

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM126Oct22

In the matter between:

FLM SA Proprietary Limited

Primary Acquiring Firm

And

Everfresh Market Ballito (Pty) Ltd; Everfresh Market Hillcrest (Pty) Ltd; and Riverbend Trade and Invest 11 (Pty) Ltd

Primary Target Firms

Panel : AW Wessels (Presiding Member)
: M Mazwai (Tribunal Panel Member)
: I Valodia (Tribunal Panel Member)
Heard on : 21 December 2022
Decided on : 21 December 2022

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



Presiding Member
Mr Andreas Wessels

22 December 2022

Date

Concurring: Ms Mondo Mazwai and Prof. Imraan Valodia



competitiontribunal
SOUTH AFRICA

Merger Clearance Certificate

Date : 22 December 2022

To : Cliffe Dekker Attorneys

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Case Number: LM126Oct22

Food Lover's Market South Africa (Pty) Ltd And Everfresh Market Ballito (Pty) Ltd; Everfresh Market Hillcrest (Pty) Ltd; and Riverbend Trade and Invest 11 (Pty) Ltd

You applied to the Competition Commission on **27 September 2022** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- no conditions.
- the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

Tebogo Mputle

ANNEXURE A

FLM SA PROPIETARY LIMITED

AND

EVERFRESH MARKET BALLITO T/A FOOD LOVER'S MARKET BALLITO

AND

**RIVERBEND TRADE AND INVEST 11 PROPIETARY LIMITED T/A FOOD LOVER'S
MARKET ARBOUR CROSSING**

AND

**EVERFRESH MARKET HILLCREST PROPIETARY LIMITEDN T/A FOOD LOVER'S
MARKET THE CRESCENT**

CASE NUMBER: LM126Oct22

CONDITIONS

1. DEFINITIONS

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

- 1.1 **"Acquiring Firm"** means FLM SA Proprietary Limited;
- 1.2 **"Approval Date"** means the date on which the Merger is approved by the Competition Tribunal;
- 1.3 **"B-BBEE"** means Broad-Based Black Economic Empowerment as defined in the B-BBEE Act;

- 1.4 **"B-BBEE Act"** means Broad-Based Black Economic Empowerment Act, No. 53 of 2003, as amended;
- 1.5 **"Business Days"** means Business Day as contemplated in Section 1(1A) of the Competition Act;
- 1.6 **"Competition Act"** means the Competition Act, No. 89 of 1998 (as amended);
- 1.7 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.8 **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.9 **"Conditions"** means these conditions, and "Condition" means, as the context requires, any one of them;
- 1.10 **"FLM SA"** means FLM SA Proprietary Limited, a wholly owned subsidiary of Food Lovers Holdings Proprietary Limited;
- 1.11 **"FLH"** means Food Lovers Holdings Proprietary Limited;
- 1.12 **"Food Lover's Market Arbour Crossing"** means the franchised store that is wholly owned by Everfresh Market Proprietary Limited;
- 1.13 **"Food Lover's Market Ballito"** means the franchised store that is wholly owned by Everfresh Market Proprietary Limited;
- 1.14 **"Food Lover's Market The Crescent"** means the franchised store that is wholly owned by Everfresh Market Proprietary Limited;
- 1.15 **"Food Lover's Market Brand"** means all business activities and branding associated with the franchise model commonly known as "Food Lover's Market";
- 1.16 **"HDP"** means Historically Disadvantaged Persons as defined in section 3(2) of the Competition Act;
- 1.17 **"Implementation Date"** means the date, occurring after the Approval Date on which the Merger is implemented by the Parties;
- 1.18 **"Parties"** means FLM SA and the Target Stores;

- 1.19 **"Prospective HDP Franchisees"** means any HDPs who meet FLM SA's franchising criteria;
- 1.20 **"Merger"** means the acquisition of control by the Acquiring Firm over the Target Stores;
- 1.21 **"Small to Medium"** means small businesses and medium-sized businesses as defined in the Competition Act;
- 1.22 **"Target Stores"** means Food Lover's Market Ballito, Food Lover's Market Arbour Crossing and Food Lover's Market The Crescent;
- 1.23 **"Start-up costs"** means an estimated amount of R [REDACTED] that is required to develop a corporate-owned store under the Food Lover's Market Brand;
- 1.24 **"CAPEX investment"** means the estimated amount of R [REDACTED] to R [REDACTED] that any prospective franchisee is required to expend in order to open a store under the Food Lover's Market Brand; and
- 1.25 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and
- 1.26 **"Tribunal Rules"** means the Rules for the Conduct of Proceedings in the Tribunal.

2 **CONDITIONS TO THE APPROVAL OF THE MERGER**

- 2.1 FLM SA shall ensure that 3 (three) of the [REDACTED] stores it will open in the KZN region in the next five (5) years will have a significant HDP component – either by virtue of being wholly-owned and operated by HDP franchisees or will be co-owned by FLM SA as to 51% and an HDP Joint Venture partner as to 49%.
- 2.2 In order to give effect to the realisation of the objective set out in paragraph 2.1 above, FLM SA shall implement the following initiatives:
- 2.2.1 FLM SA has identified [REDACTED] corporate stores it intends to develop. FLM SA has also outlined [REDACTED] suitable areas for franchising opportunities. This is a total of [REDACTED] stores in the KZN region in the next five (5) years.

2.2.2 Of the [REDACTED] corporately owned stores, FLM SA shall ensure that one store is owned and operated through a joint venture arrangement with an HDP Joint Venture partner who shall likely come from the ranks of FLM SA's KZN employee base; this being recorded that such employee will be an HDP. The Joint Venture partner ratio will be 51% in respect of FLM SA and 49% in respect of the HDP Joint Venture partner, with FLM SA funding of no less than R [REDACTED] [REDACTED] ([REDACTED] rands) this being the start-up costs required to open this store. For the sake of clarity, in terms of the corporate owned store, although FLM SA will fund the CAPEX required to open the Joint Venture store, the rights that arise from the Joint Venture partner's participation in the Joint Venture are those of an equal partner (i.e.: the operating partner in the Joint Venture Agreement is the person that runs the business for their own and for the collective benefit). The 49% interest is a substantive interest which takes into account the fact that the HDP shareholder will also be a owner-manager of the business. The HDP individual will have influence over the management and operations of the business in a manner aligned with the substantive and strategic nature of the HDP individual's interest in the business.

2.2.3 Of the [REDACTED] franchised stores identified, FLM SA shall ensure that two stores shall be owned and operated by an HDP franchisee, with the CAPEX investment being borne by the HDP franchisee and provided that the HDP franchisee meets FLM SA's franchisee qualifying criteria, namely, (i) access to at least 50% of the CAPEX investment in freely available cash; (ii) the ability to raise the remaining 50% through funding; and (iii) experience in the grocery retail industry, in particular, in the retail of fresh and perishable products.

2.3 The spirit of this undertaking is captured in paragraph 3.1 of these Conditions. To the extent that FLM SA will open additional franchised stores in the KZN region in the next five (5) years, it will endeavour to ensure that the ownership structure contributes to the main objective set out in paragraph 2.1 of these Conditions.

3 SUPPLIER DEVELOPMENT CONDITION

3.1 FLM SA shall ensure that the Target Stores will continue to procure from existing Small to Medium and/or HDP suppliers for a period of 5 (five) years from the Implementation Date provided that all suppliers meet FLH's minimum listing requirements, namely:

- 3.1.1 the farm on which the fresh produce is grown, must have a Food Safety Management System in place that has been assessed against Local G.A.P (good agricultural practice) intermediate level;
- 3.1.2 the pack house in which the fresh produce is packaged must be in possession of a Certificate of Acceptability issued by the responsible Local Authority and have a Food Safety Management System in place that has been assessed against Local G.A.P intermediate level (Local G.A.P is a capacity building program developed by Global G.A.P, a farm certification scheme owner. Global G.A.P has written a number of farm certification standards based on Good Agricultural Practice);
- 3.1.3 the packaging and labelling of any pre-packed fresh produce conforms to all legislative requirements, including but not limited to the Agricultural Produce Standards Act 119 of 1990 and all Regulations promulgated thereunder; and
- 3.1.4 the quality of the fresh produce accords with the specifications set by FLH's buyers.

4 MONITORING COMPLIANCE WITH THE CONDITIONS

- 4.1 The Acquiring Firm will notify the Commission of the Implementation Date of the Merger within 5 (five) business days of its occurrence.
- 4.2 The Acquiring Firm will, in writing, provide the Commission with a compliance report on the anniversaries of the Implementation Date for the duration of five (5) years. This compliance report will include the following details relating to the Merger Conditions:
 - 4.2.1 The identities and contact details of the suppliers to the Target Stores, including the monetary value of the transactions concluded between each of the Small to Medium/HDP suppliers and the Target Stores;
 - 4.2.2 The status of the granted franchisee rights in respect of HDP owned stores which includes information on the location, identity and contact details of the HDP franchisees; and
 - 4.2.3 The status of the Joint Venture partnerships between FLM SA and an HDP partner which includes information on the location, identity and contact details of the HDP partners; and
 - 4.2.4 Final Joint Venture Agreements concluded between FLM SA and an HDP partner.

4.3 The Commission may, for the duration of the Conditions, request additional information on compliance with these Conditions.

5 **APPARENT BREACH**

An apparent breach of these Conditions shall be dealt with in terms of Rule 39 of the Commission Rules and Rule 37 of the Tribunal Rules.

6 **GENERAL**

All correspondence in relation to these conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

7 **VARIATION OF THE CONDITION**

The Merging Parties and the Commission may at any time, on good cause shown, apply to the Tribunal for the conditions to be waived, relaxed, modified and/or substituted.