

SOUTH AFRICA / JUDGMENT

Robertsons Holdings Proprietary Limited v Silver 2017 Proprietary Limited (LM251Dec17) [2018] ZACT 79 (17 August 2018)

[2018] ZACT 79

COURT

Competition Tribunal

BEFORE

Mondo Mazwai, Medi Mokuena, Fiona Tregenna

CASE / FILE NUMBER

LM251Dec17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:LM251Dec17

In

the matter between:

Robertsons
Holdings Proprietary
Limited
Acquiring Firm
and
Silver
2017 Proprietary
Limited
Target Firm
Panel
Mondo Mazwai (Presiding Member)
Medi Mokuena (Tribunal Member)
Fiona Tregenna (Tribunal Member)
Order issued on
20 June 2018
Reasons issued on
17 August 2018
PUBLIC

REASONS FOR DECISION

Approval

[1] On 20 June 2018, the Competition Tribunal conditionally approved the large merger between Robertsons Holdings Proprietary Limited

("Robertsons") and Silver 2017 Proprietary Limited ("Silver").[1]

[2] The reasons for the approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[3] The primary acquiring firm is Robertsons which is ultimately controlled by Remgro Limited, a public company listed on the JSE. Remgro

controls a number of firms of which RCL Foods is relevant to this transaction.

[4] Remgro is an investment holding company which holds interests in various industries including food, liquor and home care. RCL Foods

manufactures branded and private label food products, including mayonnaise and cooking oil which it distributes through its own

supply chain specialist, Vector Logistics.

[5] Robertsons also owns 25.7% shareholding in Unilever South Africa Holdings Proprietary Limited ("ULSAH").

Primary target firm

[6] The primary target firm is Newco which was specifically incorporated for this transaction and is wholly owned by Unilever South Africa Proprietary Limited ("ULSA"). Newco will be used to house the ULSA Spreads Business which is the business of manufacturing,

marketing, sale and distribution of spread products.

[7] The Spreads Business is involved in the manufacture, marketing, sale and distribution of the following;

7.1. margarine products under the Rondo, Stork, Rama, Flora and Marvella brands;

7.2. a dairy cream alternative, Meadowland;

7.3. and Flora cooking oil.

Proposed transaction and rationale

- [8] In terms of the proposed transaction, Robertsons which currently owns 25.7% in ULSAH will sell this interest back to ULSAH. The money generated from this transaction will be used to purchase Newco for the purpose of acquiring the Spreads Business.
- [9] The parties submitted that their rationale for the transaction is ULSAH's intention to dispose of its Spreads Business worldwide which Robertsons sees as an ideal business opportunity.

Relevant market and impact on competition

Horizontal assessment

- [10] During its investigation, the Commission identified an overlap in the supply of refined packed sunflower oil as the acquiring firm, through RCL Foods, owns the Nola cooking oil brand and the target firm owns the Flora cooking oil brand.
- [11] The Commission found that the combined market share of the merged entity would be less than 5% with an accretion of less than 1%. It identified a number of competing firms which would continue to constrain the merged entity post merger.
- [12] We concur with the Commission's finding that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Vertical assessment

- [13] The Commission identified two vertical overlaps; (i) the processing of oil seeds and (ii) the provision of cold chain distribution services.
- [14] In its assessment of the processing of seeds the Commission found that Remgro through the Nola brand manufactures processed sunflower oil through its processing facility. Nola does not provide crushing and refining services to third parties. It does sell its excess supply to third parties on an ad hoc basis. The Commission found that Nola's refinery capacity amounts to less than 10% of the market. The Commission is of the view that the proposed transaction does not raise input foreclosure concerns. ULSA does not process its own sunflower oil but relies on third party suppliers. Currently it procures crude sunflower oil from [...] and refines it by [...]. Nola's refinery capacity accounts for less than 10% of the market and neither [...] raised concerns. The merging parties also confirmed that they would continue to procure crude and refined sunflower oil from their current suppliers. The Commission is of the view that the proposed transaction would be unlikely to raise customer foreclosure concerns.
- [15] In its assessment of cold chain distribution, ULSA procures cold chain distribution from [...] while Remgro Group procures it from its own subsidiary Vector Logistics. The Commission is of the view that there are a number of other suitable logistics providers who could continue to constrain the merged entity postmerger. The Commission is of the view that the proposed transaction would unlikely raise input foreclosure concerns. In relation to customer foreclosure, the Commission considered whether the merged entity would terminate its contract with Clover following the transaction. The current supply agreement

would expire on [...]. The Commission identified a number of suppliers within the market who could serve as alternatives [...]. Given this, the Commission was of the view that the proposed transaction would not result in customer foreclosure concerns.

- [16] We concur with the Commission's finding that the proposed transaction is unlikely to result in foreclosure concerns.

Coordinated effects

- [17] The Commission submitted that the market for the production and supply of edible oils, baking fats and margarine in South Africa have ongoing cartel investigations. The ULSA Spreads Business was implicated in one of the Commission's cartel investigations which is currently pending before the Tribunal.[2] As the ULSA Spreads Business will be transferred to Newco for the proposed transaction the Commission submitted that clarity should be garnered on the payment of an administrative fine should ULSA be found to have contravened the Act. The merging parties, while

initially opposing the inclusion of the remedy indicating that the Commission would be able to use mechanisms available in section 64 to enforce an order, accepted the inclusion of a condition at the hearing. The condition to this merger is an undertaking by ULSA that if an administrative penalty was imposed it would be responsible for such payment.

Public interest

- [18] The employees of the Spreads Business which were part of ULSA will be transferred to Newco in light of the proposed transaction. As such all the Spreads Business employees will not be affected by the proposed transaction. The remaining employees of ULSA, i.e. employees of ULSA that were not transferred to NEWCO, would remain in the ULSA Business posttransaction and could potentially be affected by the proposed transaction. The merging parties submitted that the remaining employees would have been employees in ULSA who would have done some work for the Spreads Business and some work for ULSA's other business interests. As a result of the proposed transaction the merging parties undertook to determine whether the remaining employees could be gainfully employed and identified approximately 60 ULSA employees who may be affected. During the Commission's investigation of the effect this may have on the 60 employees, The Minister of Economic Development filed a notice to participate during the Commission's investigation and proposed that the merger be approved subject to an employment condition.

- [19] After negotiations, the merging parties and the Commission agreed to a condition to remedy the employment concern that the proposed

transaction raises. In totality, the proposed transaction would not result in any retrenchments. The merging parties have undertaken not to retrench any employees as a result of the merger. Half of the identified employees will be made employment offers within the Remgro Group or Newco while the remaining half will continue to be employed in ULSA.

[20] The proposed transaction further raised no other public interest concerns.

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, employment concerns are remedied by the conditions to the approval of this merger. Accordingly, we approve the proposed transaction unconditionally.

Ms Mondo Mazwai

Mrs Medi Mokuena and Prof. Fiona Tregenna concurring.

17 August 2018

Date

Tribunal case manager : Ms Aneesa Ravat.

For the merging parties : Mark Garden of Edward Nathan

Sonnenbergs and Chris Charter of Cliffe

Dekker Hofmeyr.

For the Commission :

Reabetswe Molotsi, Nelly Sakata and Thabelo Masithulela.

CC Case Number: 2017Nov0058

In the large merger between:

ROBERTSONS HOLDINGS (PROPRIETARY) LIMITED Primary acquiring firm

SILVER 2017 PROPRIETARY LIMITED

Primary target firm

CONDITIONS

1. DEFINITIONS

In this document and the annexures hereto the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings

1.1. "Approval Date" means the date on which the Merger is approved by the Tribunal or the Competition Appeal Court, as the case may be;

1.2. "Competition Act" means the Competition Act, No. 89 of 1998 (as amended);

1.3. "Competition Appeal Court" means the Competition Appeal Court of South Africa, a court established in terms of section 36 of the Competition Act;

1.6. "Labour Relations Act" means the Labour Relations Act, No. 66 of 1995 (as amended);

1.7. "Merger" means the acquisition by Robertsons of control over Newco, subsequent to the transfer of the Spreads Business from ULSA into Newco by way of an internal restructuring;

1.8. "Merging Parties" means, collectively, ULSA, Robertsons and Newco;

1.9. "Newco" means Sliver 2017 Proprietary Limited, a company duly Incorporated in South Africa (Registration Number 2017/397657/07);

1.10. "Remgro" means Remgro Limited, a company incorporated in South Africa (Registration Number 1968/006415/06);

1.11. "Remgro Group" means Remgro and any of its direct or Indirect subsidiaries; ; '

1.12. "Robertsons" means Robertsons Holdings (Proprietary) Limited, a company Incorporated In South Africa (Registration Number 1982/008128/07);

1.13. "Sale of Business Agreement" means the Sale of Business Agreement concluded between ULSA and Newco on 14 December 2017;

1.14. "Spreads Business" means that portion of the business conducted by ULSA, as a going concern, which relates to the manufacture, marketing, sales and distribution of the "Rondo"; "Stork"; "Rama"; "Flora" (including Flora branded sunflower oil packaged In 750ml bottles); and "Marvella" branded margarine products (but excluding dressings and mayonnaise); and the "Meadowland" branded dairy cream alternative;

1.15. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established In terms of section 26 of the Competition Act; and

1.16. "ULSA" means Unilever South Africa (Proprietary) Limited, a company incorporated in South Africa (Registration Number 1939/012365/07).

2 EMPLOYMENT

2.1 The Merging Parties shall not retrench any employees as a result of the Merger.

2.2 Insofar as ULSA had identified a potential of 60 (sixty) job losses by employees who spend less than 50% (fifty percent) of their working time per annum working in its Spreads Business ("the Potentially Affected Employees")

2.1.1 Remgro shall, on the Implementation Date or as soon as practicably possible thereafter, procure that offers of employment are made to between 25 (twenty five) and 35 (thirty five) appropriately qualified Potentially Affected Employees for additional positions that will be created by Newco, or otherwise required within the Remgro group postmerger. For the avoidance of doubt, such offers

will be made to appropriately qualified Potentially Affected Employees before the relevant posts are offered to any other applicant.

2.1.2 Employment offers will be made to the Potentially Affected Employees in their current locations. Only if no other options are available or if Potentially Affected Employees indicate a desire for relocation, will offers requiring relocation be made.

2.1.3 The offers of employment will be on terms and conditions which, when taken as a whole, are not materially less favourable to the employee concerned than his/her current terms and conditions of employment with ULSA. For the avoidance of doubt, it is recorded that an offer of employment which will necessitate the relocation of a Potentially Affected Employee will not amount to a materially less favourable term or condition only if, taking into account the specific circumstances of the employee concerned, any relocation does not negatively affect the employee. Upon an offer of employment by Newco or another entity within the Remgro group being accepted by the employee concerned, ULSA shall terminate the employment of that employee.

2.1.4 ULSA, in turn, will ensure continued employment for the remaining Potentially Affected Employees who do not receive an offer as contemplated in clauses 2.1.1 to 2.1.3 above (expected to be between 25 (twenty five) and 35 (thirty five) employees).

2.3 For the sake of clarity, the Potentially Affected Employees will either be absorbed within Newco or another Remgro group entity, or will remain with ULSA, such that there will be no retrenchments arising from the Merger. Retrenchments do not include (i) any termination of employment by ULSA in relation to those Potentially Affected Employees who receive and accept an offer of employment from Newco or another entity within the Remgro group as contemplated in clauses 2.1.1 to 2.1.3 above; (ii) any termination of employment by ULSA in relation to those Potentially Affected Employees who receive and unreasonably reject an offer of employment from Newco or another entity within the Remgro group as contemplated in clauses 2.1.1 to 2.1.3 above; (iii) voluntary retrenchment and/or voluntary separation arrangements; (iv) voluntary early retirement packages;

(v) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (vi) resignations or retirements in the ordinary course of business; (vii) retrenchments lawfully effected for operational requirements unrelated to the Merger; and (viii) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

3 LIABILITY FOR ADMINISTRATIVE PENALTY POSTMERGER

3.1 ULSA undertakes, as part of the conditions, that it shall remain responsible for the payment of any Administrative Penalty that may be imposed on it postmerger by the Tribunal, or the Competition Appeal Court or any other court, as the case may be, in relation to the pending cartel case before the Tribunal under Case Number: CR223Mar17.

3.2 For the sake of clarity, the above commitment does not exonerate Robertsons or its successor(s) in title, from being liable for the payment of any Administrative Penalty arising from the pending cartel proceedings in the Tribunal under Case No.: CR223Mar17.

4 MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1 ULSA shall circulate a copy of the Conditions to the Potentially Affected Employees within 10 (ten) business days of the Approval Date.

4.2 As proof of compliance thereof, ULSA shall within 7 (seven) business days of circulating the Conditions, provide the Commission with an affidavit by a senior representative attesting to the circulation of the Conditions and attach a copy of the notice sent.

4.3 Any employee who believes that the Merging Parties have not complied with these Conditions may approach the Commission. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of these conditions, the matter shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

4.4 All correspondence in relation to these conditions must be submitted to the following email address: merqerconditions@compcom.c.aza.

5 DURATION OF THE CONDITIONS

The Conditions will terminate upon fulfilment by the Merging Parties of their obligations contained herein, but in any event, in respect of paragraphs 3.1 and 3.2 on the finalisation of pending cartel proceedings under Tribunal Case No.: CR223Mar17, including any subsequent appeals and/or reviews.

6 VARIATION

The Merging Parties or the Commission shall be entitled, on good cause shown, to apply to the Tribunal for a waiver, relaxation, modification and/or substitution of any of these conditions at any time after the Approval Date.

1] Conditions attached as Annexure A.

[2] Case no CR223Marl 7.

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