

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM163Dev20

In the matter between:

Devland Cash and Carry (Pty) Ltd

Primary Acquiring Firm

And

Certain stores of Masscash (Pty) Ltd

Primary Target Firm

Panel	: Ms Y Carrim (Presiding Member)
	: Mr E Daniels (Tribunal Member)
	: Prof. F Tregenna (Tribunal Member)
Heard on	: 15 February 2021
Order Issued on	: 16 February 2021
Reasons Issued on	: 10 March 2021
Revised Reasons Issued on	: 24 March 2021

REASONS FOR DECISION

Conditional approval

- [1] On 16 February 2021, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction whereby Devland Cash and Carry (Pty) Ltd ("Devland") intends to acquire certain stores owned by Masscash (Pty) Ltd ("Target Stores"). Upon implementation of the proposed transaction, the Target Stores will be wholly owned and controlled by Devland.
- [2] The reasons for the conditional approval follow.

Parties to the proposed transaction

Primary Acquiring Firm

- [3] The primary acquiring firm is Devland, a private company incorporated in accordance with the laws of the Republic of South Africa. Devland is jointly controlled by two individuals, Mr Mahomed Gathoo and Mr Shiraz Gathoo.
- [4] The stores of the acquiring firm operate a hybrid model wherein they trade in both the wholesale and retail of groceries and related products.

Primary Target Firms

- [5] The target firm comprises of the Target Stores which are owned by Masscash (Pty) Ltd ("Masscash"). Masscash is controlled by Massmart Holdings Limited ("Massmart"). Massmart owns retail and wholesale stores.
- [6] The Target Stores subject to the proposed transaction include:
 - [6.1] Cambridge Food located in Kempton Park;
 - [6.2] Cambridge Food located in Bloemfontein;
 - [6.3] Cambridge Food located in Johannesburg CBD;
 - [6.4] QwaQwa Cash and Carry located in QwaQwa;
 - [6.5] Rhino Cash and Carry located in Lusikisiki;
 - [6.6] Rhino Cash and Carry located in Umlazi;
 - [6.7] Rhino Cash and Carry located in Umzinto;
 - [6.8] Rhino Cash and Carry located in Flagstaff; and
 - [6.9] Klerksdrop Cash and Carry located in Klerksdrop.
- [7] The above Target Stores are mainly grocery retail stores located in various parts of South Africa.

Proposed transaction

- [8] The proposed transaction is made up of two indivisible parts that constitute a single transaction. The first leg of the merger entails the acquisition by Devland of certain stores within Masscash from Massmart. Post-merger, the Target Stores will be wholly owned and controlled by Devland.
- [9] The second leg of the merger involves the acquisition of the Target Stores, in which Devland will acquire 2 (two) immovable properties in Klerksdorp and QwaQwa. The businesses of Klerksdorp Cash and Carry and QwaQwa Cash and Carry are conducted on these properties respectively.

Rationale

- [10] The acquiring firm is looking to expand its national footprint in the grocery retail market. With respect to the primary target firm, following a review of its stores, Massmart decided to close non-performing stores. The sale of these stores will ensure that the affected employees do not lose their employment. Accordingly, the acquiring firm will employ all affected employees on terms and conditions of employment that are no less favourable to the employees than those which they enjoyed with Massmart.

Competition analysis

- [11] The Commission found that the proposed transaction results in a horizontal overlap between the activities of the merging parties in respect of the retail and wholesale trade of groceries and found as follows:
- [10.1] In the market for the retail of grocery products in Johannesburg (Newtown), the Commission found that the merged entity will have a market share of less than 10% with an accretion below 5%. Furthermore, the merged entity will continue to be constrained by several firms such as Central Fruits and Veg, Kwikspar Jeppe, Spar Newtown, Al Bengle Supermarket, Fordsburg Café and Supermarket, Shoprite End Street and Newtown Supermarket, amongst others.

[10.2] With regards to Klerksdorp, the Commission found that the merged entity will have a market share of less than 20% and will continue to face competition from other retailers in the market such as Overland Cash and Carry, Tom's Choice, Mega Packaging, OK Grocer Minimarket, amongst others.

[10.3] In respect of the wholesale trade in grocery products in New Castle, QwaQwa, and Phuthaditjhaba, the Commission found that the merged entity will have a market share of less than 10% with an accretion of approximately 3%. The merged entity will continue to face competition from other wholesalers such as Phoenix Cash and Carry, PMB Wholesalers, Howick Wholesalers, Champion Cash and Carry and Goolams Wholesalers, amongst others.

Public Interest

[12] During the merger investigation, the merging parties submitted that the proposed transaction will not result in any retrenchments and provided an unequivocal undertaking to the Commission to this effect. It was submitted by the merging parties that the employees of the Target Stores will be transferred in terms of section 197 of the Labour Relations Act 66 of 1995 and accordingly their employment conditions will not be negatively affected.

[13] However, during the Tribunal proceedings the merging parties agreed to a moratorium on employment for a period of 9 months, which was imposed as a condition to the merger.

[14] In relation to the proposed transaction's effect on the greater spread of ownership by Historically Disadvantaged Persons ("HDPs") and workers, the merging parties submitted that the acquiring firm is owned by HDPs while the Target Stores are not owned by HDPs. The proposed transaction will therefore lead to an increase in the spread of ownership HDPs.

Conclusion

[15] Based on the above, we are of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any of the relevant markets. Furthermore, the proposed transaction does not raise any public interest concerns. We therefore approved the merger subject to the employment condition set out in the attached **Annexure A**.

Signed by: Yasmin Tayob Carrim
Signed at: 2021-03-24 09:35:01 +02:00
Reason: Witnessing Yasmin Tayob Carrim

Yasmin Tayob Carrim

Ms Yasmin Carrim

24 March 2021
Date

Mr Enver Daniels and Prof. Fiona Tregenna

Tribunal Case Manager:

Lumkisa Jordan

For the merging parties:

Kwena Mahlakoana of Kwena Mahlakoana
Attorneys

For the Commission:

Mogau Aphane and Thabelo Masithulela

ANNEXURE A

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM163Dec20

In the matter between:

Devland Cash and Carry (Pty) Ltd

Primary Acquiring Firm

And

Certain stores of Masscash (Pty) Ltd

Primary Target Firm

CONDITIONS

1. DEFINITIONS

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

- 1.1 **"Acquiring Firm"** means Devland Cash and Carry (Pty) Ltd;
- 1.2 **"Approval date"** means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT10);
- 1.3 **"Day"** means any calendar day which is not a Saturday, Sunday or public holiday in South Africa;
- 1.4 **"Commission"** means the Competition Commission of South Africa;
- 1.5 **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.6 **"Competition Act"** means the Competition Act, No. 89 of 1998, (as amended);
- 1.7 **"Conditions"** mean these conditions.

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- 1.8 **"Employees"** means employees of the Target Stores to be transferred to the Acquiring Firm in terms of section 197 of the LRA and the employees of the Acquiring Firm and the Target Stores as at the Approval Date of the proposed transaction;
- 1.9 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.10 **"LRA"** means the Labour Relations Act, No. 66 of 1995, (as amended);
- 1.11 **"Merger"** means the acquisition of the Target Stores by the Acquiring Firm;
- 1.12 **"Merging Parties"** means the Acquiring Firms and the Target Stores;
- 1.13 **"Moratorium"** means a period of 9 months from the Implementation Date;
- 1.14 **"Rules"** mean the Rules for the Conduct of Proceedings in the Competition Commission and the Rules for the Conduct of Proceedings in the Competition Tribunal;
- 1.15 **"Target Stores"** mean the stores that are subject of the Merger, a list of which appears as Appendix A1 of these Conditions.
- 1.16 **"Tribunal"** means the Competition Tribunal of South Africa; and
- 1.17 **"Tribunal Rules"** means the Rules for the Conduct of Proceedings in the Tribunal.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

- 2.1 The Merging Parties shall not retrench any Employees for a period of 9 (nine) months from the Implementation Date.
- 2.2 For the sake of clarity, retrenchments do not include:
- (i) voluntary separation arrangements;
 - (ii) voluntary early retirement packages;
 - (iii) retrenchments as a result of unreasonable refusals to be redeployed in

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- accordance with the provisions of the LRA;
- (iv) resignations or retirements in the ordinary course of business;
 - (v) retrenchments lawfully effected for operational requirements unrelated to the Merger;
 - (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and
 - (vii) any decision not to renew or extend a contract of a contract worker.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1 The Merging Parties shall circulate a copy of the Conditions to all their employees within 5 (five) Days of the Approval Date.
- 3.2 As proof of compliance with 3.1 above, a director of each Merging Party shall within 10 (ten) Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees in that regard.
- 3.3 The Acquiring Firms shall inform the Commission in writing of the Implementation Date within 5 (five) Days of its occurrence.
- 3.4 The Acquiring Firm shall, on the 9th (ninth) month following Implementation Date, submit an affidavit confirming compliance with the condition 2.1 above for the duration of the Moratorium.
- 3.5 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

4. VARIATION

- 4.1 The Commission or the Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

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5. GENERAL

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

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APPENDIX A 1

A list of Target Stores

Store	Location
Cambridge Food	Kempton Park
Cambridge Food	Bloemfontein
Cambridge Food	JHB CBD
QwaQwa Cash and Carry	QwaQwa
Rhino Cash and Carry	Lusikisiki
Rhino Cash and Carry	Umlazi
Rhino Cash and Carry	Umzinto
Rhino Cash and Carry	Flagstaff
Klerksdorp Cash and Carry	Klerksdorp