competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM100Aug20

In the matter between:

Retailability Proprietary Limited	Primary Acquiring Firm
And	
Parts of the Edgars business conducted by Edcon Limited in South Africa, as a going concern, consisting of certain assets and liabilities	Primary Target Firm

Panel:	Ms M Mazwai (Presiding Member) Ms Y Carrim (Tribunal Member) Mr E Daniels (Tribunal Member)
Last submission received on:	04 September 2020
Order Issued on:	04 September 2020
Reasons Issued on:	09 October 2020
Revised Reasons Issued on	11 November 2020

REASONS FOR DECISION

Approval

[1] On 4 September 2020, the Tribunal approved with conditions, the proposed transaction in which Retailability Proprietary Limited ("Retailability") is to acquire parts of the Edgars business owned by Edcon Limited in South Africa, as a going concern.

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

Parties to the transaction

Primary acquiring firm

[3] The primary acquiring firm, Retailability is jointly controlled by Helvetia Finance Limited t/a C.R. Lines & Associates, [redacted] and Metier Investment and Advisory Services (Pty) Ltd [redacted]

[4] C.R. Lines is ultimately controlled by Clifford Raymond Lines (founder and executive chairman of Retailability). C.R. Lines functions as a holding company for Retailability and does not have any other activities. Metier is a private equity firm with investments in a range of industries spanning healthcare, hospitality, FMCG and telecommunications. [redacted]

[5] In South Africa, Retailability is a clothing apparel retailer; owning 98 Beaver Canoe stores that sell clothing apparel for men and boys; 25 Style stores that sell men and ladies' contemporary and formal fashion wear; and 172 Legit stores. Legit has a fashion store format which focuses on the retailing of clothing, footwear and accessories aimed at young, budget constrained women in the LSM 4-8 categories. In addition to women's apparel, the Legit stores also supply colour cosmetics and cellular products.

Primary target firm

[6] The primary target firm consists of 120 Edgars stores (out of a total of 181 in South Africa) together with certain assets and identified liabilities including: consignment stock, database information, the Edgars club benefit programme, an e-commerce platform, and intellectual property (the "Edgars Business").

[7] These stores target middle-to-upper income consumers in the LSM 6-10 categories and house private-label brands such as Free 2BU, Charter Club, and Stone Harbour, and a wide range of market label brands for clothing, footwear, and cosmetics. They also include iconic Edgars Home and Edgars Beauty stores as store-in-store formats, rounding out the department store offering in South Africa.

[8] The Edgars Business also sells cellular products primarily on contract, in collaboration with MTN, Vodacom and Cell-C. 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 the Edgars Business stores.

[9] Edgars account cardholders can also purchase insurance products, including both short term and long-term insurance through the Edgars Business. Edcon does not hold an insurance licence but instead facilitates the retailing of the various insurance products on behalf of Hollard, which is the primary provider and underwriter of the insurance products sold.

Proposed transaction and rationale

Transaction

[10] The Edcon Group's financial difficulties have been public knowledge for a while. In an effort 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.[1]

[11] According to Edcon, the Covid-19 lockdown which commenced in March 2020, affected its fragile financial position to such an extent that the directors resolved

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[1] 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.

to place Edcon Limited in business rescue in an effort to save jobs and any viable divisions of the business.

[12] The voluntary business rescue process,[2] 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 the wind down process. The accelerated sales process seeks to achieve the sale of Edcon's divisions as going concerns. Under the plan, they seek to realise those assets which remain unsold after the completion of the accelerated sales process by way of a trade out process, private treaty, auction or any other manner in which they, in their sole discretion, deem appropriate given the circumstances prevailing at the time (i.e. the wind down process). The wind down process would culminate in all the positions at Edcon being declared redundant and the retrenchment of all remaining employees.

[13] This transaction emanates from the accelerated sales process. In terms of the proposed transaction, Retailability will acquire the Edgars Business as well as several associated businesses located in neighbouring jurisdictions: Botswana, Eswatini, Lesotho and Namibia, as going concerns.

Rationale

[14] Retailability considers the Edgars Business as a strategic and complementary fit in its business model.

[15] Edcon is pursuing the proposed transaction in furtherance of its business rescue process formulated and implemented by the BRPs.

[2] In terms of section 129(1) of the Companies Act, No. 71 of 2008 (as amended).

Participating Parties

SACCAWU

[16] The employees of Retailability are represented by the South African Commercial, Catering and Allied Workers Union ("SACCAWU"). The employees of the Edgars Business are also represented by SACCAWU. Non-unionised employees were represented by Ms Josh Suknandan, Retailability's Head of Human Resources.

[17] During its investigation, the Commission received concerns from SACCAWU on behalf of the employees of the Edgars Business. SACCAWU raised concerns about job retention, alleged that there was inadequate consultation in the process of business rescue, and alleged that Retailability intended to unilaterally change terms of employment upon implementation of the merger. SACCAWU proposed a number of conditions.

The DTIC

[18] The Department of Trade, Industry and Competition ("DTIC") supported the expedited consideration of the proposed transaction on the basis that Edcon's financial difficulties were well known and the transaction presented an opportunity for the Edgars Business and for jobs to be saved.

Impact on competition

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

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

b. segmented narrow markets for
    i. clothing,
    ii. footwear, and
    iii. apparel accessories;

c. the national retail market of cell phone products; and

d. the national retail market of cosmetics.

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

[20] *"[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*".[3] 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 middle to upper consumer segment (LSM 4-10).

[21] 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 8% after an accretion of 6.3% (representing the Edgars Business'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 retail of clothing, the merged entity would have an estimated market share of 10.6% after an accretion of 8.5%. In the narrow market for retail of footwear, the Commission found that the merged entity would have an estimated market share of 7.9% after an accretion of 5.8%. The Commission also found that in the narrow market for retail of accessories, the merged entity would have an estimated market share of 6.9% after an accretion of 4.8%.

[3] Recommendation pages 24-5 paras 59 and 60 citing Tribunal merger decision in *Massmart Holdings Limited and Moresport* (62/LM/Jul05).

[22] The Commission further found that the merged entity will continue to face competition from Truworths, Woolworths, Pepkor Group (Ackermans and Pep), Massmart, Mr Price, and many other independent apparel stores including prominent international clothing retailers such as Zara and H&M.

[23] When assessing the broad national market for retail of apparel within the LSM 4-10 segment (middle to upper consumer segment), the Commission found that the merged entity would have an estimated market share of 12.2% after an accretion of 9.6%. The Commission then assessed the narrow markets for the retail of clothing, footwear and accessories within the LSM 4- 10, and found that in the narrow market for the retail of clothing, the merged entity would have an estimated market share of 17.9% after an accretion of 14.3%. The Commission also found that in the narrow market for the retail of footwear, the merged entity would have an estimated market share of 14.1% after an accretion of 10.4%. The merged entity would further have an estimated market share of 12.3% after an accretion of 8.6%, in the narrow market for the retail of accessories. The Commission highlighted the fact that the Edgars Business predominantly competes with Truworths and Woolworths, therefore, the survival of the Edgars Business will ensure that Truworths and Woolworths will continue to face their largest competitor.

Retail of cellphone products

[24] 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 6.49% after an accretion of 6.4%. The Commission's view was that the proposed transaction is unlikely to substantially change the structure of the market. Further, the Commission notes that cellular products are primarily sold in collaboration with MTN, Vodacom and Cell-C, as the cellular providers in South Africa. These mobile operators also have a number of their own retail stores that compete with the merging parties.

Retail of cosmetics

[25] 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 46.1% after an accretion of 45.9%. The Commission is of the view that the proposed transaction is unlikely to substantially change the structure of the market. Further, the Commission notes that in South Africa there exist a number of large retail chains that have focused their product offering and retail experience around personal care and cosmetic products, combining these with in-store concepts in pharmacies which fit the broad category (namely Clicks and Dis-Chem).

[26] 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.

[27] We agree with the Commission's assessment of the impact of the transaction, and the conclusion that the proposed transaction is unlikely to adversely affect competition in any of the identified markets.

Public Interest

[28] The merging parties submitted that if the proposed transaction fails, it will have a negative impact on employment since the winding down alternative contemplated by the BRP would result in all the positions at Edcon being declared redundant and the retrenchment of all remaining employees. According to the parties, Edgars employs 7 595 employees. A major public interest outcome of the proposed transaction is that 5200 of these jobs would be saved due to the fact that the Edgars Business was being sold as a going concern.

[29] The merging parties also submitted that the relevant markets in which the Edgars Business operates as well as related markets such as those in which

suppliers (local and regional) and landlords operate will be negatively affected if the transaction fails.

[30] The Edgars Business operates 120 stores across South Africa and occupies significant gross lettable area (GLA) in a number of major shopping centres in the market for rentable retail space in South Africa. Suppliers and service providers to these stores would include not only suppliers of trading stock but also suppliers of administration, facilities and logistic services. Hence an indirect positive impact on employment could flow from this transaction, which seeks to ensure that the Edgars Business survives as a going concern, rather than from it being wound up in a liquidation.

[31] Furthermore, the target firm's suppliers include, amongst others, a number of small and medium businesses, or firms controlled or owned by historically disadvantaged persons. The closure of the Edgars Business' stores would negatively affect such small and medium businesses, or firms controlled or owned by historically disadvantaged persons as well.

Proposed remedies

[32] SACCAWU expressed concerns with the transaction as indicated above.

[33] Each of the employee representatives, SACCAWU and the DTIC were informed of the hearing and invited to make submissions before the Tribunal if they wished. SACCAWU was the only party that elected to make written submissions to the Tribunal. Its concerns were the same as those made to the Commission during its investigation; namely that:

a. There be a moratorium on retrenchments for a period of five years;

b. A recall period of five years for retrenched employees;

c. No downward variation in the terms of employment of workers for five years;

d. Recognition of the union as a bargaining agent for a minimum period of five years.

[34] The merging parties had already tendered remedies to SACCAWU's concerns during the Commission investigation. In our assessment the conditions proposed by the merging parties and accepted by the Commission adequately address the concerns raised by SACCAWU discussed in more detail below.

[35] Regarding the moratorium on retrenchments, the merging parties provided an undertaking not to implement any merger-related retrenchments in the merged entity (employees of both Retailability and the Edgars Business) for a period of three years after the implementation of the merger. In our view the tender by the merging parties is reasonable in the current economic climate, to secure jobs while at the same time allowing the merged entity an opportunity to turnaround the Edgars Business.

[36] Regarding the recall period, Retailability undertook to give preference to any erstwhile Edcon employees should vacancies arise for a period of three years from the implementation of the merger. In our view this is a reasonable period and would synchronise with the period for the moratorium on retrenchments thus enabling ease of compliance and monitoring.

[37] Both the merging parties and the Commission agreed on the principles that any potential downward variation of the terms and conditions of employment as well as the recognised status of the union are both directly regulated by the Labour Relations Act.

[38] SACCAWU also levelled criticisms against the BRPs and took issue with a prior voluntary retrenchment process and expressed dissatisfaction against the business rescue process.[4] In our view all these concerns fall outside the ambit of the Competition Act and relate mostly to the administration of the business

[4] See Recommendations page 42-43 para 118.

rescue plan for which the unions, employees and creditors have remedies in other fora.

Other public interest considerations

[39] On balance, in weighing up the likely effect on public interest, we find that the merger will not have any negative effects on small and medium businesses, or firms controlled or owned by historically disadvantaged persons and was unlikely to have any negative effects on a particular industrial sector or region.

Conclusion

[40] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the markets of horizontal overlap between the merger parties. Further, the proposed transaction is likely to have a positive effect on employment and suppliers and service providers of the Edgars Business.

[41] As highlighted by the merging parties, the proposed transaction will save 5,200 jobs and 120 Edgars stores each of which in turn support further industries. In this time of economic decline and Covid-19, the need to save this South African business and jobs appears both dire and warranted.

[42] Accordingly, we approved the transaction on the basis of the conditions attached to the order.

Signed by: Yasmin Tayob Carrim
Signed at: 2020-11-11 12:07:01 +02:00
Reason: I approve this document

Yasmin Tayob Carrim

11 November 2020

Ms Yasmin Carrim **Date**

Ms Mondo Mazwai and Mr Enver Daniels concurring.

Tribunal Case Managers:	C Mathonsi, L Jordaan and M Tshabalala
For the Merging Parties:	M Garden of ENSAfrica instructed by Edcon Limited and A Aukema of CDH instructed by Retailability Proprietary Limited
For the Commission:	B Mabatamela and R Maphwanya