

SOUTH AFRICA / JUDGMENT

SPAR Group Ltd v SPAR Encore Ltd (LM133Oct22) [2023] ZACT 34 (27 February 2023)

[2023] ZACT 34

COURT

Competition Tribunal

BEFORE

L Mncube, M Mazwai, I Valodia

CASE / FILE NUMBER

LM133Oct22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case

No: LM133Oct22

In

the matter between:

The
SPAR Group Ltd
Primary Acquiring Firm
and
SPAR
Encore Ltd
Primary Target Firm

Panel:

L Mncube (Presiding Member), M Mazwai (Tribunal Member), I Valodia (Tribunal Member)
Heard

on:

31 January 2023
Order

issued on:

31 January 2023
Reasons
issued on: 27 February 2023

REASONS FOR DECISION

- [1] On 31 January 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger between The Spar Group Ltd (“Spar Group”) and Spar Encore Limited (“Spar Encore”) (“proposed transaction”). In terms of the proposed transaction, The Spar Group intends to acquire 50% of the issued share capital in Spar Encore from Bruce Hughes (“Mr Hughes”). Post-merger, The Spar Group will exercise 100% control over Spar Encore.[1]

The Parties

- [2] The Spar Group is a public company listed on the Johannesburg Securities Exchange (“JSE”), as such it is not controlled by any single shareholder. [2] While it controls in excess of 7 firms across the Southern Region, of relevance to the proposed transaction is its shareholding in Spar Encore (i.e the target firm) (50%) and Spar Engage (Pty) Ltd (“Spar Engage”) (50%).
- [3] The Spar Group is active as a wholesaler and retailer throughout South Africa. Its wholesaling activities include the acquisition and distribution of its branded and private label goods for its Spar outlets and for Spar Guild members.[3] The distribution of the said goods takes place through 7 distribution centres located in Johannesburg (Jet Park), Midrand, Durban,

Pinetown, Cape Town, Port Elizabeth and Mbombela. Its retail activities are conducted through grocery stores, liquor stores, building material stores, and pharmacy stores across South Africa. Through Spar Engage, it provides merchandising and sales services to principals selling products in Spar branded stores. The merchandising and sales services include ordering, planning, stock rotation,

ranging, promotional activity work, brand awareness building and shelf management.[4]

- [4] Spar Encore is an end-to-end private label supplier, jointly controlled by The Spar Group and Mr Hughes in the ratio 50% each. It is active in the sourcing, packing warehousing and supply of private label products to The Spar Group.[5]

Competition Assessment

Overlaps

- [5] The Tribunal considered the activities of the merger parties and found that there exists a vertical overlap, as a result of Spar Encore being active in sourcing, packing, warehousing and supplying of private label products to The Spar Group.

Market definition

[6] The merger parties submitted that the supply of private label products to the main grocery retailers[6] is carried out internally by such grocery retailers. The only distinguishing factor in the proposed transaction is that The Spar

Group has outsourced part of its private supply chain to Spar Encore, but for this there would be no separate business carried by Spar Encore. Accordingly, the merger parties submitted that there is no separate market for the end-to-end supply of private label products. [7]

[7] In defining the relevant market, the Commission considered and relied upon Tribunal precedence in the merger between The Spar Group and Monteagle[8] (“Spar Group / Monteagle”), where The Spar Group acquired its existing 50% shareholding in Spar Encore (previously known Monteagle Africa Ltd[9]) from Monteagle Consumer Group Ltd.

[8] On the basis of the available evidence, the Tribunal found that Monteagle (i.e., the Target Firm) was active in the upstream market

for the sourcing, packaging and distribution of private label products. Further, that The Spar Group was active as a wholesaler of branded and private label products for its Spar branded stores. [10]

[9] On account of the evidence before it, the Tribunal assessed the impact of the proposed transaction on the upstream market for the supply of private label products and the downstream market for the wholesale of private label products.

[10] In defining the geographic market, the Tribunal considered that the supply of private label products to The Spar Group was supplied

nationally to the 7 distribution facilities in order for The Spar Group’s wholesaling business to service the various Spar retail stores. Accordingly, the Tribunal assessed the effects of the merger nationally.[11]

Vertical Assessment

[11] The Commission is of the view that the proposed transaction is unlikely to result in any input foreclosure concerns as Spar Encore only supplies private label products to The Spar Group.

[12] The Tribunal considered whether Spar Encore will, post-merger, have the ability and incentive to foreclose downstream competitors in the supply of private label products. As set out above, Spar Encore has historically only supplied The Spar Group with private label products. In the circumstances, the Tribunal does not believe that Spar Encore will have the ability or incentive to foreclose downstream competitors.

[13] In respect of customer foreclosure, the Tribunal found that there are more than of private label manufacturers supplying private label products to The Spar Group. These manufacturers supply of the private label products sold by The Spar Group and the balance ([....]) is procured from Spar Encore.[12]

[14] The Commission engaged some private label suppliers of The Spar Group, and no concerns were raised in respect of the proposed transaction.[13] In the circumstances, the Commission formed the view that the proposed transaction is unlikely to result in customer foreclosure.

[15] On the evidence before it, the Tribunal agrees with the Commission's findings.

Public Interest

Effect on employment

[16] The merger parties submitted that the proposed transaction will not result in any retrenchments. Further, that post-merger, the terms and conditions of Spar Encore's employees will remain unchanged.[14]

[17] The Commission contacted The Spar Group's employee representative, namely, the South African Commercial Catering and Allied Workers Union ("SACCAWU") and Spar Encore's employee representative, a certain Kirsty Rowley and informed them of the proposed transaction. The Commission received no concerns from the merger parties' employees.

[18] Accordingly, the Tribunal concluded that the proposed transaction is unlikely to raise significant employment concerns.

Effect on the spread of ownership

[19] The merger parties submitted that the seller, Mr Hughes is not an HDP. As such, the proposed transaction will result in Spar Encore being wholly owned by The Spar Group and as a result of The Spar Group having 36.54% shareholding by HDPs, the transaction will promote a greater spread of ownership and increase levels of ownership by HDPs.[15]

[20] The Commission found that The Spar Group is a level 7 B-BBEE Contributor and has 36.54% shareholding by HDPs, 17.56% of which is held by black women.[16] Furthermore, as Mr Hughes is not an HDP shareholder, the proposed transaction will result in Spar Encore being solely controlled by a level 7 B- BBEE Contributor which is 36.54% held by HDPs.

Effect on the ability of small and medium business, or firms controlled or owned by HDPs, to effectively enter into, participate in or expand within the market.

[21] On 2 November 2022, the Department of Trade Industry and Competition ("DTIC") made submissions to the Commission, noting that the exit of the seller (Mr Hughes) as a shareholder in Spar Encore will narrow the participation of independent operators in the logistics and supply chain sectors in South Africa, while also presenting an opportunity for The Spar Group to promote the entry of new independent Historically Disadvantaged Persons ("HDP") and small and medium businesses into the supply chain of Spar Encore. The DTIC called upon the Commission to engage the merger parties and recommend that the acquiring firm avail at least 25% of its shareholding in Spar Encore to a suitable HDP owned and/or small and medium sized business.[17]

[22] This notwithstanding, while the merger Conditions agreed to by the Commission and Merger parties made provision for the merged entity to localise goods currently procured from foreign manufacturers and in future procure those goods from South African manufacturers, the Conditions did not expressly provide for the procurement of such localised goods from HDPs and/or small and medium sized businesses.[18]

[23] Accordingly, on 22 December 2022, the Tribunal wrote to the parties, noting that while the agreed Conditions make provision for the localisation of goods, the Conditions do not expressly provide for the procurement of such localised goods from HDPs and/or small and medium businesses. It requested that the parties clarify whether this was an omission, alternatively explain why the procurement of localised goods from HDPs and/or small and medium businesses was not included in the agreed Conditions.[19]

[24] On 9 January 2023, the merger parties responded to the Tribunal, advising, inter alia, that there is no need to include a specific Condition of this nature as the entering, participation or expanding of HDPs and small and medium businesses will be achieved through the approval of the proposed transaction.

[25] On 13 January 2023, the Commission responded, advising that while it initially sought to impose a procurement Condition which would

facilitate the entry and participation of HDPs and/or small and medium suppliers, it was advised by the merger parties, during the negotiation stage of the Conditions that as a result of their supply requirements,[20] it would be risky to make a firm commitment to procure localised goods from HDPs and/or small and medium businesses. This notwithstanding, the merger parties indicated that they would endeavour to procure private label products from HDPs and small and medium businesses. In light of this, the Commission

accepted the merging parties' proposal for the Conditions to not expressly provide for the procurement of localised goods from HDPs and/or small and medium business.[21]

[26] The Tribunal considered that the DTIC's submissions were intended to promote the entry, participation and/or expansion of HDPs and/or small and medium businesses into the supply chain of Spar Encore. Accordingly, the Tribunal imposed a Condition that when localising the procurement of goods, the merged entity shall use its best endeavours to procure such localised goods from small and medium businesses or firms controlled or owned by Historically Disadvantaged Persons. The Tribunal further made provision, for the merger parties, as part of their monitoring and compliance obligations, to provide the Commission with details of its endeavours to procure localised goods from small and medium businesses or firms controlled or owned by Historically Disadvantaged Persons.[22]

Conclusion

[27] We conclude that the proposed transaction is unlikely to significantly lessen or prevent competition in any relevant market. Furthermore, the public interest concerns that have been raised in relation to the proposed transaction, have been addressed by the Conditions annexed hereto as Annexure A.

Presiding Member Professor Liberty Mncube

Concurring: Ms Mondo Mazwai and Professor Imraan Valodia

Date: 27 February 2023

Tribunal Case Managers: Matshidiso Tseki And Sinethemba Mbeki

For the Merging Parties: Howard Stephenson of Garlicke & Bousfield Inc

For the Competition:

Tumiso Loate And Themba Mahlangu

[1] The Spar Group acquired its existing 50% shareholding in Spar Encore (previously called Monteagle Africa Ltd) from Monteagle Consumer

Group Ltd.

[2] Shareholders holding more than 3% of the issued share capital in The Spar Group are Government Employees Pension Fund (19.40%), Coronation Fund Managers (7.67%) and Vanguard (3.83%).

[3] The SPAR Guild is a voluntary trading group controlled by a board of directors to which ten directors are appointed by SPAR SA and ten directors are appointed by the Independent Retailers through the National Council of the Guild. Stores owned by Spar Guild members include SPAR, SuperSPAR, KwikSPAR, Tops at SPAR, Pharmacy at SPAR, Build It and Savemore stores.

[4] Merger Record p 53 para [2.2].

[5] Merger Record p 54 para [2.1].

[6] i.e., Pick n Pay, Woolworths, Shoprite-Checkers.

[7] Merger Record, p65 para [6].

[8] Spar Group and Monteagle, Tribunal Case No: LM139Dec19.

[9] Monteagle has since changed its trading name to "Spar Encore".

[10] Merger Recommendation, p15 of 25, para [13].

[11] Merger Recommendation, p15 of 25, para [16].

- [12] Merger Recommendation p 12 of 21 para [26] read with Merger Record p 16 para [14].
- [13] The Commission engaged [...] and [...].
- [14] Merger Record p 291 para [7.7.1].
- [15] IBID para [7.7.4]
- [16] Merger Recommendation, p17 of 25, para [32].
- [17] Merger Record p 286 – 287.
- [18] Merger Recommendation p 18 of 21.
- [19] Tribunal email to the Merging Parties and Commission dated 22 December 2022.
- [20] The private label suppliers should be able to supply at a national level; required volumes; required quality.
- [21] Commission's email to the Tribunal dated Friday, 13 January 2023.
- [22] Paragraphs 2.3 and 3.2 to Annexure A.
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