

SOUTH AFRICA / JUDGMENT

Pick n Pay Retailers (Pty) Ltd v Pick n Pay Douglasdale Family Supermarket & Liquor Store (LM114Sep22) [2022] ZACT 90; [2024] 1 CPLR 9 (CT) (15 December 2022)

[2022] ZACT 90

COURT

Competition Tribunal

BEFORE

T Vilakazi, Y Carrim, S Goga

CASE / FILE NUMBER

LM114Sep22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM114Sep22

In the matter between:

Pick n Pay Retailers (Pty) Ltd

Primary Acquiring Firm

and

Pick n Pay Douglasdale Family

Supermarket & Liquor Store

Primary Target Firm

Panel: T Vilakazi (Presiding Member)

Y Carrim (Tribunal Member)

S Goga (Tribunal Member)

Heard on: 08

December 2022

Order issued on: 08

December 2022

Reasons

issued on: 15 December 2022

REASONS

FOR DECISION

- [1] On 08 December 2022, the Tribunal unconditionally approved the large merger whereby Pick n Pay Retailers (Pty) Ltd ("PnP Retailers."), intends to acquire the business of Pick n Pay Douglasdale Family Supermarket & Liquor Store ("PnP Douglasdale") as a going concern. Post-merger, PP Retailers will have sole control over the business of PP Douglasdale.

The parties

- [2] The primary acquiring firm is PP Retailers, a wholly owned subsidiary of Pick n Pay Stores Limited ("Pick n Pay"). Pick n Pay operates a multi-format, multi- [1] channel business model designed to cater for a diverse spectrum of customers. It also operates supermarkets in various formats that are focused on the supply of fast-moving consumer goods ("FMCG"). [2]
- [3] The primary target firm is PP Douglasdale, which is currently operated by Cherokee Trading Post 24 (Pty) Ltd ("Cherokee Trading").[3] The target firm is a Pick n Pay franchise store, which forms part of the broader Pick n Pay corporate offering. PP Douglasdale conducts its business as a supermarket and liquor retailing franchise store, forming part of the broader Pick n Pay multi-format, multi-channel retail offering to consumers in South Africa.[4]

The transaction

- [4] In terms of the proposed transaction, PP Retailers will acquire the business of PP Douglasdale from Cherokee Trading.[5] Post-merger, PP Retailers will have sole control over the business of PP Douglasdale.

Competition Assessment

- [5] The Commission identified a horizontal overlap in the activities of the merging parties in that PP Retailers and PP Douglasdale are active in the markets for the retail of grocery products and liquor products. A vertical overlap exists because the target firm purchases some of its grocery products and liquor products from the Acquiring Group.

Horizontal Assessment

- [6] The Commission did not reach a conclusion on the relevant product market. Nevertheless, it focussed its assessment on the broad markets for the retail of grocery products and the retail of liquor products as separate markets. In line with case precedent in grocery retail markets[6], the Commission assessed the effects of the transaction within a 3km radius of the target firm's store.

- a. In the market for the retail of grocery products, the Commission found that although the merged entity will hold a market share of 32.18%, the merged entity will continue to face competition from approximately 13 stores in the identified local market.[7]
 - b. The Commission was unable to retrieve detailed information relating to the market shares of competing liquor stores in the Douglasdale catchment area. However, the Commission found that there are a number of competing retail liquor stores in the Douglasdale local market, including Berry & Bottles Liquor Store, Checkers LiquorShop Jukskei Park, Woolworths Wine & Spirits, Omega Liquor Store, and Liquor City Olivedale.[8]
- [8] The Commission found that in the local markets for the retail of grocery products and the retail of liquor products, the proposed transaction does not raise any competition concerns arising from the horizontal overlap in the activities of the merging parties. On the evidence before it, the Tribunal agrees with the Commission's findings.

Vertical Assessment

- [9] The Commission found that there is a pre-existing vertical relationship between PP Douglasdale and the Acquiring Firm. As a Pick n Pay franchise store, PnP Douglasdale purchases Pick n Pay brands and branded stock from the acquiring group. Pre-merger, the Target Firm procures the majority of its trading stock requirements from Pick n Pay.
- [10] The merging parties submitted that the acquiring group intends to acquire the Target Firm as a going concern and that Pick n Pay has no intention to replace any of the registered suppliers.
- [11] After considering the merging parties' submissions, the Commission concluded that the proposed transaction is unlikely to give rise to any foreclosure concerns in any relevant market.
- [12] No third-party concerns were raised regarding the transaction.
- [13] Having considered the above, the Tribunal is of the view that the proposed transaction is unlikely to result in substantial prevention or lessening of competition in any relevant market.

Public Interest

Effect on employment

- [14] The Commission considered whether the proposed transaction would have an adverse effect on employment. The merging parties submit that the proposed transaction will not have any adverse effect on employment and no retrenchments will result from the implementation of the proposed transaction.

- [15] The Commission engaged with the employee representative of the Acquiring Firm and Target Firm. The representative of the employees of PP Douglasdale indicated that the employees of PP Douglasdale raised concerns relating to job security.
- [16] To address the employees' concerns, the merging parties made an undertaking that the proposed transaction would not lead to retrenchments or have any negative consequences on employment.[9] The Commission concluded that the proposed transaction is unlikely to raise employment concerns.

Effect on the spread of ownership

- [17] The Commission considered the effect of the proposed transaction on the promotion of a greater spread of ownership by historically disadvantaged individuals ("HDPs") or workers as shareholders. According to the merging parties, PP Retailers has shareholding by HDPs of 17.76% black ownership, with 7.24% of its shares being held by black women. [10] PP Douglasdale is operated by Cherokee Trading which has no HD shareholders.
- [18] The merging parties further submitted that the proposed transaction Will enhance the level of ownership in the grocery sector in the hands of HDP shareholders.[11] Specifically, the proposed transaction will result in the target store increasing its shareholding by HDPs to an HDP shareholding of approximately 17.76%, of which 7.24% is in the hands of black women. The Department of Trade, Industry, and Competition ("dtic")
- [19] The tic submitted a notice of intention to participate in the merger proceedings and raised the following concerns.[12]
- a. It has observed a growing trend over the past few years wherein Pick n Pay acquires its independent/franchise stores that became available for sale, with some subsequently being converted into Pick n Pay stores, Boxer stores, or corporate stores. The tic noted this feature is likely to be a result of franchise agreements which allow Pick n Pay exclusive right of first refusal to acquire a franchise store when it is available for sale. It further noted that it is rare that existing Pick n Pay franchises are acquired by new, third-party entrants/franchisees, or where Pick n Pay has grown the overall pool of franchise store owners, nationally or in specific geographic locations. [13]
 - b. The incremental mergers entered into between Pick n Pay and franchisees create barriers to entry for HDPs and small/medium businesses to enter the market. As a result, it is of the view that reliance on indirect B-BBEE ownership to advance an argument that the proposed transaction promotes entry/ownership by HDPs, is unconvincing. [14]
- [20] In order to address this concern, the dtic proposed that the merging parties should consider a condition in the proposed transaction wherein Pick n Pay returns/sells the target firm to an independent owner i.e., a suitable HDP and/or small/medium business within two
- (2) years, post implementation of the proposed transaction.

[21] In response to the dtic's concerns, the merging parties submitted the following.

A [...][15]

B Pick n Pay notes that typically when a franchisor establishes franchise business, it does so with the aim of establishing a brand of stores which can be established across a spread of geographic locations as a part of a broad regional and/or national offering. As part of such franchise agreements, there will typically be certain obligations which are placed on both the franchisee and the franchisor. In particular, in respect of the latter, the franchisor will often have to commit to ensuring that the brand is adequately marketed and promoted in a given area in order to drive footfall to the franchise store. The overall effect of such a partnership is that whilst a franchisee may run a franchise store in particular area, the store in question forms part of a broader competitive offering to the overall market for a franchisor. In this respect, in order to protect the franchisor's investment in the establishment and growth of a store in a particular area, a franchisor will often include a right of first refusal in order to mitigate the potential loss of investment should a franchisee sell the store to a competing brand and/or franchisor (i.e., to a Shoprite Checkers by way of example). In this respect, where a franchisor is not able to protect its investment in this manner, it will be unlikely to establish a franchise model in the first place, as its significant investment in establishing a franchise model could be undermined by competitors who would not have incurred those costs and could simply free ride on its investment." [16]

C [...][17]

[22] The merging parties further submitted that [...][18]

[23] Having considered the merging parties' response, the Commission concluded that the proposed transaction should be approved for the following reasons.

A [...]

B The proposed transaction does not lead to a dilution in HDP shareholding. PP Douglasdale currently has no ownership by HDPs. The acquisition of PP Douglasdale in this instance would lead to an increase in HDP shareholding in PP Douglasdale as Pick n Pay Retailers has an HP shareholding of approximately 17.76%.

[24] The Commission concluded that proposed transaction has no negative impact in terms of any public interest considerations. The Tribunal concurs with the Commission's findings.

Conclusion

on public interest

[25] In light of the above, the Tribunal concludes that the proposed transaction is unlikely to have an adverse effect on the public interest.

Conclusion

[26] The Tribunal concluded that it is unlikely that the proposed transaction will significantly lessen or prevent competition in any relevant market. Furthermore, there are no public interest concerns raised by the transaction.

DATE: 15 December 2022

Presiding Member

Dr Thando Vilakazi

Concurring: Ms Yasmin Carrim and Ms Sha'ista Goga

Signed by: Thando Vilakazi

Signed at: 2022-12-15 10:05:08 +02:00

Reason: Witnessing Thando Vilakazi

Tribunal Case Managers: Sinethemba Mbeki

For the Merging Parties: Avias Ngwenya and Nicci van der

Walt for NortonsInc.

For the Commission: Tarryn

Sampson and Grashum Mutizwa

- [1] Pick n Pay is listed on the Johannesburg Stock Exchange ("JSE"). Its shareholders with a shareholding of more than 5% as at 27 February 2022 are: Newshelf 1321 (Pty) Ltd (as to 25.3%), Government Employees Pension Fund (16.5%), and Fidelity Series Emerging Markets Opportunity Fund (7.7%). Merger Record, p17 of 431, para [2.2].
- [2] Merger Recommendation, p22 of 39, para [16]. FMCG include an array of goods such as food, groceries, clothing, health, and beauty goods, general merchandise, and liquor.
- [3] The shareholders of Cherokee Trading are: Andre Joseph Du Preez and the Matcan Eagle Trust
- [4] PP Douglasdale offers goods and services which are identical to those offered by Pick n Pay in its other Pick n Pay branded franchise and corporate supermarket stores
- [5] Merger Record, p50 of 431, para [3.1].
- [6] Merger Recommendation, p24 of 39, para [26] See also Shoprite Checkers (Pty) Ltd and Metcash Seven Eleven (Pty) Ltd and A Portion

of The Friendly Distribution Division of Metcash Trading Africa (Pty) Ltd merger Case Number: LM009Apr11, Pick N Pay Retailers Ltd and Trio Belville (Pty) Ltd Case Number: LM242Mar15, Spar Group Ltd and Florida Fooliner (Pty) Ltd, Florida Junction Superstar and Florida Junction Tops at Spar, and Memoire Trading 130 (Pty) Ltd, Gordon Road Superstar and Gordon Road Tops at Spar Case Number: LM221Mar15.

- [7] Merger Recommendation, p26 of 39, para [34].
- [8] Merger Recommendation, p28 of 39, para [38].
- [9] Merger Recommendation, p29 of 39, para [45].
- [10] Merger Record, p49 of 431, para [1.10].
- [11] Merger Recommendation, p30 of 39, para [49].
- [12] Merger Record. D300 of 431
- [13] Merger Recommendation, p30 of 39, para [53.1].
- [14] Merger Recommendation, p31 of 39, para [53.2].
- [15] Merger Record, p315 of 431, para [19] and [20]. Letter submitted by the merging parties dated 08 November 2022.
- [16] Merger Record, p383 of 431, para [5] and [6]. Letter submitted by the merging parties dated 08 November 2022.
- [17] Merger Record, p387 of 431, para [21] and [22]. Letter submitted by the merging parties dated 08 November 2022
- [18] Merger Record, p385 of 431, para (15). Letter submitted by the merging parties dated 08 November 2022.

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