

SOUTH AFRICA / JUDGMENT

Shoprite Checkers (Pty) Ltd v Trademarks (LM090Oct21) [2022] ZACT 1 (13 January 2022) [2022] ZACT 1

COURT

Competition Tribunal

BEFORE

Enver Daniels, Imraan Valodia, Thando Vilakazi

CASE / FILE NUMBER

LM090Oct21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:LM090Oct21

In the matter between:

Shoprite Checkers (Pty) Ltd

Primary Acquiring Firm

and

The Trademarks owned by Mr Basil Synodinos

Primary Target Firm

Panel

: Enver Daniels (Presiding Member)

: Imraan Valodia (Tribunal Member)

: Thando Vilakazi (Tribunal Member)

Heard on : 09 December & 15 December 2021

Order issued on : 17 December 2021

Reasons

issued on : 13 January 2022

REASONS

FOR DECISION

Approval

[1] On 17 December 2021, the Competition Tribunal conditionally approved the large merger in which Shoprite Checkers Proprietary Limited (“Shoprite”) acquired the 12 registered trademarks owned

by Mr. Basil Synodinos (“Synodinos”) which are used in conducting his retail grocery and general merchandise activities (the “Trademarks”).

[2] The reasons for the conditional approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[3] The primary acquiring firm is Shoprite Checkers Proprietary Limited (“Shoprite”). Shoprite is wholly owned by Shoprite Holdings Limited (“Shoprite Holdings”), a company listed on the Johannesburg Stock Exchange (JSE). Its shares are widely held. Accordingly, no firm controls Shoprite Holdings.

[4] Shoprite Holdings owns several firms in South Africa that are engaged in the supply of, inter alia, grocery, pharmaceutical products, financial services, furniture products and travel and leisure ticketing services.

[5] Shoprite and Shoprite Holdings will collectively be referred to as the Shoprite Group.

Primary target firm

[6] The primary target firm is comprised of 12 registered trademarks, owned by Mr. Basil Synodinos (“Synodinos”), some of which are used in conducting his retail grocery and general merchandise

activities (the “Trademarks”).

[7] The Trademarks are used by Synodinos to conduct retail grocery activities at the following stores that are solely controlled and operated by Synodinos:

7.1. President-Hyper (Krugersdorp, Gauteng);

7.2. President-Hyper (Vaal, Gauteng); and

7.3. President Supermarket Proprietary Limited (Fochville, Gauteng).

[8] The stores solely controlled by Synodinos will be referred to as the “President Outlets”.

Proposed transaction and rationale

- [9] In terms of the proposed transaction the Shoprite Group is acquiring the Trademarks from Synodinos. Post-merger, the Trademarks will be solely controlled by Shoprite Group.
- [10] The proposed merger does not include Shoprite acquiring the President Outlets. Synodinos will continue to independently own and operate the President Outlets post- merger. However, post-merger, Shoprite will own the Trademarks which the President Outlets use in conducting their retail grocery operations and, accordingly, the President Outlets will be obliged to pay Shoprite Group the relevant royalties/fees associated with using the Trademarks.
- [11] There is an existing franchise agreement between Shoprite Group and the President Outlets and new franchise agreements will be concluded to facilitate the President Outlets continuing to use the Trademarks post-merger.
- [12] We note that the merging parties have also separately concluded a Call and Put Option Agreement (“Option Agreement”) which, inter alia, grants Shoprite Group an option to acquire all the President Outlets from Synodinos during [...].
- [13] We note, further, that the Shoprite Group intends to acquire the Trademarks to roll out a new large retail supermarket format franchise offering using the Trademarks (“the Expansion Plan”).
- [14] The Option Agreement and the Expansion Plan were the focus of the conditions attached to the approval of the merger and shall be discussed in further detail, below.

Relevant market and impact on competition

Horizontal assessment

- [15] The proposed transaction results in a horizontal overlap as both merging parties hold a portfolio of trademarks that are applied to retail grocery activities. The Commission did not take a definitive view on either a relevant product or geographic market.
- [16] Based on publicly available information, the Commission estimated that the Trademarks constitute less than 1% of the value of trademarks applicable to retail activities in South Africa. Therefore, the Commission concluded that the merger is unlikely to result in a substantial prevention or lessening of competition in any relevant market.
- [17] However, although the proposed merger does not result in any market share accretion in the retail grocery market, the Option Agreement contemplates Shoprite Group acquiring the retail grocery operations of the President Outlets. This will, therefore, result in Shoprite Group increasing its market share in the retail grocery market (howsoever defined).
- [18] The merging parties and the Commission thus agreed that Shoprite Group’s acquisition of the President Outlets would constitute a merger for the purposes of the Act.

- [19] Therefore, to ensure that such acquisition is subject to merger review, the Commission and the parties have agreed that this merger should be approved subject to a condition requiring the merging parties to notify Shoprite Group's acquisition of the President Outlets in terms of the Option Agreement in future.
- [20] Accordingly, we have approved the merger subject to the condition agreed to by the merging parties and the Commission.
- [21] Finally, and as noted in paragraph 13 above, Shoprite intends to acquire the Trademarks to roll out a new large retail supermarket format franchise offering, using the Trademarks.
- [22] During the hearing on 15 December 2021, the Tribunal questioned the merging parties and the Commission at length regarding inter alia, the Expansion Plan. The Tribunal's concern was that should the Trademarks be devalued by misuse or no use from Shoprite (for any reason), that the President brand may disappear from the market entirely in the future.
- [23] The Shoprite Group's Expansion Plan would seem to directly counter this from happening and as such the Tribunal requested that the merging parties agree to make elements of the Expansion Plan a condition to the approval of the merger, which was agreed to by the merging parties.
- [24] As such, the Shoprite Group has agreed to use its best endeavours, in line with its proposed expansion plans for the Trademarks, to open outlets operated by a franchisee [...] over the course of the next [...] years, measured from the date of the approval of the merger.
- [25] The Conditions relating to both the Option Agreement and the Expansion Plan are attached hereto as Annexure A.

Public interest

- [26] The merger has no impact on employment, given that the Trademarks do not have employees and constitute an intangible asset.
- [27] The merger does not raise any other public interest considerations.

Conclusion

- [28] 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, no public interest issues arise from the proposed transaction. Accordingly, we approve the proposed transaction subject to the conditions detailed above.

13 January 2022

Mr Enver Daniels

Date

Prof. Imraan Valodia and Dr. Thando Vilakazi concurring.

Case Manager

: Kameel Pancham

For the Merging Parties : Graeme Wickins and Petra Krusche of Werksmans Attorneys

For the Commission : Wiri Gumbie and Mogau Aphané

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