



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: FTN131Sep15

In the matter between:

| | |
|---|----------------------------------|
| The Competition Commission of South Africa | Applicant |
| And | |
| Fruit & Veg City Holdings Proprietary Limited | 1st Respondent |
| Fruit & Veg City SA Proprietary Limited | 2nd Respondent |
| Everfresh Wholesale Proprietary Limited | 3rd Respondent |

And in the matter between

| | |
|--|----------------------------------|
| The Competition Commission of South Africa | Applicant |
| And | |
| Fruit & Veg City Proprietary Limited | 1st Respondent |
| Sandro Gastaldi | 2nd Respondent |
| Luciano Gastaldi | 3rd Respondent |

Panel : N Manoim (Presiding Member)
I Valodia (Tribunal Member)
M Mokuena (Tribunal Member)

Heard on : 07 October 2015

Decided on : 07 October 2015

ORDER

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents annexed hereto marked "A".



Presiding Member
Mr N Manoim

07 October 2015
Date

Concurring: Prof. I Valodia and Ms M Mokuena

ANNEXURE "A"

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)**

CC CASE NO: 2011 Jun0084

CT CASE NO: CR059JUN15

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

FRUIT & VEG HOLDINGS (PROPRIETARY) LIMITED

First Respondent

FRUIT & VEG CITY SA (PROPRIETARY) LIMITED

Second Respondent

EVERFRESH WHOLESALE (PROPRIETARY) LIMITED

Third Respondent

CT Case No: CR060JUN15

CC Case No: 2012Aug0468

And in the matter between:

THE COMPETITION COMMISSION

Applicant

And

FRUIT & VEG CITY (PROPRIETARY) LIMITED

First Respondent

SANDRO GASTALDI

Second Respondent

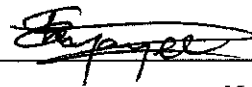
LUCIANO GASTALDI

Third Respondent

FILING SHEET

TAKE NOTICE THAT the Competition Commission hereby files a Settlement Agreement entered into between the Commission and the abovementioned Respondents.

Signed at PRETORIA on this the 09th day of September 2015.



Korkoi Ayayee

Junior Legal Counsel

Competition Commission

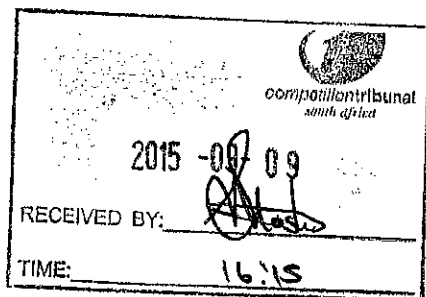
The dti Campus, Building C, Mulayo

77 Meintjies Street, Pretoria

Tel: (012) 394 3335

E-mail: korkoia@compcom.co.za

Ref: 2011Jun0084



TO: THE REGISTRAR OF THE COMPETITION TRIBUNAL

Block C DTI Campus

Competition Tribunal

Pretoria

Ref: Lerato Motaung

E-mail: leratom@comtrib.co.za

AND TO: ENS

Attorneys for the Respondents

150 West Street

Sandton

Johannesburg

2196

Email: hsenekal@ensafrika.com

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT Case No: CR059JUN15

CC Case No: 2011Jun0084

In the matter between

THE COMPETITION COMMISSION

Applicant

and

FRUIT & VEG CITY HOLDINGS (PROPRIETARY) LIMITED

First Respondent

FRUIT & VEG CITY SA (PROPRIETARY) LIMITED

Second Respondent

EVERFRESH WHOLESALE (PROPRIETARY) LIMITED

Third Respondent

CT Case No: CR060JUN15

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And in the matter between

THE COMPETITION COMMISSION

Applicant

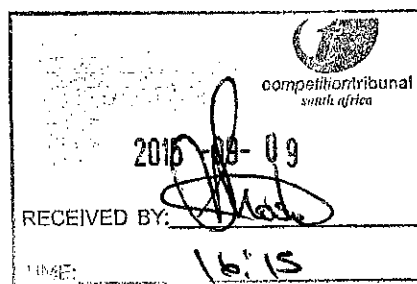
and

FRUIT & VEG CITY (PROPRIETARY) LIMITED

First Respondent

SANDRO GASTALDI

Second Respondent



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SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND FRUIT & VEG CITY HOLDINGS (PROPRIETARY) LIMITED, FRUIT & VEG CITY SA (PROPRIETARY) LIMITED, EVERFRESH WHOLESALE (PROPRIETARY) LIMITED, FRUIT & VEG CITY (PROPRIETARY) LIMITED, SANDRO GASTALDI AND LUCIANO GASTALDI IN RESPECT OF A CONTRAVENTION OF SECTION 13A(3) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED.

Preamble

The Competition Commission ("Commission") and Fruit & Veg City Holdings (Proprietary) Limited, Fruit & Veg City SA (Proprietary) Limited, Everfresh Wholesale (Proprietary) Limited, Fruit & Veg City (Proprietary) Limited, Sandro Gastaldi and Luciano Gastaldi (collectively referred to below as the "Respondents") hereby agree that an application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D read with sections 58(1)(b) and 59(1)(d)(iv) of the Competition Act No. 89 of 1998, as amended ("the Act"), on the terms set out below.

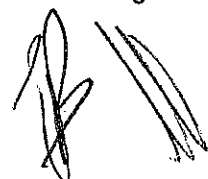
1. Definitions

For the purposes of this Settlement Agreement the following definitions shall apply:

- 1.1. **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;



- 1.3. **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.4. **"Everfresh"** means Everfresh Wholesale (Proprietary) Limited, a private company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 10 Quality Street, Moberi, Durban;
- 1.5. **"Everfresh distribution centre"** means the distribution centre of Everfresh situated at 10 Quality Street, Moberi Durban;
- 1.6. **"Everfresh merger transaction"** means the intermediate merger transaction filed with the Commission on 9 June 2011 under Commission case number 2011Jun0084;
- 1.7. **"Everfresh Stores"** means 10 retail stores namely: Everfresh Market Ballito CC; Everfresh Market Berea CC; Everfresh Cowey Road CC; Everfresh Market Hillcrest CC; Bridoon Trade and Investments 141 CC; Everfresh Market Virginia; Riverbend Trade and Investment 11 CC; Fullsail 89 CC; Verdana General Trading CC and Fast Pace Trade and Investment 13 (Pty) Ltd;
- 1.8. **"F&V City"** means Fruit and Veg City (Proprietary) Limited, a private company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 2nd Floor, Thor Gardens, Corner Odin and Viking Roads, Thornton, 7460, Cape Town. F & V City is a wholly owned subsidiary of Fruit & Veg Holdings (Proprietary) Limited;
- 1.9. **"F&V City SA"** means F & V City SA (Proprietary) Limited, a private company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 2nd Floor, Thor Gardens, Corner Odin and Viking Roads, Thornton, 7460, Cape Town. F & V City SA is a wholly owned subsidiary of Fruit & Veg Holdings (Proprietary) Limited;

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, located at the bottom right of the page.

- 1.10. **"F&V Holdings"** means Fruit and Veg City Holdings (Proprietary) Limited, a private company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 2nd Floor, Thor Gardens, Corner Odin and Viking Roads, Thornton, 7460, Cape Town;
- 1.11. **"Gastaldi brothers"** means Luciano Gastaldi and Sandro Gastaldi;
- 1.12. **"Gastaldi merger transaction"** means the intermediate merger transaction filed with the Commission on 6 August 2012 under Commission case number 2012Aug0468;
- 1.13. **"Parties"** means the Commission the Respondents, namely F&V Holdings, F&V City SA , Everfresh, F&V City and the Gastaldi Brothers;
- 1.14. **"Respondents"** means F&V Holdings, F&V City SA , Everfresh, F&V City and the Gastaldi Brothers;
- 1.15. **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and the Respondents; and
- 1.16. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Commission's investigations and findings

- 2.1. On 30 June 2015, the Commission filed two (2) referrals for prior implementation with the Tribunal with case numbers CR059Jun15 and CR060Jun15 respectively. The first referral concerned a contravention of section 13A(3) of the Act by F&V Holdings, F&V City SA and Everfresh. ("the Everfresh merger transaction"). The second referral concerned a contravention of section 13A(3) of the Act by F&V City and the Gastaldi Brothers ("the Gastaldi merger transaction").

Handwritten signature and scribble.

The Everfresh merger transaction

2.2. During September 2010, F&V Holdings and Everfresh entered into a series of inter-related agreements which resulted in F&V Holdings becoming the franchisor of all the Everfresh Stores and the Everfresh distribution centre. Everfresh in turn acquired a 50% shareholding in F&V City SA in terms of section 12(1) of the Act.

2.3. The aforementioned inter-related agreements were as follows:

2.3.1. Franchise agreements between F&V Holdings and entities owning ten retail stores that were previously operated under the Everfresh name ("the Everfresh stores") dated 29 July 2010 in terms which F&V Holdings became the franchisor to all the Everfresh Stores. However unlike in ordinary franchise agreements, the Everfresh Stores contributed significant assets to the franchise agreements and the business of F&V Holdings. Moreover, as part of the franchise agreements, the Everfresh Stores were required to rebrand to F&V City and operate under the Food Lovers' Market brand;

2.3.2. An agreement dated 29 July 2010 in terms of which Everfresh sold its distribution centre in Durban to F&V City SA as a going concern and as part of the consideration in this agreement, Everfresh acquired a 50% shareholding in F&V City SA.

2.3.3. A shareholder's agreement dated 29 July 2010 between Everfresh and F&V Holdings to govern their equal partnership in F&V City SA.

2.4. The net effect of the conclusion of the above inter-related agreement is that they constituted one single indivisible merger transaction in terms of which:

2.4.1. Everfresh acquired joint control of F&V City SA; and

2.4.2. F&V Holdings acquired control of the Everfresh Stores and Everfresh distribution centre.



- 2.5. The Everfresh merger transaction met the threshold for a notifiable intermediate merger.
- 2.6. The Everfresh merger transaction was entered into and implemented during September 2010 and was not notified to the Commission as required in terms of the Act. The merger transaction was subsequently notified as an intermediate merger by the merging parties only in June 2011 and was approved by the Commission with conditions on 2 September 2011.
- 2.7. Consequently, F&V Holdings, F&V City SA and Everfresh implemented the Everfresh merger transaction without the approval of the Commission in contravention of section 13A(3) of the Act.

The Gastaldi merger transaction

- 2.8. During March 2010, F&V City and the Gastaldi brothers through a series of inter-related agreements formed two (2) joint ventures which housed their retail, distribution and wholesale businesses of grocery products respectively, thus acquiring joint control of each other's business in terms of section 12(1) of the Act.
- 2.9. In terms of the Gastaldi merger transaction, F&V City and the Gastaldi brothers formed two joint ventures, namely, Fruit & Veg City (Western Cape) (Proprietary Limited) (trading as "Retail Newco") and Zelpy 2916 (Pty) Ltd (trading as "DC Newco"). DC Newco was used to house the wholesaling activities of F&V City¹ and the wholesaling activities of the Gastaldi brothers². Retail Newco housed the retail activities of F&V City³ and the retail activities of the Gastaldi brothers⁴.

¹ The warehouse and distribution businesses of F&V City consisted of the warehouse and distribution centre in Johannesburg.

² The warehouse and distribution businesses of the Gastaldi brothers consisted of the warehouse and distribution centre in Pretoria.

³ The retail business of F&V City consisted of; Fruit & Veg City Lenasia, Fruit & Veg City Bruma, Fruit & Veg City Viera and Fruit & Veg City Hillfox.

⁴ The retail business of the Gastaldi brothers consisted of; Fruit & Veg City Pretoria, Fruit & Veg City Elarduspark, Fruit & Veg City Gateway, Fruit & Veg City Montana, Fruit & Veg City Rustenburg, Fruit & Veg City Pretoria North,



2.10. The inter-related agreements between F&V City and the Gastaldi Brothers were as follows:

2.10.1. An agreement dated 28 March 2012 in terms of which F&V City sold its four retail stores to Retail Newco;

2.10.2. An agreement dated 28 March 2012 in terms of which the Gastaldi brothers sold their retail stores to Retail Newco;

2.10.3. An agreement dated 1 August 2012 in terms of which F&V City sold its warehouse and distribution centre located in Johannesburg to DC Newco; and

2.10.4. An agreement dated 1 August 2012 in terms of which the Gastaldi brothers sold their warehouse and distribution centre located in Pretoria to DC Newco.

2.11. The net effect of the conclusion of the above inter-related agreement is that they constituted one single indivisible merger transaction in terms of which F&V City and the Gastaldi brothers acquired joint control of the retail, warehousing and distribution of each other's respective businesses in Gauteng Province through their equal shareholding in Retail Newco and DC Newco.

2.12. The Gastaldi merger transaction met the threshold for a notifiable intermediate merger.

2.13. The Gastaldi merger transaction was entered into and implemented during March 2010 and was not notified to the Commission as required in terms of the Act. The merger transaction was subsequently notified as an intermediate merger by the merging parties only on 6 August 2012 and was approved by the Commission without conditions on 25 September 2012.



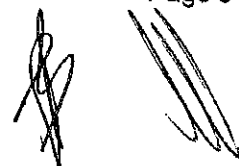
2.14. Consequently, the F&V City and the Gastaldi brothers implemented the Gastaldi merger transaction without the approval of the Commission in contravention of section 13A(3) of the Act.

3. Admissions

- 3.1. In respect of the Everfresh merger transaction, F&V Holdings, F&V City SA and Everfresh admit that the Everfresh merger transaction constituted a notifiable intermediate merger as defined in section 11(5)(b) of the Act and was implemented without the prior approval of the Commission in contravention of section 13 A(3) of the Act.
- 3.2. In respect of the Gastaldi merger transaction, F & V City and the Gastaldi Brothers admit that the Gastaldi merger transaction constituted a notifiable intermediate merger as defined in section 11(5)(b) of the Act and was implemented without the prior approval of the Commission in contravention of section 13 A(3) of the Act.

4. Agreement concerning the Respondent's future conduct

- 4.1. The Respondents agree and undertake to notify the Commission of any future transactions that constitute a notifiable merger as defined in section 12(1) of the Act read together with section 11(5) of the Act. The Respondents furthermore agree and undertake to refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act.
- 4.2. The Respondents also agree and undertake to develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act.



4.3. The Respondents furthermore agree and undertake to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of this Settlement Agreement as an order by the Tribunal.

5. Administrative Penalty

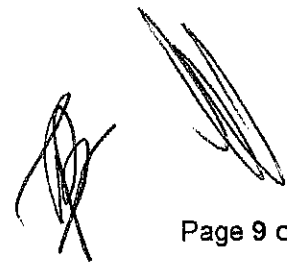
5.1. Having regard to the provisions of sections 59(1)(d), 59(2) and 59(3) of the Act, the Respondents agree and undertake to pay an administrative penalty for the contravention of section 13A(3) of the Act.

5.2. The Respondents agree that they are jointly and severally liable to pay an administrative penalty of R750 000.00 (seven hundred and fifty thousand Rand, only), one paying in full, the others to be absolved.

5.3. The administrative penalty imposed on the Respondents is less than 10% of the total turnover of the Respondents for the relevant years as stipulated in section 59(2) of the Act.

5.4. The Respondents will pay the amount set out in paragraph 5.2 above to the Commission in 12 (twelve) equal monthly instalments in the sum of R62 500.00 (sixty two thousand five hundred rand). The first instalment must be paid within 5 business days from the date of the confirmation of this Settlement Agreement as an order of the Tribunal and subsequent instalments must be paid on the first day of each calendar month until the total amount of the penalty is paid in full.

5.5. The penalty must be paid into the Commission's bank account which is as follows:



Name: The Competition Commission Fee Account
Bank: Absa Bank, Pretoria
Account Number: 4050778576
Branch Code: 323 345
Reference: F&V / 2011Jun0084 / 2012Aug0468

5.6. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

6. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and the Respondents relating to the contraventions of section 13A(3) of the Act by the Respondents that were the subject of the Commission's investigation referred to the Tribunal under CT Case Nos: CR059JUN15 and CR060JUN15.

Dated and signed at CAPE TOWN on the 3RD day of SEPTEMBER 2015

For the Respondents

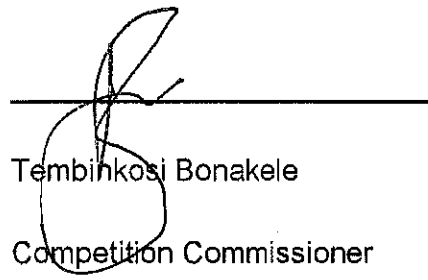


Nigel Meintjes (duly authorised)

Legal Director

Dated and signed at PRETORIA on the 9th day of SEPT 2015

For the Competition Commission



Tembinkosi Bonakele
Competition Commissioner