

SOUTH AFRICA / JUDGMENT

Woolworths (Pty) Ltd v Absolute Pets (Pty) Ltd (LM125Nov23) [2024] ZACT 45 (30 April 2024) [2024] ZACT 45

COURT

Competition Tribunal

BEFORE

AW Wessels, I Valodia, A Kessery

CASE / FILE NUMBER

LM125Nov23

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COMPETITION TRIBUNAL OF
SOUTH AFRICA

Case No: LM125Nov23

In

the matter between:

Woolworths
(Pty) Ltd
Primary
Acquiring Firm
And
Absolute
Pets (Pty) Ltd
Primary
Target Firm

Panel:

AW Wessels (Presiding Member)
I
Valodia (Panel Member)
A
Kessery (Panel Member)
Heard

on:

27 March 2024
Order issued

on:

02 April 2024
Reasons issued

on: 30 April
2024

REASONS FOR DECISION

Introduction

- [1] On 2 April 2024, the Competition Tribunal (“Tribunal”) conditionally approved the large merger whereby Woolworths (Pty) Ltd (“Woolworths”) intends to acquire 93.45% of the issued share capital of Absolute Pets (Pty) Ltd (“Absolute Pets”) from SPE Mid-Market Fund I Partnership (“SPE Fund”), represented by SPE Mid-Market Fund I General Partner Proprietary Limited (“SPE Fund General Partner”) (“SPE”) and Absolute Pets’ management (collectively referred to as “the sellers”). Upon implementing the proposed transaction, Woolworths will solely control Absolute Pets.

Parties to the transaction and their activities

Primary acquiring firm

- [2] Woolworths is a private company which is wholly owned by Woolworths Holdings Limited (“WHL”). WHL is a public company listed on the Johannesburg Stock Exchange. No single shareholder controls WHL. Woolworths has interests in numerous entities in South Africa, including Woolworths Financial Services (Pty) Ltd (“Woolworths Financial Services”), Universal Product Networks (RF) (Pty) Ltd, Woolworths Developments (RF) (Pty) Ltd, Virtual Market Place (RF) (Pty) Ltd and NowNow Foods (RF) (Pty)

Ltd.

- [3] Woolworths sells clothing, food and general merchandise (including pet food and pet products) through a chain of retail stores (356 stores across South Africa) as well as online.
- [4] In the sale of pet products, Woolworths’ offering consists of dry and wet pet food, treats, accessories and toys, clothing and fashion, hygiene, and cleaning products, and grooming products for cats and dogs. Woolworths sells its own private label pet care brands in pet food, treats, accessories, and hygiene and cleaning products, namely Posh Pets, Fresh Pet and Country Road. It also sells other pet-related products from the third-party suppliers.
- [5] In August 2023, Woolworths introduced an insurance for cats and dogs, namely WPETInsure. WPETInsure is offered through Woolworths Financial Services, administered by OnePlan and underwritten by Absa Insurance Company Limited.

Primary target firm

- [6] Absolute Pets is a private company incorporated in terms of the laws of South Africa. It is controlled by SPE Fund (as to [...]%) represented by the SPE Fund General Partner which is 100% controlled by Sanlam Investment Management (Pty) Ltd (“Sanlam Investment Management”), which is 100% controlled by Sanlam Investment Holdings (Pty) Ltd.
- [7] Absolute Pets is a specialist pet products retailer with 157 stores across South Africa. It also offers a broad range of pet products online. Its pet product offering consists of dry and wet food, accessories and toys, hygiene and cleaning products, clothing and fashion products, and health and travel items for cats and dogs, as well as small pets such as birds, hamsters, rabbits and fish. It also offers pet-related services such as pet spa and grooming. Absolute Pets sells its own private label pet care brands in food, treats, accessories, and hygiene and cleaning products, including Absolute Pets, Lokuno, Olly and Max, Petwise Treats and Cute Companions. Absolute Pets also sells pet food and other pet-related products from third-party suppliers.
- [8] Absolute Pets also offers pet insurance which is underwritten by Dotsure Limited.

Transaction and rationale

Transaction

- [9] Woolworths will acquire 93.45% of the issued share capital of Absolute Pets from “the sellers”. Upon implementation of the proposed transaction Woolworths will solely control Absolute Pets.
- [10] Woolworths intends to acquire the remaining management-retained shareholding in Absolute Pets of 6.55% over an agreed period post completion of the proposed transaction.
- [1]

Rationale

- [11] The proposed transaction essentially provides Woolworths with an opportunity to expand its national presence in the pet care market, and to scale and strengthen its existing pet business.
- [12] The seller seeks to realise its investment in Absolute Pets to benefit its stakeholders.

Competition assessment

- [13] The proposed transaction gives rise to a horizontal overlaps in the markets for (i) pet food for cats and dogs (including wet and dry pet food), (ii) pet treats for cats and dogs, (iii) pet accessories and toys for cats and dogs, (iv) pet hygiene, cleaning and grooming products for cats and dogs, and (v) dog clothing and fashion (collectively referred to as “pet-related products”). The proposed transaction also gives rise to a horizontal overlap in the market for the provision of pet insurance.

- [14] Insofar as the market for the provision of pet insurance is concerned, we note that the merging parties will continue to face competition from OUTsurance, MediPet, First for Women, Hollard, PetMeUp, PawPaw, and others. Further, the merging parties are not underwriters but brokers in relation to pet insurance and accordingly, will also face competition from other brokers. On this basis, we agree with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the provision of pet insurance.
- [15] The Commission assessed the broad market for the sale of pet-related products and found that Woolworths and Absolute Pets do not sell the same or similar brands of pet-related products. Woolworths does not sell any of the brands of pet-related products which are sold by Absolute Pets. Further, the Commission found that Woolworths and Absolute Pets are not close competitors because of the differences in quality and nutritional value of their respective product offerings. While the types of brands of pet-related products sold by Woolworths are the same or similar to brands sold by other retail grocery stores, the brands of pet-related products sold by Absolute Pets are similar and comparable to other brands sold by specialist pet stores and veterinary clinics.
- [16] The Commission considered the horizontal overlap between the merging parties' activities in the broad market for the sale of pet-related products through the retail channel (retail grocery stores) and through the non-retail channel (specialist pet stores and veterinary clinics), in South Africa, as well as within a 5 km radius of each target store.
- [17] The Commission found that Woolworths has a small market share of less than 5% in the market for the sale of pet-related products through the retail channel in South Africa. The Commission also found that there are a number of other competing specialist pet stores, e-commerce platforms and veterinary clinics active in the market for the sale of pet-related products in South Africa. Further, grocery stores are expanding their networks into the pet-related products market by offering stand-alone specialist pet-stores. There are therefore numerous alternative non-retail channels in South Africa which will continue to place a competitive constraint on the merged entity post implementation of the proposed transaction.
- [18] On this basis, we agree with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the sale of pet-related products through the retail and non-retail channels in South Africa.
- [19] Regarding the sale of pet-related products through retail and non-retails channels within a 5km radius of each target store, the Commission found that there are 155 areas where there is a Woolworths store within a 5 km radius of an Absolute Pets store. Of the 155 areas, there are 9 areas with five or less competing stores (retail and non-retail channels). In 146 of the overlapping areas there are more than five other alternative competing stores (retail and non-retail channels) which will continue to place a competitive constraint on the merged entity post implementation of the proposed transaction.

[20] On this basis, we agree with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the sale of pet-related products through the retail and non-retail channels within a 5km radius of each target store.

Conclusion

on competition assessment

[21] We are of the view that the proposed transaction is unlikely to substantially lessen or prevent competition in any market in South Africa.

Public interest

Employment

[22] The merging parties submitted that the proposed transaction will not result in any adverse effect on employment and there will be no job losses or merger- specific retrenchments as a result of the proposed transaction.

[23] We are of the view that the proposed transaction is unlikely to raise employment concerns.

Spread of ownership

[24] Pre-transaction, Woolworths has a shareholding by historically disadvantaged persons (“HDPs”) of approximately [...] % and Absolute Pets has a shareholding by HDPs of approximately [...] %.

[25] Post-transaction, Absolute Pets will have a shareholding by HDPs of approximately [...] %. The proposed transaction results in a dilution of shareholding by HDPs of approximately [...] %. The merging parties further submitted that the dilution will be reduced to [...] % when Woolworths acquires the remaining management-retained shareholding in Absolute Pets.

[26] In order to remedy the dilution in shareholding by HDPs, the merging parties have committed to within three years from the implementation date of the merger: (i) establish [...] new Absolute Pets’ stores in South Africa; (ii) create [...] permanent employment

opportunities in South Africa to service the new Absolute Pets’ stores; and (iii) support the effective participation and expansion of small, medium and micro enterprises owned by HDPs that operate within Woolworths’ pet care products supplier base in an amount equal to R[...] in aggregate. The merging parties also committed to establishing an evergreen employee share ownership plan for the benefit of qualifying workers (workers employed at Absolute Pets) which shall acquire 5% of the issued share capital of the merged entity[2].

Conclusion

on public interest

[27] We are not aware of any other public interest concerns arising in this case. Based on the above, we are of the view that the proposed transaction does not raise any public interest concerns.

Third party views

[28] The Department of Trade, Industry and Competition (“dtic”) raised concerns[3] relating the dilution of HDP shareholding and the quantification and qualification of growth strategies related to the merging parties. These concerns were addressed by the merging parties commitments which are reflected in the conditions attached hereto as Annexure A.

[29] The dtic also expressed concerns regarding the horizontal overlap between the merging parties’ activities. Two other competitors also raised concerns relating to a change in market structure and the possibility of the prices of pet-related products increasing as a result of the merger. As already stated, the proposed transaction is unlikely to substantially lessen or prevent competition in any market in South Africa.

[30] Another competitor also expressed concern relating to the landlord agreements which are in place and the anticompetitive nature of certain non-compete clauses.

[31] We sought clarity from the merging parties on the number of retail leases of each of the merging parties that contain exclusivity provisions, or provisions that have the substantially the same effect. The merging parties confirmed that Woolworths does not have any lease agreements with exclusivity provisions (or clauses that have substantially the same effect) or clauses that may serve to restrict the product lines, store size and location of other stores selling grocery items within any particular shopping centre. Similarly, Absolute Pets does not have any exclusivity provisions (or clauses that have substantially the same effect) in its lease agreements.

Conclusion

[32] For the reasons set out above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and does not raise any significant competition or public interest concerns.

[33] We therefore approve the proposed transaction subject to the conditions attached hereto as Annexure A.

Signed by: Anisa Kessery

Signed at: 2024-04-30 14:10:52 +02:00

Reason: Witnessing Anisa Kessery

30 April 2024

Date

Adv. Anisa Kessery

Mr Andreas Wessels and Prof. Imraan Valodia concurring

Tribunal Case Manager Baneng Naape For the Merging Parties Robert Wilson & Dudu Mogapi on behalf of Webber Wentzel, and Tayla Theron & Richardt van Rensburg on behalf of Edward Nathan Sonnenbergs For the Commission Tarryn Sampson and Grashum Mutizwa

ANNEXURE A WOOLWORTHS PROPRIETARY LIMITED

AND

ABSOLUTE PETS PROPRIETARY LIMITED

CT CASE NUMBER: LM125Nov23

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below, and cognate expressions bear corresponding meanings –

- 1.1 "Acquiring Firm" means Woolworths Proprietary Limited;
- 1.2 "Approval Date" means the date referred to on the Tribunal's merger clearance certificate (Notice CT 10), being the date on which the Merger is approved in terms of the Competition Act;
- 1.3 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.4 "Competition Rules" means the Rules for the Conduct of Proceedings in the Commission;
- 1.5 "Competition Act" means the Competition Act, 89 of 1998, as amended;
- 1.6 "Conditions" means these conditions;
- 1.7 "Days" means any calendar day other than a Saturday, a Sunday or an official public holiday in South Africa;
- 1.8 "ESOP" means the employee share ownership plan referred to in clause 3;
- 1.9 "ESOP Establishment Period" means 18 months from the Implementation Date;
- 1.10 "HDP" means a historically disadvantaged person as defined in section 3(2) of the Competition Act;
- 1.12 "Merged Entity" means the Target Firm subject to the control of the Acquiring Firm following the Implementation Date;
- 1.13 "Merger" means the proposed acquisition by the Acquiring Firm of 93.45% of the issued shares in the Target Firm;

1.14 "Merging Parties" means the Acquiring Firm and the Target Firm;

1.15 "Qualifying Workers" means Workers employed at the Target Firm;

1.16 "SME" means small and medium sized entity;

1.17 "Target Firm" means Absolute Pets Proprietary Limited; and

1.18 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and

1.19 "Workers" means an employee as defined in the Labour Relations Act 66 of 1995 (as amended) and, in the context of ownership, refers to ownership by a broad base of Workers.

2. EXPANSION COMMITMENTS

Within 3 (three) years from the Implementation Date, the Acquiring Firm shall in aggregate:

2.1 Establish [...] new Target Firm stores in South Africa. The Acquiring Firm shall establish at least [...] Target Firm stores within the first year after the Implementation Date, at least [...] Target Firm stores within the second year after the Implementation Date, and at least [...] Target Firm stores within the third year after the Implementation Date; and

2.2 create at least [...] permanent employment opportunities in South Africa to service the new Target Firm stores to be established in accordance with clause 2.1 above. The [...] permanent employment opportunities within the Target Firm shall be calculated based on 3 (three) permanent

employment opportunities per new store. The Acquiring Firm shall therefore create at least [...] new permanent employment opportunities within the first year after the Implementation Date, at least [...] new permanent employment opportunities within the second year after the implementation Date, and at least [...] new permanent employment opportunities within the third year after the Implementation Date;

2.3

provided that should the Acquiring Firm establish or create fewer or more new Target Firm stores or permanent employment opportunities in South Africa in any one of the 3 (three) years referred to in clauses 2.1 and 2.2, the fewer or more new Target Firm stores or new employment opportunities shall be made up during or count towards the remaining

years referred to in clauses 2.1 and 2.2.

3. ESTABLISHMENT OF AN ESOP

The Merged Entity shall, during the ESOP Establishment Period, establish the ESOP for the benefit of Qualifying Workers, which by the end of the ESOP Establishment Period shall acquire 5% (five per cent) of the issued share capital of the Merged Entity in accordance with the design principles attached hereto as Annexure A.1.

4. THE PROMOTION AND DEVELOPMENT OF HDPS AND SMES IN THE MERGED ENTITY'S SUPPLY CHAIN

Over a period of 3 (three) years following the Implementation Date, the Acquiring Firm shall support the effective participation and expansion of HDP-owned SMEs that operate within the Acquiring Firm's pet care products supplier base in an amount equal to R [...] in aggregate. The R [...] will be made available as financial support to assist suppliers in becoming financially viable and to facilitate the promotion and development of HDP-owned SMMEs in Woolworths and Absolute Pets. Financial support may include loans, short-term funding and working capital support.

5. MONITORING OF COMPLIANCE WITH THE CONDITIONS

5.1 The Acquiring Firm shall inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.

5.2 Prior to the implementation of the ESOP, the Acquiring Firm must provide the Commission with the salient details pertaining to the ESOP. This information will include the rights of Qualifying Workers in respect of the ESOP and the total number of Qualifying Workers at the time of implementation of the ESOP.

5.3 Within 10 (ten) Days of the adoption and implementation of the ESOP, the Acquiring Firm shall provide the Commission with an affidavit attested to by a senior official of the Acquiring Firm, detailing the steps taken by the Acquiring Firm and Merged Entity and confirming their compliance with the Conditions.

5.4 For the duration of the Conditions, the Acquiring Firm shall, within 10 days of each anniversary of the Implementation Date, provide the Commission with an affidavit attested to by a senior official of the Acquiring Firm, confirming compliance with the Conditions.

5.5 The Commission may request such additional information from the Acquiring Firm and the Merged Entity, which the Commission may, from time to time, deem necessary for purposes of monitoring the extent of compliance with these Conditions.

6. APPARENT BREACH

Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

7. VARIATION OF CONDITIONS

The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted.

8. GENERAL

All correspondence concerning these Conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

Annexure A.1

ESOP DESIGN PRINCIPLES

Design Principle Applicable Criteria Structure · The ESOP will be a unitised employee share ownership trust that will be established to acquire shares in the Merged Entity. · The ESOP will distribute 40% of all dividends received on the allocated shares to the Workers in proportion to their holding of units on the dividend payment date. 60% of the dividends will be retained to repay any finance or loans incurred in the establishment of the ESOP. · For the avoidance of doubt, once the finance or loans have been extinguished 100% of the declared dividends will be distributed to the ESOP. Cost to Workers · The Workers will not be required to pay to participate in the ESOP. · The Merged Entity will make provision and cover the reasonable costs for independent legal and financial experts to act on behalf of the Workers in the ESOP establishment process (the "Provision"). For the avoidance of doubt, the Provision will be at no cost to the Workers and will not impact any dividend flows due to the Workers. · Any disputes between the Merged Entity and any independent legal and financial experts as regards the reasonableness of fees/costs will be resolved by arbitration or any other mutually agreed dispute resolution mechanism. Governance · The board of trustees of the ESOP will be balanced, and the Workers will be represented on the board, e.g., 1 (one) trustee appointed by Merged Entity; 1 (one) appointed by the Workers, and 1 (one) an independent trustee. · The board of trustees of the ESOP will meet the requirements of the B-BBEE Act 53 of 2003. Duration · The ESOP will be perpetual/evergreen. Participants · All current and future Workers of the Target Firm and, following the Implementation Date, the Merged Entity, who participate in the ESOP and who have been employed by the Target Firm or the Merged Entity, as the case may be, for a period of at least 12 (months) after the Implementation Date. · Maternity leave will have no adverse impact on the qualifying criteria.

Participation Benefits · Workers will be entitled to dividends based on their participation rights in the ESOP calculated with reference to units allocated to them. · Workers will cease to participate in the ESOP for "bad leaver" events such as resignations and dismissals. · Death, retirement at the normal age, and retrenchment will not affect Workers' participation in the ESOP. · The value of the ESOP will be determined with reference to the shares it acquires in the Merged Entity and the valuation of the shares at the Implementation Date. · The Merged Entity will provide vendor finance for the ESOP to acquire the shares in the Merged Entity, which vendor finance will be settled over a fixed period. · The vendor financing will be interest-free. · The dividend policy will provide for a "trickle" dividend in the ratio of 40:60, i.e. at least 40% of any dividends declared will flow to the Workers who participate in the ESOP, and at least 60% will be used to service the vendor financing.

[1] The sale shares are to be acquired from the respective sellers in the following proportions [...]

- [2] The merged entity is Absolute Pets subject to Woolworths' control following the implementation date.
- [3] The dtic filed a Form CC5(2), Minister's Notice of Intention to Participate, on behalf of the Minister of Trade, Industry and Competition, on 13 November 2023.
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