



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM126Oct22

In the matter between:

FLM Proprietary Limited

Primary Acquiring Firm

and

Everfresh Market Ballito (Pty) Ltd

Primary Target Firms

Everfresh Market Hillcrest (Pty) Ltd and

Riverbend Trade and Invest 11 (Pty) Ltd

Panel : Andreas Wessels (Presiding Member)
: Mondo Mazwai (Tribunal Member)
: Imraan Valodia (Tribunal Member)

Heard on : 21 December 2022

Order issued on : 22 December 2022

Reasons issued on : 05 January 2023

REASONS FOR DECISION

Conditional approval

[1] On 22 December 2022, the Competition Tribunal (“Tribunal”) conditionally approved the large merger in terms of which FLM SA Proprietary Limited (“FLM SA”), intends to acquire 51% of the entire shareholding in respect of Everfresh Market Ballito (Pty) Ltd, Everfresh Market Hillcrest (Pty) Ltd and Riverbend Trade and Invest 11 (Pty) Ltd (collectively “the Target Firms”).

[2] The reasons for the conditional approval follow.

Parties to the proposed transaction and their activities

Primary acquiring firm

- [3] FLM SA is 100% owned by Food Lovers Holdings Proprietary Limited (“FLH”) which is subject to negative control by Actis Berry Limited (“Actis”). FLM SA does not control or own any other firm.
- [4] FLH is the holding company and franchisor in respect of *Food Lover’s Market*. It comprises corporate retail stores, meat processing facilities, distribution centres, an import and export business and a food production business.
- [5] Food Lover’s Market is a supermarket chain comprising franchised and corporate-owned grocery stores which retail a wide range of fast-moving consumer goods (“FMCG”). The FMCG products include fresh produce, dry groceries, butchery, perishable, beverages, personal care, household groceries, baked goods and confectionary. However, groceries (including fresh produce) and butchery products typically constitute the largest categories in many Food Lover’s Market stores.

Primary target firms

- [6] The primary target firms are (i) Everfresh Market Ballito Proprietary Limited, t/a Food Lover’s Market Ballito (“Food Lover’s Market Ballito”); (ii) Riverbend Trade and Invest 11 Proprietary Limited, t/a Food Lover’s Market Arbour Crossing (“Food Lover’s Market Arbour Crossing”); and (iii) Everfresh Market Hillcrest Proprietary Limited, t/a Food Lover’s Market The Crescent (“Food Lover’s Market Crescent”).
- [7] Each of Food Lover’s Market Ballito, Food Lover’s Market Arbour Crossing and Food Lover’s Market Crescent are wholly-owned subsidiaries of Everfresh Market Ballito Proprietary Limited (“Everfresh Ballito”); Riverbend Trade and Invest 11 Proprietary Limited (“Riverbend”) and Everfresh Market Hillcrest Proprietary Limited (“Everfresh Hillcrest”), respectively. [REDACTED] is a majority shareholder of each of Everfresh Ballito (■%), Riverbend (■%) and Everfresh Hillcrest (■%).
- [8] The Target Firms do not own or control any other firms.
- [9] The Target Firms conduct franchised stores under the Acquiring Group’s Food Lover’s Market chain of corporate and franchised stores. The Target Firms operate in the

grocery retail market in the KwaZulu-Natal province, more specifically in the greater Durban region.

Proposed transaction and rationale

- [10] In terms of the Sale of Business Agreement, FLM SA will have sole control over the Target Firms.
- [11] Post-merger, FLM SA and each of the sellers will enter into Joint Venture Agreements in respect of the sellers' erstwhile stores in the following joint venture partner ratio: FLM SA: 51%, and the seller in each case: 49%.
- [12] The merging parties submitted that the proposed merger is an important step towards FLM SA expanding its presence in the greater Durban region and growing the Food Lover's Market brand. A number of prospective sites in the greater Durban region have been identified and it is the intention of FLM SA to apply its resources towards developing the brand's presence in the region, with improved performance of the Target Firms providing a springboard.

Relevant markets and impact on competition

- [13] The Competition Commission ("Commission") considered the activities of the merging parties and found that the proposed transaction results in a horizontal overlap in the market for the retail of groceries as both the Acquiring Group and the Target Firms provide retail grocery products.
- [14] The Commission considered the competition effects of the proposed transaction on the broad market for the retail of grocery products within a 5km radius, noting that there is no accretion to the Food Lover's brand as a result of the transaction.
- [15] The Commission found that the nearest retail store of the Acquiring Firm to the target retail stores is 4.7km away from one of the Target Firms i.e., Food Lover's Market La Lucia situated in La Lucia Mall, Umhlanga. The distance between the Food Lover's Market corporate-owned stores and the Target Firms' stores in all other instances exceed 15km.
- [16] The Commission also considered market concentration in relation to the potential geographic overlap, basing its market share calculations on third party submissions in relation to revenues for the 2021 financial year. The Commission found that the merged

entity will have an estimated market share of less than 10% within a 5km radius of the Target Firms in Umhlanga.

- [17] Furthermore, the Commission was of the view that the proposed transaction is unlikely to change the structure of the market as the Target Firms will continue to operate as Food Lover's Market stores under corporate ownership. Consequently, the proposed transaction will only change the ownership from franchisee to corporate owned stores.
- [18] The Commission furthermore found that the proposed transaction raises a vertical overlap as FLM SA supplies the Target Firms with fresh produce and ambient and perishable groceries. The Commission found that the Target Firms also procure fresh produce from other suppliers in the market.
- [19] The Commission was concerned about the likely implications on the existing Target Firms' SME and/or HDP suppliers in the event that they cease to source products from them post-merger. However, the merging parties agreed that the Target Firms will continue to procure fresh produce and ambient and perishable groceries from the other suppliers.
- [20] The Commission also sought to determine the post-merger position regarding the Target Firms' existing suppliers as the Target Firms will, post-merger, form part of the Acquiring Group's Seed Change Programme ("SCD Programme") which seeks to identify and develop small and medium-sized suppliers and provide them with a platform in retail stores. The merging parties submitted that the SCD Programme will not have an impact on existing suppliers as the SCD Programme is intended to identify and support non-listed suppliers. Pre-merger, the Target Firms do not source from the SCD Programme beneficiaries, but post-merger the SCD Programme beneficiaries will be able to have their products sold in the Target Firms but not to the exclusion of existing suppliers.
- [21] In light of the above, we concur with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

Employment

- [22] The Target Firms are being acquired as going concern enterprises and therefore the employees will be transferred in terms of section 197 of the Labour Relations Act 1995 as amended. Further, the merging parties submitted that the merger will not result in any retrenchments.
- [23] The Commission contacted the respective employee representatives and only received a response from the Acquiring Group's employee representative, who confirmed receipt of the non-confidential merger report. No employment concerns were raised.
- [24] The Commission noted that the Acquiring Group undertook ■■■ retrenchments in Food Lovers Holdings and FLM SA combined in the past 12 months. The Acquiring Group retrenched drivers and butchery employees. However, none of the retrenchments took place in KwaZulu-Natal. The Commission further noted that no retrenchments took place in the Target Firms. The Commission was of the view that these retrenchments are unlikely to be related to the proposed transaction as the retrenchments took place because of restructuring that was influenced by factors such as less production in the butchery due to the centralization of production to the butchery factories, and poor volume of sales in relation to staff cost.

Effect on greater spread of ownership

- [25] Neither the Acquiring Group nor the Target Firms have any HDP or worker ownership.
- [26] The Commission was of the view that the proposed transaction does not promote a greater spread of ownership, particularly in relation to HDPs and/or workers in terms of section 12A(3)(e) of the Act. The Commission therefore requested the merging parties to provide remedies to alleviate this concern.

DTIC submissions

- [27] The DTIC raised concerns and requested the Commission to engage with the merging parties with a view to recommend that the Acquiring Group will make firm commitments in terms of value and timeframes with respect to new investments in franchise and/or corporate owned stores, upstream facilities and distribution stores in the region; and furthermore that the expansion of new franchise stores should support HDP and/ or small and medium-sized businesses ("SME") as new entrants into the sector.

Tendered remedies

[28] The Commission invited the merger parties to make commitments in the form of conditions which would address the above concerns. After further engagements, the merging parties agreed to certain conditions.

[29] We approved the proposed transaction subject to the following public interest-related conditions as tendered by the merging parties:

29.1. 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%.

29.2. In order to give effect to the realisation of the objective set out in the conditions, FLM SA shall implement the following initiatives:

29.2.1. 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.

29.2.2. 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]) 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 an 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.

29.2.3. 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.

29.2.4. 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 the conditions.

[30] The merging parties furthermore tendered the following conditions related to supplier development:

30.1 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:

30.1.1. 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;

30.1.2. 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);

30.1.3. 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

30.1.4. the quality of the fresh produce accords with the specifications set by FLH's buyers.

[31] We are satisfied that the abovementioned imposed conditions address any public interest concerns resulting from the proposed transaction.

Conclusion

[32] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the imposed conditions address any public interest issues that may arise from the proposed transaction. Accordingly, we approve the proposed transaction subject to the conditions attached hereto as **Annexure "A"**.



Mr Andreas Wessels

05 January 2023

Date

Ms Mondo Mazwai and Prof. Imraan Valodia concurring

Case Manager : Theodora Michaletos

For the Merging Parties : Chris Charter of Cliffe Dekker Hofmeyr Inc

For the Commission : Tamara Paremoer and Nonhlanhla Msiza