) Ltd Primary

Acquiring Firm

And

Barrie Cline Clothing (Pty) Ltd Primary

Target Firm

Panel: Ms M Mazwai (Presiding Member), Ms Y Carrim (Panel Member), Prof Fiona Tregenna (Panel Member)

Last submission received on: 09 October 2020

Order Issued on:

09 October 2020

Reasons

Issued on:

09 November 2020

REASONS

FOR DECISION

Approval

- [1] On 9 October 2020, the Tribunal approved, with Conditions, the proposed transaction in which K2020211444 (South Africa) (Pty) Ltd (“K2020”) is to acquire Barrie Cline Clothing (Pty) Ltd (Barrie Cline).
- [2] The reasons for the conditional approval of the proposed transaction follow.

Parties to the transaction

Primary acquiring firm

- [3] The primary acquiring firm is K2020, which is controlled by Truworths Limited (“Truworths”). Truworths is a wholly owned subsidiary of Truworths International Group Limited (“Truworths International Group”). In addition to Truworths, Truworths International Group owns a number of companies inter alia Young Designers Emporium (Pty) Ltd, Truworths Trading (Pty) Ltd and Truworths UK Holdco 1 Ltd. K2020 does not control any firm.
- [4] K2020 and all the firms directly and indirectly controlling it, will collectively be referred to as “The Truworths Group”.
- [5] K2020 is a special purpose vehicle which has no business activities. The Truworths Group is an investment holding and management company that invests in companies that are leading retailers of fashion clothing, footwear, related merchandise, and homeware. It operates through approximately 728 stores in South Africa and 49 stores in the rest of Africa, and approximately 132 stores in the United Kingdom and Europe. The Truworths Group also has more than 10 000 different line items which, inter alia include women, men and children’s clothing; accessories; footwear; homeware; cosmetics; and fine jewellery.

Primary target firm

- [6] The primary target firm is Barrie Cline. Barrie Cline is controlled by Mr. Barrie Cline and Ms. Sharon Combrinck.
- [7] Barrie Cline manufactures (through outsourced arrangements), and supplies women’s outerwear apparel on an exclusive basis to Truworths from a central head office and warehouse in Cape Town. Barrie Cline arranges for the manufacture of lady’s outerwear apparel through outsourced arrangements with cut, make and trim operators (“CMTs”).[1] Design houses, such as Barrie Cline, provide CMTs with the design/garment specifications, tech packs, fabrics, patterns, and stitching

requirements, for the purposes of manufacturing.

Proposed transaction and rationale

Transaction

- [8] The Truworths Group through, K2020, intends to acquire the business (assets and liabilities) of Barrie Cline, as a going concern. Upon the implementation of the proposed transaction, K2020 will exercise sole control over Barrie Cline.[2]

Rationale

- [9] Truworths recognises that the proposed transaction presents it with an opportunity to streamline its operations, and seamlessly integrate the design function into its operations with little to no disruptions.
- [10] The primary target firm submits that the proposed transaction is motivated by the advanced age of the directors and their desire to retire from professional activities.

Impact on competition

- [11] The Commission found a pre-existing vertical overlap between the activities of the merging parties as Barrie Cline designs, manufactures (through outsourced arrangements), and supplies women's outerwear apparel on an exclusive basis to Truworths from a central head office and warehouse in Cape Town.
- [12] The Commission did not conduct an in-depth market definition for its vertical assessment given that the proposed transaction is unlikely to have any competition concerns but the Commission noted that the merging parties are active in different levels of the apparel value chain.
- [13] The Commission therefore considered the following markets in the vertical analysis:
- 13.1 The upstream market for the design and manufacturing of apparel in South Africa.
- 13.2 The downstream market for the retail of apparel in South Africa.

Input foreclosure

- [14] In line with the European Commission, the Commission investigated whether the merged entity will have the ability to substantially foreclose access to an important input, whether it would have the incentive to do so and whether the foreclosure strategy would have significant adverse effects on downstream competition in that specific market.
- [15] From an input foreclosure perspective, the Commission noted that the Truworths Group is the only local customer of Barrie Cline for women's outerwear apparel and it does not provide women's outerwear apparel to other competitors of the Truworths Group. Considering this, the Commission found that it is unlikely that competitors of the Truworths Group would be foreclosed from a supplier of women's outerwear apparel as a result of the merger. As such, the proposed transaction will not alter the structure of the market as Barrie Cline will continue to provide women's outerwear apparel to Truworths, as it did pre-merger.

[16] When considering Barrie Cline's ability to foreclose, the Commission noted that the merging parties submitted that, based on the exclusive nature of the supply arrangement between the merging parties, it is not easy to provide an estimation of the market share size in the design and manufacturing of apparel market. However, the merging parties estimate that Barrie Cline's market share is [...] As such, the Commission is of the view that the merged entity is unlikely to have the ability to foreclose any significant downstream competitor of the Truworths Group as it is a relatively small player and did not provide any women's outerwear apparel to any third party in South Africa, pre-merger.

Customer foreclosure

[17] The Commission noted that the Truworths Group has an estimated market share of less than 10% in the downstream market for the retail of apparel in South Africa and as such it does not have the ability to foreclose in any market in South Africa. In addition, the Truworths Group does not account for a substantial portion of the downstream retail of apparel market in South Africa. Furthermore, the Commission noted that Barrie Cline does not have the capacity to satisfy the Truworths Group's apparel on its own given its negligible market share as well as the low volumes procured by the Truworths Group from it.

[18] The Commission noted that the Truworths Group purchases apparel from an additional 61 design houses in South Africa. The Commission therefore highlighted the fact that the Truworths Group only procures a portion of its apparel requirements from Barrie Cline, being women's outerwear apparel in particular, and procures the rest of its apparel requirements from other design houses that compete with Barrie Cline. The Commission did not receive any concerns from the Truworths Group's other suppliers. The Commission further noted that the merging parties confirmed that the Truworths Group will continue to make use of other design houses that it currently uses to satisfy its apparel requirement in South Africa.

[19] The Commission is of the view that based on the above information, it is not likely that any foreclosure concerns will arise as a result of the merger. We find no reason to disagree.

Public Interest

[20] The Commission, in its investigation, engaged with the trade unions that were representing the merging parties' employees, as well as the Department of Trade and Industry and Competition ("DTIC"). Their respective submissions are addressed below.

Employment

[21] In terms of the proposed transaction the employees of Barrie Cline will be transferred to Truworths in accordance with section 197 of the Labour Relations Act. The merging parties provided an unequivocal undertaking that there would be no retrenchments as a result of the proposed merger.[3]

- [22] The South African Commercial, Catering and Allied Workers Union (“SACCAWU”), which represented the employees of the Truworths Group submitted that the proposed transaction should be approved subject to a condition that there will be no retrenchments for a period of three years.
- [23] The Southern African Clothing and Textile Workers Union (“SACTWU”), which represented the employees of Barrie Cline, required the parties to provide an explicit and unequivocal commitment against job losses as a result of this transaction and confirm that the Truworths Group would retain the same number of jobs at Barrie Cline that were present pre-merger. Further, SACTWU required that, in the event that retrenchments become necessary, the merging parties should provide SACTWU with six months’ notice of the retrenchments.
- [24] The merging parties, in response to SACCAWU and SACTWU submitted that an absolute moratorium on retrenchments would not be possible given the current economic circumstances. Further, the merging parties could not commit to maintaining the number of jobs in the business pre- and post-merger. They submitted that the merger is a job-saving merger as the directors of the target firm are at an advanced age and would be retiring, which could lead to the closure of the business and job losses.
- [25] The merging parties anticipated limited job duplications due to their vertical relationship and did not envisage merger specific job losses. Further, they undertook not to retrench but indicated during the hearing that it was too soon to assess the impact of the Covid-19 pandemic to provide a three-year moratorium. They confirmed that the number of employees to be transferred is 163.
- [26] In order to give effect to the unequivocal undertaking regarding merger-specific retrenchments and taking into account the current

economic climate, while also protecting jobs, the merging parties agreed to a one-year moratorium on merger related retrenchments.[4] This was thereafter made a Condition for the merger’s approval.

Small businesses, or firms controlled or owned by historically disadvantaged persons, spread of ownership and Industrial sector and region

- [27] SACTWU also sought clarity on whether the merging parties had considered the prospect of worker ownership for Barrie Cline workers within the broader Truworths Group post-merger.
- [28] Regarding worker ownership within the Truworths Group, the Truworths Group submitted that it operates a number of share ownership schemes within the Group. Qualifying employees of Barrie Cline would be considered for these schemes.

- [29] The DTIC's initial concern regarding the proposed transaction was that the merger parties had not adequately considered the public interest provisions contained on sections 12A(3)(c) (the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to enter, participate or expand in a market) and 12A(3)(e) (the promotion of a greater spread of ownership, particularly by historically disadvantaged persons and workers) of the Act.
- [30] The merging parties submitted that Barrie Cline outsources its manufacturing capabilities to at least 14 CMTs. More than 40% of these CMTs are owned by historically disadvantaged persons. Post-merger, the Truworths Group intends to continue to employ the services of all CMTs currently used by Barrie Cline and thus will protect small and medium sized businesses. Furthermore, the proposed transaction is a substantial and long-term investment commitment that may enable the rejuvenation of local manufacturing within the Republic of South Africa.
- [31] During the Commission's investigation, the DTIC raised the concern that while there is an exclusive relationship between the Truworths Group and Barrie Cline, the Truworths Group also procures the services of other design houses, and therefore this transaction may result in the foreclosure of those other design houses that are contracting with the Truworths Group.
- [32] In addressing this concern, the merging parties submitted that the acquisition of Barrie Cline is principally motivated on insourcing a design and supply function (that has for the last three decades been outsourced to Barrie Cline) in order to protect the local supply industry. Furthermore, the proposed transaction presents the Truworths Group with an opportunity to continue to utilize a local supply source, streamline its operations, protect the longevity and ensure the sustainability of this local supply source and the proposed transaction is the only manner in which this local supply source can continue.
- [33] The Commission found that the implementation of the proposed transaction is unlikely to have a negative impact on small businesses, or firms controlled or owned by historically disadvantaged persons and spread of ownership; neither is it likely to have any negative effects on a particular industrial sector or region.

Conclusion

- [34] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant markets. Further, the transaction does not raise any significant public interest concerns.
- [35] Accordingly, we approved the transaction subject to the conditions attached to the order.

Date: 09 November 2020

Ms Mondo Mazwai

Ms Yasmin Carrim and Prof Fiona Tregenna concurring.

Tribunal Case Managers: C Mathonsi and M Tshabalala

For the Merging Parties: M Morrison and O Motshudi of Fullard

Mayer Morrison instructed by the merging parties

For the Commission: R Ncheche, R Maphwanya and A Mfuphi

[1] CMTs are factories that cut, make and trim fabrics into clothing.

[2] In accordance with section 12(2)(a) of the Competition Act 89 of 1998, as amended (“Act”).

[3] Recommendation page 23 para 53.

[4] Transcript page 32.

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