

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM087Aug20

In the matter between:

Foschini Retail Group Proprietary Limited

Primary Acquiring Firm

And

The assets and business conducted by Edcon Limited as a going concern under the "Jet" division out of certain Edcon's physical retail stores in South Africa

Primary Target Firm

Panel: M Mazwai (Presiding Member)
E Daniels (Tribunal Panel Member)
Y Carrim (Tribunal Panel Member)

Heard on: 23 September 2020
Decided on: 23 September 2020

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that—

1. the large merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).


Ms Mondo Mazwai
Presiding Member

23 September 2020
Date

Concurring: Ms Yasmin Carrim and Mr Enver Daniels

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CONDITIONS

1. DEFINITIONS

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

- 1.1. **"Acquiring Firm"** means Foschini;
- 1.2. **"Act"** means the Competition Act, No. 89 of 1998 (as amended);
- 1.3. **"Affected Persons"** means, collectively, Edgars Consolidated Stores Limited, Edcon creditors, Edcon employees represented by the Employment Committee and SACCAWU, as contemplated in section 128(1)(a) of the Companies Act;
- 1.4. **"Approval Date"** means the date referred to on the Tribunal's Merger Clearance Certificate (Form CT10);
- 1.5. **"Business Rescue Plan"** means the Business Rescue Plan in relation to Edcon dated 8 June 2020, prepared in terms of section 150 of the Companies Act, and approved by the Affected Persons;
- 1.6. **"Commission"** means the Competition Commission of South Africa;

- 1.7. **“Companies Act”** means the Companies Act, No. 71 of 2008 (as amended);
- 1.8. **“Conditions”** means these conditions;
- 1.9. **“Days”** means any calendar day which is not a Saturday, Sunday or official public holiday in South Africa;
- 1.10. **“Durban DC”** means Edcon’s distribution centre located at 57A Joyner Road, Prospecton, Isipingo, Durban;
- 1.11. **“Edcon”** means Edcon Limited;
- 1.12. **“Eligible Edcon Employees”** means the employees of Edcon employed in relation to its Jet division who, as a result of the implementation of the Business Rescue Plan, were issued with a termination notice in terms of section 189 of the Labour Relations Act ;
- 1.13. **“Foschini”** means Foschini Retail Group Proprietary Limited;
- 1.14. **“Head Office”** means the Edcon head office located at Edgardale, 1 Press Avenue Crown Mines, Johannesburg, 2092;
- 1.15. **“Implementation Date”** means the date, occurring after the Approval Date, on which the last condition precedent to the Sale Agreement is fulfilled or waived, as the case may be;
- 1.16. **“Jet Business”** means parts of the business conducted by Edcon in South Africa through its Jet division, as a going concern, consisting of certain assets and liabilities, that will be transferred to Foschini pursuant to the Merger;
- 1.17. **“Labour Relations Act”** means the Labour Relations Act, No. 66 of 1995 (as amended);
- 1.18. **“Merged Entity”** means the combined Foschini and Jet businesses that will be operated by Foschini pursuant to the successful implementation of the Merger;

- 1.19. **“Merger”** means the acquisition by Foschini of the Jet Business.
- 1.20. **“Merging Parties”** mean Foschini and the Jet Business;
- 1.21. **“Target Firm”** means the Jet Business;
- 1.22. **“Transferring Employees”** means the minimum of 4 664 employees of Edcon in relation to the Transferring Stores, Head Office (who are directly connected to the Jet Business), and the Durban DC, at the Implementation Date, who will be transferred to Foschini in terms of section 197 of the Labour Relations Act pursuant to the Merger;
- 1.23. **“Transferring Stores”** means, collectively, the 333 (three hundred and thirty three) stores listed in Annexure A to the Sale Agreement, which are leased by Edcon for purposes of conducting the business of its Jet division in South Africa, and the 48 (forty eight) additional stores selected by Foschini in accordance with the Sale Agreement, that will be transferred to Foschini pursuant to the Merger;
- 1.24. **“Tribunal”** means the Competition Tribunal of South Africa;
- 1.25. **“SACCAWU”** means the South African Commercial Catering and Allied Workers Union;
- 1.26. **“SACTWU”** means the Southern African Clothing and Textile Workers’ Union;
and
- 1.27. **“Sale Agreement”** means the Sale of Assets Agreement between Edcon and Foschini.

CONDITIONS FOR APPROVAL

2. EMPLOYMENT

- 2.1. The Merging Parties shall ensure that the Transferring Employees are transferred to Foschini, in accordance with the provisions of section 197 of the Labour Relations Act, after the Implementation Date.
- 2.2. The Merging Parties shall use their best endeavours to increase the number of Transferring Employees prior to the Implementation Date.
- 2.3. The Acquiring Firm shall give preference to Eligible Edcon Employees should vacancies arise in the Jet Business for a period of 3 (three) years from Implementation Date. In the event that the Acquiring Firm, acting reasonably, satisfies itself that an applicant for a position is an Eligible Edcon Employee and subject to all other employment criteria being equal, the Merged Entity shall give preference to the Eligible Edcon Employee in the appointment process.
- 2.4. The Acquiring Firm shall not retrench any employees for a period of 2 (two) years from the Implementation Date, as a result of the Merger. Retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

3. TRANSFERRING STORES

- 3.1. The Merging Parties shall ensure that the Transferring Stores –

- 3.1.1. remain open and operational between the Approval Date and Implementation Date;
- 3.1.2. are fully integrated into the Acquiring Firm's structures after the Implementation Date; and
- 3.1.3. are operated in accordance with the Acquiring Firm's business plans after the Implementation Date,

subject to external circumstances (such as prevailing macro- and micro-economic conditions, the effects of the COVID-19 pandemic, landlords honouring the terms of the new lease agreements, and electricity supply disruptions) and internal circumstances (such as Acquiring Firm's trading performance).

- 3.2. The Merging Parties shall use their best endeavours to increase the number of Transferring Stores prior to the Implementation Date.

4. LOCAL PROCUREMENT

- 4.1. The Merged Entity shall ensure that the Target Firm maintains at least the same ratio of procurement of apparel products from South African manufacturers and suppliers as it did at the end of its preceding financial year, provided that if such local procurement ratio cannot be achieved in relation to the integrated Target Firm, the shortfall will be made up in the procurement of apparel products from South African manufacturers and suppliers by the Acquiring Firm.
- 4.2. The Merged Entity shall use its best endeavours to increase the Target Firm's ratio of procurement of apparel products from South African manufacturers and suppliers as at the end of its preceding financial year.

5. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 5.1. The Merging Parties shall circulate a copy of the Conditions to all employees and/or their respective representatives within 5 (five) Days of the Approval Date.
- 5.2. As proof of compliance thereof, the Merging Parties shall within 5 (five) Days of circulating the Conditions, provide the Commission with an affidavit by a senior official of the Merging Parties attesting to the circulation of the Conditions and attach a copy of the notice sent.
- 5.3. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.
- 5.4. The Merging Parties shall inform the Commission of the final number of Transferring Employees within 5 (five) Days of the Implementation Date.
- 5.5. The Merging Parties shall inform the Commission of the final number of Transferring Stores within 5 (five) Days of the Implementation Date.
- 5.6. The Merging Parties shall, within 10 (ten) Days of the Implementation Date, inform the Commission of the proportion of the Target Firm's procurement that was sourced from South African manufacturers and suppliers in the preceding financial year.
- 5.7. The Merged Entity shall, for a period of 3 (three) years from the Implementation Date, submit a report on each anniversary of the Implementation Date, detailing its compliance with clauses 2 and 4 of the Conditions.

5.8. Any person who believes that the Merging Parties have failed to comply with clauses 2, 3, or 4 of the Conditions may approach the Commission with his/her complaint.

6. APPARENT BREACH

6.1. An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

7. VARIATION OF THE CONDITION

7.1. The Commission or The Merging Entity shall be entitled, upon good cause shown, to apply to the Tribunal for the waiver, relaxation, modification and/or substitution of one or more of the Conditions.

8. GENERAL

8.1. All correspondence in relation to these Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.