

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 020099

In the matter between:

Shoprite Checkers (Pty) Ltd

Primary Acquiring Firm

And

The Assignment of Certain Leases and

Primary Target Firm

The Employment of Employees of Final

Selected Stores of Ellerines Furnitures (Pty) Ltd

Panel	:	Norman Manoim (Presiding Member), Anton Roskam (Tribunal Member) Yasmin Carrim (Tribunal Member)
Heard on	:	12 December 2014
Order issued on	:	12 December 2014
Reasons issued on	:	15 January 2015

Reasons for Decision

Approval

- [1] On 12 December 2014, the Competition Tribunal ("Tribunal") conditionally approved the merger between Shoprite Checkers (Pty) Ltd ("Shoprite") and Ellerines Furnishers (Pty) Ltd ("Ellerines"), in the Business Rescue, as represented by the Business Rescue Partners, in respect of The Assignment of Certain Leases and The Employment of Employees of Final Selected Stores of Ellerines Furnitures (Pty) Ltd).

- [2] The reasons for conditionally approving the proposed transaction follow below.

Parties to transaction

- [3] The primary acquiring firm is Shoprite, a private company registered in the Republic of South Africa. Shoprite is a wholly-owned subsidiary of Shoprite Holdings Limited ("SHL"), a public company which is listed on the Johannesburg Stock Exchange ("JSE") and is thus not controlled by a single firm. Shoprite's core business is retailing a wide range of Fast Moving Consumer Goods ("FMCG"), including groceries, food, household, health, beauty amongst others, through its various stores and supermarkets.
- [4] Shoprite operates through various divisions under well-known brand names such as Shoprite, Checkers, Checkers Hyper, Shoprite Usave, OK Power Express, inter alia, and has value added retail services such as Moneymarket, Computicket and LiquorShops. Of relevance to the proposed transaction is that Shoprite conducts 295 OK Furniture outlets and 48 House and Home stores.
- [5] The primary target firm is a number of stores trading under the Ellerines brand. Ellerines is in turn wholly-controlled by Ellerines Holdings Ltd ("EHL") which is ultimately controlled by African Bank Investments Ltd ("ABIL"). ABIL is a publicly listed company on the JSE, and is thus not controlled by any single firm. Ellerines operates through six furniture retail brands, namely, Ellerines, Bearers, Furniture City, Dial-a-Bed, Geen and Richards and Wetherlys.

Proposed transaction

Background to the transaction

- [6] Ellerines is currently under business rescue, which commenced on 07 August 2014, in terms of the Companies Act, 71 of 2008("Companies Act").¹ The decision of the Ellerines board was taken following a decision by ABIL Ellerines' parent company, to cease providing funding to Ellerines to cover its losses which had been incurred as a result of reduced turnover by Ellerines and its high fixed cost base. Prior to adopting the resolution to enter into business rescue, the directors of Ellerines formed the view that in order to restore profitability, a significant restructuring of the business would be required. This involved assessing various stores of Ellerines and deciding which stores were viable to continue trading and which ones would have to be closed down.
- [7] Business Rescue Practitioners ("BRPs") were appointed on 08 August 2014, and the Business Rescue Plan was approved on 10 November 2014 in terms of section 153 of the Companies Act. The restructuring process continued parallel to a process of the sale of Ellerines' assets, brands or divisions, which the BRPs believed may result in a better return to Ellerines' creditors than what would have resulted in an immediate liquidation.

Transaction details

- [8] As a result of the sales (and bidding process) the BRPs received an offer from Shoprite to acquire various leases of Ellerines. This would be done through an Agreement entered into between Shoprite and Ellerines whereby Shoprite would gain the

¹ The proposed transaction is similar to a transaction that was approved by the Tribunal on 12 November 2014, See Lewis Stores (Pty) Ltd and Ellerrine Furnishers (Pty) Ltd, in Business Rescue, as represented by the Business Rescue Partners, in respect of the 63 Bearers Stores: Case No: 019893.

opportunity to take over certain of the leases of retail premises of Ellerines' businesses designated for closure by the BRPs. However, Shoprite would not take over all of them as more fully described in the Agreement.

Rationale for the transaction

- [9] Ellerines' BRPs hope that the business rescue proceedings will facilitate the rehabilitation of Ellerines. This will be achieved either by restructuring the company's affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing on a solvent basis or if that is not possible, then by finding an outcome that results in a better return for creditors.

Competition assessment

- [10] The Commission submitted that the proposed transaction gives no rise to any horizontal or vertical overlaps. This is because the acquisition of the leases does not ascribe any additional market share to Shoprite and is therefore a replacement of Shoprite in a particular shopping centre. The proposed transaction thus poses no competition concerns, and will therefore not result in the substantial lessening or preventing of competition.

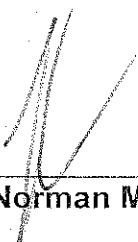
Public Interest

- [11] On 02 December 2014, as part of the CCMA facilitated consultation process, an agreement between Ellerines and SACCAWU and Non-Unionised Employees was entered into in terms of which most of employees of Ellerines applied for Voluntary Severance Agreements ("VSAs"). The Commission thus deemed it necessary to impose an employment condition in relation to the remaining employees that did not accept VSAs.

[12] It is worthy to note that the proposed transaction is mainly in the interest of saving jobs. The transfer of leases to Shoprite will allow Ellerines to prevent a substantial number of employees from losing their jobs. In addition to this, since Ellerines is under business rescue, the job losses cannot be said to be merger specific, to the contrary the proposed transaction will have a positive impact on employment. The proposed transaction raises no other public interest concerns.

CONCLUSION

[13] Despite the fact that the Commission's analysis under the proposed transaction was conducted on an urgent basis so as to preserve the jobs of Ellerines' employees, we agree with the Commission's analysis. We thus approve the proposed merger with the employment condition set out in the Annexure to these reasons.



Mr Norman Manoim

15 January 2015
DATE

Mr Anton Roskam and Yasmin Carrim concurring.

Tribunal Researcher:

Caroline Sserufusa

For the merging parties:

Petra Krusche of Werksmans and Jocelyn
Katz of Edward Nathans Sonnenbergs Inc

For the Commission:

Grace Mohamed

Annexure A

Shoprite Checkers (Pty) Ltd

And

Ellerines Furnishers (Pty) Ltd, in the Business Rescue, as represented by the Business Rescue Partners, in respect of The assignment of certain leases and the employment of employees of Final Selected Stores as fully described in item 1.9 hereof of Ellerines Furnishers (Pty) Ltd

CC CASE NUMBER: 2014Novo667

CONDITIONS

1. Definitions

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

- 1.1. **"Agreement"** means the Agreement entered into between Ellerines (in business rescue, as represented by the business rescue practitioners, Jayat Pema (5505145157080) and Leslie Matuson (5503215083088) and Shoprite, dated 24 November 2014;
- 1.2. **"Approval Date"** means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT 10);
- 1.3. **"Business Rescue Practitioners"** means the business rescue practitioners of Ellerines namely, Jayat Pema (5505145157080) and Leslie Matuson (5503215083088);
- 1.4. **"Commission"** means the Competition Commission of South Africa;
- 1.5. **"Conditions"** means these conditions;

- 1.6. "CCMA" means Commission for Conciliation, Mediation and Arbitration
- 1.7. "Ellerines" means Ellerines Furnishers (Pty) Ltd;
- 1.8. "Employees" means those individuals employed by Ellerines on a full time and part time basis to work in the Final Selected Stores. Employees will not include any employees that have accepted VSAs or those that have criminal records or against whom criminal proceedings are pending and / or have previously been employed by Shoprite or any other company within the Shoprite group of companies and whose employment has been terminated as a result of dismissal;
- 1.9. "Final Selected Stores" means those Leases that will ultimately be transferred to Shoprite;
- 1.10. "Implementation Date" means the date, occurring after the Approval date, on which the Merger is implemented by the Merging Parties;
- 1.11. "Labour Relations Act" means the Labour Relations Act No. 66 of 1995 (as amended);
- 1.12. "Leases" means the leases over the Stores wherein Ellerines currently operates its business, which are earmarked for transfer to Shoprite in terms of this Merger and defined in the Agreement;
- 1.12. "SACCAWU" means the South African Commercial, Catering and Allied Workers Union;
- 1.13. "Shoprite" means Shoprite Checkers (Pty) Ltd;
- 1.14. "Merger" means the proposed acquisition of control by Shoprite of the Leases;
- 1.15. "Merging Parties" means Shoprite and the business of Ellerines;
- 1.16. "Merger Filing" means all documents filed by the Merging Parties under Commission Case Number: 2014Nov0667;
- 1.17. "Transferred Firms" means the Leases;
- 1.18. "Tribunal" means Competition Tribunal; and

1.19. "VSAs" means Voluntary Severance Agreements.

2. Recordal

2.1. The Merging Parties submit that Ellerines is under Business Rescue in terms of the Companies Act of 2008.

2.2. Ellerines issued notices in terms of section 189(3) of the Labour Relations Act to all the potentially affected employees, in terms of which the closure of certain stores and the retrenchment of employees is proposed. According to Ellerines, 2 810 employees out of a total of 7 060 are likely to be retrenched as a result of its proposed restructuring plan. These likely retrenchments are, however, not as a result of the Merger but rather, as a direct result of the financial distress of Ellerines.

2.3. The Merging Parties submit that the sale of certain Ellerines assets (stores as going concerns) under the business rescue process will result in fewer retrenchments than would otherwise be the case under liquidation. Thus, the Merging Parties submit that the Merger presents them with an opportunity to save some jobs and therefore have a positive effect on public interest.

2.4. As part of the CCMA facilitated consultation process, Ellerines, SACCAWU and the Non-Unionised Employees concluded an agreement on 2 December 2014. In terms of this agreement, 933 out of 1 241 employees of the Stores applied for and accepted VSAs. Therefore these Conditions are applicable to the remaining Employees of the Stores.

3. Conditions to the approval of the Merger

3.1. The Merging Parties shall ensure that to the extent that the transaction is implemented and Employees transferred, it is done in accordance with the terms and conditions of the Agreement.

- 3.2. Should the Merger be approved by the Commission and the Tribunal, the Employees employed in the Final Selected Stores will be transferred and employed by Shoprite.

4. Monitoring of compliance with the conditions

- 4.1. Shoprite shall notify the Commission of the Implementation Date within 3 business days of it becoming effective.
- 4.2. The Business Practitioner shall circulate a copy of these Conditions to the Employees within 5 Business days of Approval Date.
- 4.3. The Business Practitioner shall within 5 days of circulating the Conditions as contemplated in paragraph 4.2 above, provide the Commission with an affidavit by a senior official of The Business Practitioner attesting to the circulation of the Conditions and attach a copy of the notice sent.
- 4.4. Within 60 business days from Implementation Date, the Merging Parties shall provide the Commission with a comprehensive compliance report detailing compliance with paragraph 3.1 of these Conditions. This report shall include amongst others, details confirming the offers of employment made to the Employees. This report shall further include the details of the Employees including their full names, designations when previously employed at Ellerines, the kind of employment opportunities and geographic locations (stores) they are interested in (and substantially comply with the job requirements for employment opportunities), as well as their preferred mode of communication (letter, email or SMS) and the requisite contact details to allow for such communication. The Business Rescue Practitioners shall certify the contents of the report as correct in as far as same relates to those obligations falling within the square ambit of the business rescue proceedings
- 4.5. Any employee who believes that his/her employment with the Merging Parties has been terminated in contravention of these Conditions may approach the Commission with his or her complaint.
- 4.6. All correspondence in relation to these Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.

- 4.7. 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.

5. Monitoring of compliance with the conditions

- 5.1. The Merging Parties shall file a final compliance report similar to the one envisaged in paragraph 4.4 above within 60 business days of the first compliance report referred to in paragraph 4.4 above.