

SOUTH AFRICA / JUDGMENT

Opiconsivia Trading 99 (Pty) Ltd v The Fruitspot Group (55/LM/Jul11) [2011] ZACT 111; [2012] 1 CPLR 165 (CT) (20 December 2011) [2011] ZACT 111

COURT
Competition Tribunal

BEFORE
N Manoim, Y Carrim, A Wessels

CASE / FILE NUMBER
55/LM/Jul11

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 55/LM/Jul11

In the matter between:

Opiconsivia Trading 99 (Pty) Ltd

and

The Fruitspot Group

Panel: N Manoim (Presiding Member),

Y Carrim (Tribunal Member) and

A Wessels (Tribunal Member)

Heard on : 14 December 2011

Decided on : 20 December 2011

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that -

1. the merger between Opiconsivia Trading 99 (Pty) Ltd and the Fruitspot Group be approved in terms of section 16(2)(b) of the Act subject to the conditions set out in Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).

Presiding Member

N. Manoim

Concurring: Y Carrim and A Wessels

OPICONSIVIA TRADING 99 (t/a Makro)/THE FRUITSPOT GROUP

CC CASE NUMBER: 2011Jul0139

1. Definitions

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

1.1 "Approval Date" means the date on which a settlement agreement containing these Conditions between the Commission and. the merging parties is confirmed by the Tribunal]

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

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

1.4 "Fruitspot" means the business of Fruitspot Group which is comprised of: Fruit Spot (Pty) Ltd, The Fruit Shop (Pty) Ltd and Fruit Express (Pty) Ltd, and which business will be transferred to the Massmart Group upon implementation of the merger.

1.5 "Fruitspot conditions of service" means all elements governing the quality of Fruitspot's service to customers and the manner in which that service is delivered to customers, such elements include but are not limited to: the volume of produce ordered (as well as historical volume and future prospects), price, quality of produce, product range, point of delivery, frequency of delivery, turnaround time, continuity of supply, payment terms, customer's credit worthiness, credit and payment history.

1.6 "Market conditions" means forces active in the market which fall out of the control of the Massmart Group or Fruitspot. This includes but is not limited to: availability of produce, seasonality and economic conditions.

1.7 "Massmart Group" means all trading divisions of Massmart, namely Masswarehouse, Massdiscounters, Massbuiid and Masscash.

1.8 "Massmart" means Massmart Holdings Limited, a subsidiary of Wal-Mart Inc.

1.9. "Small independent retailers" means a retail store or chain of retail stores which is not owned by a major retail or wholesale group (specifically, the major retail groups including Metcash Limited, Shoprite Checkers Limited, Pick 'n Pay Stores Limited, Woolworths (Pty) Ltd and Spar Group Limited). Spar franchise stores owned by individuals are not considered as being owned by the Spar Group and are considered as small independent retailers', the same applies to Pick 'n Pay.

1.10. "Tribunal" means the Competition Tribunal of South Africa. 2. 2. Preamble

These conditions ("the Conditions") are intended to ensure that Massmart ensures that Fruitspot continues to provide post-merger the same level and quality of service it currently provides to its customers, in particular to small independent retailers.

3. Condition

3.1. Massmart will ensure that Fruitspot will, post the merger, continue to trade with all existing small independent retailers, customers in the hospitality industry and any new small independent retailers in a manner that is consistent with Fruitspot's conditions of service applied prior to the merger.

3.2. In addition, Massmart will, apply Fruitspot's conditions of service in trading with external customers in the same manner as it does with customers within the Massmart Group. For the avoidance of doubt, this means that external customers will be entitled to the same transaction terms from Fruitspot as customers within the Massmart Group, provided that Fruitspot's conditions of service are equivalent for each transaction.

3.3. Massmart will ensure that there will be no changes to Fruitspot's conditions of service except those resulting from market conditions and which would have occurred had Fruitspot remained independent of the Massmart Group.

3.4. In the event of a shortage in supply, Massmart will, supply all customers, including other Massmart subsidiaries, on a non-discriminatory basis. Massmart will, ensure that available supply is distributed in a proportionate manner so that the shortfall is not concentrated on small independent retailers and customers in the hospitality industry.

4. Monitoring of compliance with this Condition

4.1. The merging parties will inform all their existing customers of the provisions in this condition within one month of the Approval Date. To this end, the merging parties must provide an affidavit by a senior official attesting to this and a copy of the notice sent to customers within one month of the Approval Date. For the purposes hereof, "existing customers" means active customers that have made purchases within the preceding 3 (three) months.

4.2. In the event that the Commission, receives a complaint from a small independent retailer regarding non-compliance by Fruitspot or the Massmart Group with these Conditions, or otherwise determines that there has been an apparent breach by Fruitspot or the Massmart Group of such Conditions, that shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

5. Duration of the Conditions

5.1. The Conditions contained herein shall exist for a period of 2 (two) years from the Approval Date.

5.2. The Tribunal may on good cause shown, lift, revise or amend these Conditions upon being approached by the merging parties.

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