

SOUTH AFRICA / JUDGMENT

Opiconsivia Trading 99 (Pty) Ltd v The Fruitspot Group (55/LM/Jul11) [2012] ZACT 8 (30 January 2012)

[2012] ZACT 8

COURT

Competition Tribunal

BEFORE

Norma Manoim, Yasmin Carrim, Andreas 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

.....Acquiring Firm

And

The Fruitspot Group

.....Target Firm

Panel: Norma Manoim (Presiding Member)

Yasmin Carrim (Tribunal Member)

Andreas Wessels (Tribunal Member)

Heard on: 14 December 2011

Order issued on: 20 December 2011

Reasons

issued on: 30 January 2012

Reasons for Decision APPROVAL

- [1] On 20 December 2011 the Competition Tribunal ("Tribunal") approved the acquisition by Opiconsivia Trading 99 (Pty) Ltd of the Fruitspot Group with conditions. The Tribunal's reasons for approving this transaction are set out below. For ease of reference we attach the condition again as Annexure A. PARTIES TO THE TRANSACTION
- [2] The primary acquiring firm is Opiconsivia Trading 99 (Pty) Ltd ("Newco"). Newco is a wholly owned subsidiary of Masstores (Pty) Ltd t/a as Makro. Makro is in turn wholly owned by Massmart Holdings Ltd ("Massmart"). Massmart is held 51% by Wal-mart Stores Inc ("Wal-mart"). Massmart has four divisions namely, Massdiscounters, Masswarehouse, Massbuild and Masscash. Massmart also controls a company called Rahme Guys International ("Rahme Guys"), which is relevant for purposes of this transaction.
- [3] The primary target firms are the Fruit Shop (Pty) Ltd, Fruit Spot (Pty) Ltd and Fruit Express (Pty) Ltd. These firms are hereinafter referred to as "Fruitspot". DESCRIPTION OF THE TRANSACTION
- [4] In terms of the structure of the transaction, Newco intends to acquire the business of Fruitspot as a going concern. ACTIVITIES OF THE PARTIES
- [5] Newco is newly formed shelf company and does not provide any products/services. Makro, housed within Massmart's Masswarehouse division, is a chain of large wholesale club outlets which sells a broad range of food, liquor and general merchandise to commercially affiliated resellers and upper income end consumers. Massdiscounters comprises retail discount stores under the name Game and Dion Wired. Massbuild focuses on hardware and related products and Masscash comprises of Jumbo Cash and Carry, CBW, Shield, Cambridge and Saverite. Rahme Guys is a wholesale cold chain distributor of bulk fresh fruit and vegetables.
- [6] Fruitspot is a wholesaler, processor and distributor of fresh fruit and vegetables to customers in mainly the hospitality and retail segments of industry. RATIONALE FOR THE TRANSACTION
- [7] Makro, which entered the fresh produce market in 2010 with a single outlet in the Vaal, submitted that it requires access to production facilities capable of providing a suitable range of pack sizes and value added products together with cold chain facilities. Makro further submitted that it has identified Fruitspot as a suitable operation which is capable of meeting Makro's requirements.
- [8] Fruitspot submitted that this merger will benefit its business directly by vesting the business with purchaser capable of bringing larger resources into play without materially affecting the entrepreneurial freedom of the business and ensuring its sustainability and growth in existing as well as new markets. THE RELEVANT MARKET AND IMPACT ON COMPETITION
- A. Horizontal

Analysis

[9] Both Rahme Guys and Fruitspot are involved in the distribution of fresh fruit and vegetables (fresh produce). In defining the relevant product market, the Commission identified the following value chain in relation to the distribution of fresh produce from the farmer to end consumers. A brief discussion of this value chain follows below. Table: Fresh produce value chain (PLEASE VIEW DIAGRAM ON PDF) (i) Farmers [10] This diagram shows that farmers at the beginning of the value chain and outside of seasonal related imports, commercial farmers

represent the sole source of fresh produce for the formal sector in South Africa. Farmers have three potential routes when looking to sell their fresh produce, i.e. at the municipal markets like the Johannesburg market (where agents sell farmers' produce to buyers), by selling to intermediaries like Fruitspot or by selling directly to retail outlets or other buyers in the hospitality sector. (ii) Municipal markets [11] In respect of municipal markets, the Commission found that there are 20 registered municipal markets in South Africa located in various towns. The Commission also found that these markets serve as both suppliers and in some instances competitors to intermediaries. This is because intermediaries can source their fresh produce from the municipal markets and on-sell to retailers and the hospitality sector and at the same time municipal markets also sell to retail chains and restaurants. The Commission's investigation further revealed that prices for the sale of fresh produce are set at municipal markets, notably the Johannesburg municipal market.¹ The Commission defined the geographic market for municipal market as being local as customers shop at the market closest to them. (iii) Intermediaries [12] This is the part of the value chain relevant for the horizontal analysis. According to the Commission, there are various types of intermediaries. These include so called 'small runners',² larger suppliers with/without a distribution infrastructure, logistics companies and in-house distribution centres for large retailers. As an intermediary, Fruitspot provides these services: bulk fruit and vegetables in any combination as per customer request, fruit and vegetables broken down into smaller pack sizes in any size and combination, value-added products e.g. "sliced and diced" fruit and vegetables, salads and distribution of orders direct to a customer on the next business day via a cold chain system. As indicated above, Rahme Guys (which is controlled by Massmart) also distributes fresh produce.

Reasons for Decision

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THE RELEVANT MARKET AND IMPACT ON COMPETITION

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Table: Fresh produce value chain

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[13] The Commission submits that although the parties are in the same broad market, they cannot be regarded as close competitors as Fruitspot's product offering is aimed at the higher income consumer focussing on value added processing and packaging, whereas Rahme Guys' is aimed at the lower income customers with (presumably) a bias towards bulk products instead of processed products/pre-packed

products. In support of this view the Commission found that Fruitspot supplies retail stores that serve a segment of consumers

with higher incomes and standard of living such as Pick n Pay and Spar, whilst Rahme Guys supplies stores targeting low income

consumers such as Cambridge.³

[14] As there is a limited overlap between the activities of Fruitspot and Rahme Guys, the Commission did not deem it necessary to conclude on the relevant product market but rather defined the market from both a broad and a narrow perspective. The broad market is defined as the market for the supply of fresh produce by intermediaries (Fruitspot and Rahme Guys). The narrow market is defined as the supply of fresh produce, including processed products by intermediaries (Fruitspot only). [15] In relation to the geographic market the Commission found that most intermediaries source partly or wholly from the Johannesburg market and are based in Gauteng. They then sell to customers from this central point; for example Fruitspot sells within roughly a 700km radius from its headquarters in Johannesburg. Customers of the merging parties contacted by the Commission cited Johannesburg as the furthest point they could source their products without it becoming uneconomical to transport. The Commission therefore defined the geographic market for the supply of fresh produce by intermediaries within a 700km radius of Johannesburg.⁴ (iv) Retail

[16] This part of the value chain is relevant for the vertical assessment (discussed below). According to the Commission, the retail market is divided into (i) the food grocery which includes supermarkets, hypermarkets and independent stores and (ii) the hospitality market (which covers organisations such as airlines, restaurants, hotels, hospitals, prisons and schools). The Commission is of the view that hospitality retailers and other catering establishments do not compete in the same market as the food retailers as they offer a wide range of different services that are not related to meeting the consumer's food shopping needs. Massmart is engaged in the retail of fresh produce through Cambridge food stores, CBW, Brown's and a limited number of Game stores. For retailers, the Commission defined the geographic market as being local.

(v) Market participants and shares

[17] The Commission was informed by the Johannesburg municipal market that there are in excess of 400 buyers who purchase over R1 million per annum. According to the Commission it is not possible to confirm the exact market shares because of the fragmented

nature of the industry as well as the lack of availability of data of the volumes purchased directly from farmers. The Commission therefore used the volumes data provided by the Johannesburg municipal market to calculate the market shares of intermediaries (that the Commission was able to identify) involved in the narrow market. The results of these calculations are shown in the table below. Competitor Market Share Fruitspot 33.60% Protea Fresh Wholesalers 19.70% Isilulu 10.30% Victory Part Group 8.50% Rebbros Fruit and Veg 8.30% Freshmark 7.20% Turn 'N Slice 6.60% Grayston 4.10% Urban Foods 1.50% Total 100.00%

[18] This table shows that Fruitspot has a market share of approximately 33.6% in the narrow market. The Commission, however, points out that these market shares are likely to be overstated due to the difficulty of not knowing the exact total market figure of sales or volumes directly purchased from farmers. Further these market shares are of only those competitors known to the Commission.

[19] The market shares in respect of the broad market, i.e. the supply of fresh produce are shown in the table below. Table 3: Intermediaries competing with both Fruitspot and Rahme Guys in the broad market (supply of fresh produce – 2011). Competitor Market Share King Fresh Wholesalers 34.40% Fruitspot 13.60% Rahme Guys 14.00% Lala Goven 6.60% Kariba Fruit Distributions 4.60% Victory Part Group 4.60% Isilulu 4.10% Amaros 4.00% Golden Harvest 3.00% Freshmark 2.90% Turn 'N Slice 2.60% Wigwam 2.30% Grayston 1.60% Euro Gold 1.30% Urban Foods 0.60% Total 100.00%

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[20] This table shares shows that the merging parties would have a combined post-merger market share of approximately 27%. The Commission, however, cautions again that these market shares are likely to be overstated as only competitors that are known to it have been taken into consideration when doing the calculations. The Commission further submits that despite the difficulties encountered in calculating accurate market shares, it is clear that within Gauteng there are numerous players and that Gauteng is thus unlikely to be an area of concern. What concerns the Commission about this merger is the risk of foreclosure in relation to Fruitspot's customers outside Gauteng. This will be discussed in the section dealing with vertical assessment.

[21] In relation to an assessment of entry barriers, the Commission found that small scale entry is accomplished with ease and that individuals wishing to enter this market can do so with a single bakkie, which would be sufficient to enter the market and provide deliveries.⁵ For large scale entry, capital required was cited as being high.⁶ The Commission, however, points out that the sheer number of large players (who purchase in excess of 1 million per annum) in this

market, i.e. in excess of 400, indicates that barriers for large scale entry are not necessarily high.⁷ Participants in this market also have to comply with food safety requirements by large retail stores, the Department of Labour and of Health and although some of these requirements can result in a lengthy process, they are not insurmountable.

[22] In relation to buyer power the Commission found that larger retail chains have a greater ability to countervail as compared to smaller independent retailers in outlying areas outside of Gauteng given fewer options available to them. In respect of unilateral effects, the Commission found that the likelihood of this merger giving rise to unilateral effects is low as Fruitspot and Rahme Guys are not close competitors. Similarly, the Commission found that co-ordination is unlikely in this market because (i) prices are set at the municipal markets and any significant deviation from this market price will attract scrutiny from customers and potential entrants, (ii) the core of the pricing decision is outside the control of any firm and it will be challenging to punish deviators from any co-ordination scheme and (iii) the intermediary channel is fragmented and therefore it's unlikely that co-ordination will ever cover all the participants.

B. Vertical

Analysis

[23] There is a vertical relationship arising from this transaction as Fruitspot is upstream to the Massmart Group in supplying fresh produce. In assessing the likelihood of input foreclosure the Commission looked at whether it would be possible for Massmart8 to deny its downstream retail competitors the services provided by Fruitspot. The Commission further submits that the fresh produce

market within Gauteng is fairly developed with many different sources of fresh produce and therefore a foreclosure strategy by Massmart against downstream retailers would be impossible in this area.

[24] However, the Commission submits that after an observation of specific Fruitspot customers outside Gauteng, it was found that the risk of input foreclosure is high for these customers in towns such as Ladybrand, Bloemfontein, Groblersdal and Nongoma. The Commission submits that the potential to foreclose these customers lies in the fact that they are heavily reliant on Fruitspot and less than ideal alternatives or no alternatives were cited by these customers. In order to address this potential foreclosure risk, the Commission formulated a condition which requires Fruitspot to continue supplying fresh produce to its customers for a period of two years on the same basis as pre-merger.

[25] This condition, as originally formulated, was only binding on the Fruitspot Group and not on the Massmart Group. As the proposed transaction involves the sale of Fruitspot's business and not its shares, we requested the merging parties to redraft the condition in such a way that the correct firm (Massmart) is bound by it. The revised condition is attached to these reasons market as annexure "A".

[26] In relation to customer foreclosure, the Commission found that it is unlikely that Massmart would have the ability to foreclose suppliers of Fruitspot as there are various other avenues through which these suppliers can sell their products.

C. Third Party Views

[27] The Commission interviewed quite a number of market participants in order to get their views on the proposed transaction. These include retailers (such as Irene Cash Store, Arizona, Checkers, Woolworths, Secunda Multi Save, Spar, Fruit n Veg City) competitors (such as Wigwag, Urban Foods, Turn 'N Slice, Amaro's) farmers and intermediaries (such as Country Mushroom, Kudu Farms, Dew Crisp, Denny Mushroom) as well as the following governments departments: Trade and Industry ("Dti"), Economic Development ("EDD") and Agriculture, Forestry and Fisheries ("DAFF"). The concerns raised by these government departments will be discussed in the section dealing with public interest.

[28] The majority of those interviewed did not express any merger specific concerns. Only Arizona and Spar had some concerns regarding the merger as they are retailers which are supplied by Fruitspot. Arizona's concern is that this merger will leave it without a crucial source of supply of fresh produce. In this regard, the Commission submits that it was informed by AV Maharaj⁹ that it can supply Arizona if it were approached. In addition, the Commission is of the view that the condition imposed on this

transaction adequately addresses Arizona's concern. Spar's concern relates to the effect of this merger on its stores' ability to compete effectively and in this regard the Commission noted that Spar is a large retail chain with the ability to expand its operations within a period of 2-3 years in order to cope with potential supply issues from Fruitspot.

D. Public Interest

(i) Effect on Employment

[29] The merging parties submitted to the Commission that the proposed transaction will have no effect on employment and no job losses or retrenchments will occur as a result thereof.¹⁰

(ii) Effect on a particular sector or region

[30] The DAFF's concern regarding the effect of this merger on this section of public interest is that the Massmart/Walmart Group will tend to import greater quantities of fresh produce at the expense of small farmers. When assessing the likelihood of this happening the Commission found that imports occur naturally when fresh produce is out of season¹¹ and that this is a common feature of the market with or without this merger. The Commission further found that these imports are minimal - in 2010 they made up only 1.7% of the total amount of fresh produce sold in South Africa. The Commission therefore concluded that no significant public interest concerns arise with respect to the importation of fresh produce.

(iii) Effect on small business (BEE)

[31] In relation to the effect of this merger on small business the DAFF and Dti are concerned that the Massmart/Walmart will squeeze smaller farmers on price for fresh produce sold to Fruitspot going forward. In regard to this concern the Commission found that in the event that the Massmart/Walmart Group attempt to squeeze farmers from which it procures directly, those farmers would simply switch and sell on the municipal market thereby obtaining the market price for their goods. Furthermore, farmers can sell their produce via alternative channels such as retailers, the hospitality industry as well as to other distributors similar to Fruitspot. The Commission therefore concluded that the proposed transaction does not have any significant public interest concerns with respect to a price squeeze of farmers of fresh produce.

CONCLUSION

[32] We agree with the Commission that the proposed transaction is unlikely to result in a substantial lessening or prevention of competition at the intermediary level within the Gauteng area. In respect of the potential risk of foreclosure identified by the Commission, we are satisfied that the attached condition sufficiently addresses this risk. The proposed transaction is therefore approved subject to the attached condition.

30 January 2012

Norman Manoim Date

Yasmin Carrim and Andreas Wessels concurring.

Tribunal researcher: Ipeleng Selaledi

For the merging parties: Chris Charter of Cliffe Dekker Hofmeyr Inc.

For the Commission: Gertrude Makhaya

1Market players such as Fruit 'n Veg, Amaro's and Wigwam confirmed to the Commission that supply of products is highest when the gates open for the morning trade and declines as the morning trade progresses. Demand also fluctuates through the morning trade and this constant change in supply and demand affects the market price obtainable for goods.

2Small runners are described as individuals with a "bakkie" or a small truck.

3The Commission, however, acknowledges that there were instances in the past where Fruitspot used to supply Boxer stores (which serve low income consumers) which suggest that Fruitspot may straddle the whole LSM spectrum but that Rahme Guys is firmly in the low income end.

4The Commission, however, points out that not all intermediaries can cover this radius at a moment's notice.

5The Commission was informed by the Johannesburg municipal market that they have more than 15 000 "small runners" on their database which corroborates the fact that barriers are low for small scale entry.

6This is from firms such as Wigwam and AV Maharaj.

7In this regard the Commission submits that the minimum viable economies of scale (likely to be reached within 2-3 years) start with small scale entry and thereafter to organically grow over time.

8Massmart is involved in the retail market through Cambridge, Thaba Cash & Carry and Astor Brands. These stores are aimed at a low-income target market. According to the Commission, the fact that these stores target low income consumers implies that they would be in competition with independent retail stores as well as the national chain outlets. Massmart also has department stores like Game and Hybrid stores like Makro, CBW, Jumbo Cash and Carry and

Browns which are, in the view of the Commission, still able to offer a limited retail offering, including fresh produce.

9AV Maharaj supplies fresh produce to the Rhino Store in Nongoma where Arizona is located. The Rhino Group is also being acquired by Massmart in a transaction related to this one.

10Refer to the competitive report filed the merging parties, page 18 of the record.

11This was confirmed by players such as Amaro's, Wigwam, Fruit 'n Veg as well as the Johannesburg municipal market.

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Prepared on 10 October 2026 · Esheria