

COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO078Jul20

In the matter between:

The Competition Commission Applicant

And

Retail Capital (Pty) Ltd First Respondent

First Asset Finance (Pty) Ltd Second Respondent

Panel: Y Carrim (Presiding Member), AW Wessels (Tribunal Member), F Tregenna (Tribunal Member)

Heard on: 05 August 2020

Decided on: 05 August 2020

CONSENT AGREEMENT

CONSENT AGREEMENT IN TERMS OF SECTION 49D OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION

COMMISSION AND, RETAIL CAPITAL PTY LTD AND FIRST ASSET FINANCE PTY LTD
IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A(3) OF THE
COMPETITION ACT, 1998.

PREAMBLE

The Competition Commission and, Retail Capital Pty Ltd and First Asset Finance Pty Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this consent agreement as an order of the Competition Tribunal in terms of section 49D read with sections 58(1)(b) and 59(1)(d) of the Competition Act 89 of 1998, as amended on the terms set out below:

2. DEFINITIONS

For the purposes of this consent agreement the following definitions shall apply:

- 2.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 2.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 2.3. "Consent Agreement" means this agreement duly signed and concluded between the Commission and the Respondents;
- 2.4. "Days" means business days;
- 2.5. "FAF" means First Asset Finance Pty Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 145 Sir Lowry Road, Woodstock, Cape Town, 7915, the primary target firm;
- 2.6. "Merging Parties" means Retail Capital and FAF;

2.7. “Retail Capital” means Retail Capital Pty Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 145 Sir Lowry Road, Woodstock, Cape Town;

2.8. “Respondents” mean Retail Capital and FAF;

2.9. “The Transaction” means the November 2018 transaction whereby Retail Capital acquired 51% (fifty one percent) of the issued share capital of FAF; and

2.10. “Tribunal” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. BACKGROUND TO THIS CONSENT AGREEMENT

3.1 On 19 July 2019 the Commission received a notification of an intermediate merger transaction, which was filed by Retail Capital and FAF. The primary acquiring firm was Retail Capital and the primary target firm was FAF. Prior to the Transaction, Retail Capital did not directly or indirectly hold any shareholding or exercise any control over FAF.

3.2 The Transaction resulted in Retail Capital acquiring sole control of FAF in terms of the Act.

3.3 In the merger filing, the Merging Parties indicated that the Transaction had been implemented in November 2018. The Commission evaluated the Transaction and found that it was unlikely to result in the substantial lessening and/ or prevention of competition in any market, that it was unlikely to negatively impact on employment, and that it did not raise any public interest concerns. The Transaction was accordingly approved without any conditions and the Commission issued the merger clearance certificate on 13 August 2019. The issue of prior implementation, to which this Consent Agreement relates, was dealt with separately.

4. COMMISSION'S INVESTIGATION AND FINDINGS

4.1 Retail Capital did not directly or indirectly hold any shareholding or exercise any control over FAF prior to the Transaction. In terms of the Transaction, Retail Capital purchased the claims each seller held against FAF and acquired 51% (fifty one percent) of FAF's entire issued share capital in the form of 471, 750 ordinary no par value shares in FAF's issued share capital.

4.2 The Transaction was implemented in November 2018. The Merging Parties voluntarily informed the Commission of their bona fide prior implementation error in May 2019 and notified the Commission of the Transaction in July 2019, nine months after the transaction was implemented. This conduct by the Merging Parties is in contravention of 13A(3) of the Act, which stipulates that parties to an intermediate merger may not implement that merger until it has been approved, with or without conditions, by the Commission in terms of section 14(1)(b).

5. ADMISSION OF LIABILITY

The Respondents admit that they contravened section 13A(3) of the Act by implementing the Transaction prior to the approval of the Transaction by the Commission.

6. FUTURE CONDUCT

6.1 The Respondents agree and undertake to notify the Commission of any future transactions that constitute a notifiable merger as defined in section 12(1) of the Act read together with section 11(5) of the Act. The Respondents furthermore agree and undertake to refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act.

6.2 The Respondents also agree and undertake to develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of Chapter 3 of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act.

6.3 The Respondents furthermore agree and undertake to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Tribunal.

7. ADMINISTRATIVE PENALTY

7.1 Having regard to the provisions of section 59(1)(d), 59(2) and 59(3) of the Act, Retail Capital accepts that it is liable to pay an administrative penalty, which is not more than 10% of its annual turnover in the Republic and its exports from the Republic during the preceding financial year.

7.2 The Merging Parties have agreed that Retail Capital will pay an administrative penalty in the total amount of R742 500 (seven hundred and forty-two thousand and five hundred Rand), payable in 10 (ten) equal monthly instalments of R74 250 (seventy-four thousand, two hundred and fifty Rand). The first instalment shall payable within 30 days from the date of the confirmation of this Consent Agreement as an order of the Tribunal.

7.3 The administrative penalty will accrue interest in terms of the provisions of section 80(1) of the Public Finance Management Act 1 of 1999 for any amounts not paid within a year from the date of confirmation of this Consent Agreement by the Tribunal.

7.4 The penalty and such interest as may become payable in terms of 7.3 above, must be paid into the Commission's bank account which is as follows:

Bank name: Absa Bank

Branch name: ABS COMM PUBL NR

Account holder: The Competition Commission

Account number: [...]

Account type: Current

Account Branch Code: 638056

Reference: 2019Jul0038/ Retail Capital and FAF

7.5 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and the Respondents relating to the contravention of section 13A(3) of the Act by the Respondents that were the subject of the Commission's investigation under CC case number: 2019Jul0038.

Tembinkosi Bonakele

The Commissioner: Competition Commission