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SOUTH AFRICA

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 of Edcon's physical retail stores in South Africa	Primary Target Firm

Panel:	Ms M Mazwai (Presiding Member) Ms Y Carrim (Tribunal Member) Mr E Daniels (Tribunal Member)
Last submission received on:	23 September 2020
Order Issued on:	23 September 2020
Reasons Issued on:	22 October 2020

REASONS FOR DECISION

Approval

[1] On 23 September 2020, the Tribunal approved, with Conditions, the proposed transaction in which the Foschini Retail Group (Pty) Limited is to acquire, as a going concern, the assets and business conducted by Edcon Limited (Edcon) as "Jet" ("the Jet Division"), a division of Edcon.

[2] The reasons for the conditional approval of the proposed transaction follow.

Parties to the transaction

Primary acquiring firm

[3] The primary acquiring firm is Foschini Retail Group (Pty) Ltd ("Foschini Retail"), which controls Umdlalo Fashion (Pty) Ltd. Foschini Retail is controlled by The Foschini Group Ltd ("the Foschini Group").[1] The Foschini Group is not controlled by any firm/s. The Foshini Group controls in excess of 26 firms in South Africa, including Totalsports (Pty) Ltd, Sportscene (Pty) Ltd and American Swiss Watch Co (Pty) Ltd.

[4] The Foschini Group and all its subsidiaries will collectively be referred to as "The Foschini Group".

[5] The Foschini Group is an independent chain-store group in South Africa. It has a portfolio of 29 diverse fashion retail brands and sells clothing, jewellery, cell phones, accessories, cosmetics, luggage, sporting apparel and equipment, homeware and furniture to the public. The Foschini Group also sells insurance products. The Foschini Group has 2,338 retail outlets in South Africa, a distribution centre in Gauteng and six distribution centres in the Western Cape. Its merchandise is procured both locally and internationally. In South Africa, the Foschini Group operates 21 different retail chain-stores which target customers from the value to the upper segments of the market.

Primary target firm

[6] The primary target firm is the Jet division. The Jet Division is owned and controlled by Edcon.[2] The Jet Division does not control any firm/s.

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[1] A public company listed on the JSE.
[2] Edcon is a clothing, footwear and textile retail group.

[7] The Jet Division is Edcon's discount retail department store which sells clothing, footwear, homeware, some cosmetics and also cellular and insurance products. There are approximately 467 Jet stores across South Africa. These stores target lower-to-middle income consumers in the LSM 4-7 categories (value to mid-market). The Jet Division sells apparel for women, men and children, accessories, cosmetics, homeware, and also cellular and insurance products.[3] According to the merging parties, the Jet Division derives most of its revenue from apparel.

Proposed transaction and rationale

Transaction

[8] The Edcon Group's financial difficulties have been public knowledge for a while. To improve liquidity and reduce debt, the group has engaged in a number of transactions since 2016, the most recent one being the sale of its debtor's book.[4]

[9] According to Edcon, the Covid-19 lockdown, which commenced in March 2020, affected its already precarious financial position to such an extent that the directors resolved to place Edcon in business rescue, in an effort to save jobs and any viable divisions of the business.

[10] The voluntary business rescue process,[5] was initiated on 28 April 2020. The joint business rescue practitioners ("BRPs") appointed by the Edcon Board are Piers Marsden and Lance Schapiro. The business rescue plan entails an accelerated sales process and a wind down process. The accelerated sales process entails selling Edcon's divisions as going concerns. The BRP's will realise those assets which remain unsold after the completion of the accelerated sales process by way of a trade out process, private treaty, auction

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[3] Short-term and long-term insurance are offered to Jet account cardholders.
[4] See, as examples, *IDC And Celrose* case number: LM271Mar19; *New Holdco and Edgars Consolidated Stores Ltd* case no: LM270Mar19; and *RSC Cards (Pty) Ltd And Edcon Ltd in respect only of certain cardholders book debt of Edcon Ltd* case no LM129Nov19.
[5] In terms of section 129(1) of the Companies Act, No. 71 of 2008 (as amended).

or any other manner which they, in their sole discretion, will deem appropriate, taking into account the circumstances which will prevail at that time (i.e. the wind down process). The wind down process will culminate in all the positions at Edcon being declared redundant and all the remaining employees being retrenched.

[11] This transaction emanates from the accelerated sales process. In terms of the proposed transaction, the Foschini Group through Foschini Retail will acquire the Jet Division as a going concern comprising certain identified assets and liabilities.

Rationale

[12] According to the Foschini Group, the acquisition will assist it to strategically expand into the value segment of the Southern African retail apparel market and to respond to the retail trend of customers "shopping down" to value products. This trend has become even more pronounced during the current, post-COVID environment.

[13] For Edcon, it is pursuing the proposed transaction in terms of its business rescue plan which was formulated and implemented by the BRPs.

Impact on competition

[14] The Competition Commission ("Commission") found that there were horizontal overlaps in the sale of apparel, cell phones, homeware, cosmetics and insurance products. The Commission, therefore, considered the proposed transaction's effect on the following markets:

a. the national retail market for apparel as a whole; and

b. segmented narrow markets for
   i. clothing,
   ii. footwear, and

iii. apparel accessories;

c. the national retail market for cell phone products;

d. the retail market for homeware;

e. the national retail market for cosmetics;

f. The national retail market for insurance products.

Markets for retail of apparel, clothing, footwear and apparel accessories

[15] *"[D]efining the relevant product market for antitrust purposes is not an easy exercise, particularly in markets where there is a high degree of product differentiation and the existence of non-price competition, such as in retail markets*".[6] It is for this reason that the Commission examined the broad market for the retail of apparel as a whole, then the three narrow markets for clothing, footwear and apparel accessories, respectively, on a national level. It then did the same analysis in each market for the value to mid-market segment (LSM 1-7).

[16] The Commission first assessed the broad national market for the retail of apparel and found that the merged entity will have an estimated market share of <25%, after an accretion of <10% (representing the Jet Division's market share). The Commission, in its assessment of the narrow markets for the retail of clothing, footwear, and accessories, found that in the narrow market for the retail of clothing, the merged entity would have an estimated market share of <25%, after an accretion of <10%. In the narrow market for the retail of footwear, the Commission found that the merged entity would have an estimated market share of <40%, after an accretion of <10%. The Commission also found that in the narrow market for the retail of accessories, the merged

[6] Recommendation pages 45 paras 56 citing Tribunal merger decision in *Massmart Holdings Limited and Moresport* (62/LM/Jul05).

entity would have an estimated market share of <30%, after an accretion of <5%.

[17] The Commission highlighted that several small retail chains and independent retailers will continue to constrain the merged entity post-merger, in relation to the retail of apparel in South Africa. These include Cotton On, Rex Trueform, the House of Busby (Aldo, Call It Spring, Guess and Steve Madden), Blue Falcon 188 Trading (Studio 88, Skipper Bar and Side Step), AVI (Spitz, Carvela, Kurt Geiger, Gant, Green Cross, inter alia), Zara and Cape Union Mart (Old Khaki, Poetry, Tread+Miller and Keedo) and others.

[18] When assessing the broad national market for the retail of apparel within the LSM 1-7 segment (value to mid-market), the Commission found that the merged entity would have an estimated market share of <30%, after an accretion of <15% (representing the Jet Division's market share). The Commission then assessed the narrow markets for the retail of clothing, footwear and accessories within the LSM 1-7. The Commission found that in the narrow market for the retail of clothing, the merged entity would have an estimated market share of <30%, after an accretion of <20%. The Commission also found that in narrow market for the retail of footwear, the merged entity would have an estimated market share of <20%, after an accretion of <15%. The merged entity would also have an estimated market share of <15%, after an accretion of <5%, in the narrow market for retail of accessories.

[19] The Commission notes that the Jet Division competes mainly with Pepkor (Pep, Ackermans). As such, although the Foschini Group is also active in LSM 1-7, it is unlikely that the Foschini Group is a close competitor of the Jet Division, as the Jet Division targets lower-to-middle income consumers in the LSM 4-7 categories. The Jet Division will remain Pepkor's largest competitor, which may benefit consumers.

Retail of cell phone products

[20] In its assessment of the market for the national retail of cell phone products, the Commission found that the merged entity will have an estimated market share of <35%, after an accretion of <10% (representing the Jet Division's market share). The Commission notes that cellular products are primarily sold in collaboration with MTN, Vodacom and Cell-C, the cellular providers in South Africa. Cellular retail profit is derived from both the margin on physical products, as well as an ongoing rebate earned through the activation and operation of SIM cards, sourced through stores. The Commission notes that competitors of the merging parties such as Mr Price, Massmart, and Woolworths are other retailers which also sell cell phone products.

[21] The Commission also notes that mobile operators have their own retail stores which compete with the merging parties. Post-merger, the merging parties will continue to sell cell phone products in the same manner they did pre-merger.

Retail of homeware

[22] When assessing the market for the national retail of homeware, the Commission found that the merged entity would have an estimated market share of <20%, after an accretion of <5% (representing the Jet Division's market share). The Commission notes that the merging parties sell homeware but are not dedicated homeware companies. As such, the merging parties will continue to face competition from players fully focused on this market which include large retailers, such as House and Home, Sheet Street, Checkers Hyper, Pick n Pay Hyper, Westpack Lifestyle, Makro, Game, SPAR and other independent, specialist stores.

Retail of cosmetics

[23] In its assessment of the market for the national retail of cosmetics, the Commission found that the merged entity will have an estimated market share of <25%, after an accretion of <1% (representing the Jet Division's market

share). The Commission notes that, in South Africa, a number of large retail chain stores focus on personal care and cosmetic products and also have in-store pharmacies. These include amongst others, Clicks, Dischem, Checkers, Shoprite, Pick n Pay, SPAR and several independent specialised retailers.

Retail of insurance products

[24] The Commission highlighted the fact that neither the Jet Division nor the Foschini Group have insurance licences. The Jet Division and the Foschini Group are two of many distribution channels used by insurers. In addition, insurers offer their products through other types of retailers, brokers, and direct sales to customers. Other retailers also offer, on behalf of insurance companies, similar short-term and long-term insurance products.

[25] In light of the above, the Commission concluded that the proposed transaction is unlikely to result in the substantial prevention or lessening of competition in any of the above markets.

[26] In our view, the Commission's assessment of the impact of the transaction on competition was based on a thorough analysis and we agree that the proposed transaction is unlikely to adversely affect competition in any of the identified markets.

Third party submissions

[27] Some of the merging parties' competitors made submissions in relation to the proposed transaction. The Commission found that the third party concerns that were raised were either not merger-specific, or did not raise any competition concerns. We tested this with the Commission during the hearing and were satisfied with the Commission's conclusions in this regard.

Public Interest

Employment

[28] A major public interest outcome of the proposed transaction is that 371 Jet stores would be saved, and at least 4664 employees (out of approximately 7515 employees) would be transferred with the Jet Division.

[29] The Department of Trade, Industry and Competition (DTIC) supported the proposed transaction on the basis that Edcon's financial difficulties were well known. The transaction will save jobs and the domestic manufacture of clothing will benefit from the merger.

[30] During the Commission's investigation, South African Commercial, Catering and Allied Workers Union (SACCAWU), which represents the employees of the Jet Division, expressed concern about the selective closure of some Jet Stores.

[31] With respect to the concern raised by SACCAWU, the merging parties submitted that the proposed transaction entails the sale of a sustainable part of the Jet Division as a going concern and that certain stores will not be transferred to the Foschini Group. In addition, Edcon's Management Restructure Plan, which commenced prior to the proposed transaction and will continue to be implemented in parallel with the business rescue plan, entails the closure of certain Jet stores for operational reasons (including stores that were non-viable or loss-making and stores where leases had either lapsed or landlords had exercised their rights to take back the premises).

[32] The Commission noted and agreed with the counterfactual as submitted by the merging parties that absent the proposed merger, the Jet Division is likely to be closed down as part of the winding down process. For this reason, job losses arising at the Jet stores are not a result of the proposed transaction but rather the result of Edcon's perilous financial situation.

Industrial sector and region

[33] During the Commission's investigation, the Southern African Clothing and Textile Workers Union (SACTWU), which represented the Foschini employees, raised concerns about local procurement and imports in the future. SACTWU's research showed that the Jet Division bought substantially more clothing, textile, footwear, and leather products that are made in South Africa than does the Foschini Group. SACTWU submitted that, if post-merger, the Jet Division reduces its local procurement to the levels of the Foschini Group, this would facilitate a decline in local production, threaten local jobs and would have a negative impact on an industrial sector.

[34] In addressing this concern, the merging parties submitted that the counterfactual would result in no jobs saved in the Jet Division's supply chain. However, SACTWU indicated if this transaction is not approved, another buyer may still buy the Jet Division and offer better outcomes in terms of jobs in the supply chain and higher thresholds of local procurement post-acquisition.

[35] The Commission's conclusion was that the implementation of the proposed transaction is unlikely to have any negative effects on a particular industrial sector or region. Furthermore, the Conditions address the issues that have been raised with regards to local procurement.

Spread of ownership

[36] Regarding SACTWU's concern that the actual counterfactual would involve the purchase of the Jet Division by an alternate bidder identified in the business rescue process which would result in a greater spread of ownership, the Commission's view was that it was not within its remit to decide which bid is better, unless there are competition concerns with the transaction before it.

[37] The alternate bidder was informed of the proposed transaction's referral to and consideration by the Tribunal and they elected not to participate.

Further submissions

[38] SACTWU, SACCAWU and the DTIC were informed of the date of set down of the proposed transaction before the Tribunal. SACCAWU was the only party that elected to make submissions to the Tribunal.

[39] SACCAWU's concerns related *inter alia* to the terms and conditions of the transfer of employees and employment.

[40] SACCAWU's concerns have been addressed in the Conditions.

[41] The Commission is also of the view that the implementation of the proposed transaction is unlikely to have any negative effects on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.

Assessment

[42] Our role is to consider public interest concerns holistically and to examine the effect of the merger on the public interest. We accept that the counterfactual would be the closure of the stores, in the accordance with the BRPs wind down process. The survival of the Jet Division as a going concern will result in the saving of jobs, and other businesses in the industry supply chain.

[43] As highlighted by the merging parties, the proposed transaction will ensure that the merging parties retain the employment of at least 4664 employees from the target firm. In the present economic climate, exacerbated by Covid-19, the necessity to save this South African business is indisputable.

Conclusion

[44] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant markets and is likely to have a positive effect on employment.

[45] Accordingly, we approved the transaction on the basis of the Conditions attached to the order.

Enver Daniels

02 November 2020

Mr Enver Daniels **Date**

Ms Mondo Mazwai and Ms Yasmin Carrim concurring.

Tribunal Case Managers:	C Mathonsi, M Tshabalala and L Jordaan
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For the Commission:	B Mabatamela and R Maphwanya