



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM193Feb15/020644

In the matter between:

RCS Cards Proprietary Limited

Primary Acquiring Firm

And

The Consumer Finance Business of the JD Group Limited

Primary Target Firms

Panel	: Norman Manoim (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 20 May 2015
Order Issued on	: 20 May 2015
Reasons Issued on	: 11 June 2015

Reasons for Decision

Approval

- [1] On the 20 May 2015 the Competition Tribunal ("Tribunal") conditionally approved the merger between RCS Cards Proprietary Limited ("RCS Cards") and The Consumer Finance Business of the JD Group Limited ("Consumer Finance Business").
- [2] The reasons for conditionally approving the proposed transaction follow.

Parties to transaction

Primary acquiring firm

- [3] The primary acquiring firm is RCS Cards, a company incorporated in accordance with the company laws of the Republic of South Africa. RCS is a wholly-owned subsidiary of RCS Investment Holdings Limited ("RCS Investment") which is controlled by BNP Paribas Personal Finance S.A ("BNP"). BNP in turn is controlled by BNP Paribas S.A which is listed on the Euronet Paris Stock Exchange.
- [4] The primary activity of RCS Cards is the provision of unsecured credit and retail credit card facilities. RCS also provides insurance products which are ancillary to the provision of this credit.

Primary target firm

- [5] The primary target firm is the Consumer Finance Business of the JD Group Limited. The Consumer Finance Business is operated through JD Group's wholly owned subsidiaries JD Consumer Finance (Pty) Ltd ("JDCF") and JDG Trading (Pty) Ltd ("JDGT").
- [6] The Consumer Finance Business provides secured and unsecured consumer credit. The Business is also involved in the evaluation of credit applications and administrative work related to the provision of credit.
- [7] The JD Group is involved in the retail business with brand stores retailing furniture, electronics, appliances, building materials and DIY. The JD Group also has three entities which provide long and short term insurance.

Proposed transaction and rationale

- [8] The proposed transaction involves RCS Cards acquiring the Consumer Finance Business from JDCF and JDGT. As a result of RCS Cards acquiring direct control of the Consumer Finance Business the JD Group will cease to provide consumer credit to its customers in its retail stores. This transaction does not include an acquisition of the JD Group Insurance Business ("JDGI business"). However it should be noted at this juncture that the Sale of Business Agreement contains a restraint of trade clause which restricts the JD Group from offering credit life insurance to customers for a period of three years.

- [9] For RCS, the acquisition of the Consumer Finance Business is an investment opportunity which would allow it to expand further into South Africa's consumer finance sector. As part of its current restructuring process the JD Group decided to exit the consumer finance business and instead focus its attention on its retail operations.
- [10] In order to provide an understanding of the effect the transaction would have on the day-to-day business at retail stores within the JD Group the merging parties provided the Tribunal with an explanation comparing the pre and post-merger situation. This is illustrated by using the example of a consumer walking into a JD Group store with the intention of purchasing a TV on credit. In the pre-merger situation the consumer would be assisted by a retail store employee who would assist the consumer with the application process. Thereafter this credit application would be sent to the Consumer Finance Business which would evaluate the application and decide on whether credit should be granted. Once credit was approved cashiers in-store would receive monthly payments from the consumer if the consumer elected not to have a debit order run off his account. These operations would be overseen by in-store managers. The change in this process post-merger would be that the evaluation of the application which was previously done by the in-house Consumer Finance Business would be taken over by RCS. In respect to this the merging parties state that RCS would not have any of its employees present at an in-store level.
- [11] In instances where unsecured credit is granted a credit provider may require a consumer to take credit life insurance out in order to protect the underlying debt. This is seen as ancillary to the provision of credit and is considered to be a meaningful sales opportunity. In the pre-merger situation credit life insurance was provided by the JDGI business. According to the restraint of trade clause the JD Group is restrained from providing credit life insurance for three years post-merger. The merging parties submit that the rationale for this exclusivity is the protection of the underlying value of that sales opportunity.

Impact on competition

- [12] The Commission and the merging parties agreed that the relevant market for this transaction is the national market for the provision of unsecured credit. The Commission found that there is an overlap in the provision of unsecured credit. In its

investigation the Commission identified an excess of ten market participants with dominating firms being banks such as African Bank, Capitec Bank and Standard Bank. The Commission found that the merging party's post-merger market shares are nominal and as a result it concluded that the merger is unlikely to raise significant competition concerns.

- [13] In respect to the restraint of trade clause the Commission evaluated its effect on competition as well as its impact on public interest. The Commission considered the following factors in its assessment; the rationale for including a restraint of trade, whether the transaction could be concluded without the restraint, length or duration of the restraint, the ambit of such a restraint, whether the restraint was an attempt to preserve a cartel and whether competitors were entering into the restraint of trade. The Commission found that the restraint of trade was justifiable as it was common practice for a purchaser to protect its investment. The Commission further found the restraint of trade to be reasonable as it is limited in its duration to that of three years. The public interest effect of the non- compete clause will be detailed under public interest.

Public interest

- [14] The merging parties submitted that the proposed transaction would not have any public interest issues as the 870 employees currently employed under the Consumer Finance Business would be transferred to RCS.
- [15] The Commission evaluated whether the restraint of trade clause would negatively impact the JDGI business and result in retrenchments of all the employees within that division.
- [16] JD Group submitted that the JDGI business would continue to be sustainable post-transaction despite the restraint of trade clause as the business has alternate sales offerings such as funeral cover. In order to ensure that the transaction would not negatively impact on the employees of the JDGI business, the JD Group undertook not to retrench any employees falling under the JDGI business as a result of the merger. It further undertook to ensure that the JDGI business remains running three years post the implementation date of the merger. The Commission concluded that the JDGI business would likely continue to be sustainable post-merger and

undertakings by the JD Group further provided the Commission with the comfort of concluding that the proposed transaction would not lead to a negative effect on employment levels.

- [17] During its investigation it emerged that two other classes of employees would be affected by the transaction. The two classes are; employees taken over by RCS and employees in the JD Group who were not part of the JDGI business. The merging parties gave an undertaking not to retrench any of the employees taken over by RCS. The Commission found that this undertaking mitigated any public interest concerns in relation to JD Group employees who were taken over by RCS post-merger.
- [18] The Commission also investigated whether the remaining class of employees viz. those JD Group employees not part of the JDGI business, would be affected by the merger. It concluded that although restructuring was currently taking place within the broader JD Group, any retrenchments that this process might lead to would not be merger specific. Accordingly the Commission did not recommend any conditions in respect of this class of employees.
- [19] When the matter came to the Tribunal for hearing, SACCAWU asked to make representations as it was not satisfied with the undertakings concluded between the merging parties and the Commission.
- [20] At the hearing representatives from SACCAWU alleged that retrenchments which had occurred prior to the merger as well as retrenchments envisioned as part of the restructuring were merger specific. They alleged that the proposed transaction would result in job duplications between the Financial Services Division and RCS. SACCAWU alleged that this would result in 3290 employees of the Financial Services Division who provide in-store credit assessments, credit scoring and follow-ups on defaulting payment losing their jobs. SACCAWU therefore opposed the proposed transaction.
- [21] The JD Group submitted that the restructure was independent of the proposed transaction and operational in nature. It further submitted that the JD Group and SACCAWU are currently in a protracted labour dispute in relation to the restructure and that the additional protections requested by the Union were better granted by a different forum.

- [22] However at the hearing the Commission changed its position on the conditions. The Commission submitted that in order to allay SACCAWU's fears that retrenchments may be merger specific the proposed merger conditions be amended to include an undertaking that no retrenchments within the JD Group be allowed if merger specific. SACCAWU has submitted that this would be an agreeable outcome and would address their concerns.
- [23] The merging parties opposed this suggestion. While they submitted that they were willing to undertake not to retrench any employees as a result of the merger they would not want the inclusion of such in the merger conditions as it would result in a possible floodgate situation in light of the operational restructure that the JD Group envisions.

Our approach

- [24] We accept that there are three categories of employees affected by the proposed transaction; employees taken over by RCS, employees of the JDGI business, and employees of the JD Group not part of the JDGI business or taken over by RCS.
- [25] In respect to employees taken over by RCS, we are satisfied that the undertaking by RCS not to retrench this group of employees mitigates any public interest concerns.
- [26] In respect of the JDGI business of employees, we find that the undertaking not to retrench mitigates possible public interest concerns. As this is a specific concern and an undertaking which the merging parties have entered into with the Commission, we find it appropriate that the burden of proof rests with the merging parties if any of this class of employees is retrenched, to establish that the retrenchments are not merger specific. We inserted condition 2.6.1 as an amendment to the existing condition which did not speak to the issue of onus, to reflect that.¹ We explain our reasons for this below after we first deal with the position of JD Group employees.
- [27] In respect of the JD Group employees, we find that the Union had fairly raised concerns that they might be affected as a result of the merger. We are however also cognisant of the merging parties concern that extending protection to the JD Group

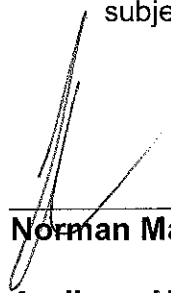
¹ Previously in the recommendation the draft condition 2.3 read as follows "JD Group shall not retrench any employees in the employ of JDGI as a result of the merger"

as a whole, could be overly burdensome, as employees retrenched as part of the restructuring process, might claim their retrenchments were merger specific.

- [28] Our solution to the problem was to insert a variance in the onus of proof. The condition, 2.6.1 which is in relation to the JDGI business, requires that the firm prove that retrenchments are not merger specific. This is in contrast to 2.6.2 which is in relation to the JD Group and which requires a retrenched employee to prove that the retrenchment is merger specific.
- [29] The reasons for adopting this approach to the onus is that on the facts of this case retrenchments within the JD Group are less likely to be merger specific as the restructuring process whilst contemporaneous with the merger, is not occasioned by it, but there is always a danger that the two processes might be elided and the merger creates the opportunity for the JD Group to retrench more extensively than might otherwise have been the case. Since this possibility is slight, the onus is placed on the employee to establish merger specificity. By contrast, the JDGI business is directly affected by the merger, and it is more likely that if retrenchments take place there, they are merger specific. Hence we reversed the onus, requiring the employer to prove that the retrenchment was not merger specific.
- [30] We have not altered the time period for the conditions of three years, as set out in accordance with 3.5 of the Order.

Conclusion

[31] 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, any public interest issues which may arise from the proposed transactions are mitigated by the conditions of this order. Accordingly we approve the proposed transaction subject to the conditions of this order.



Norman Manoim

11 June 2015
DATE

Andiswa Ndoni and Medi Mokuena concurring

Tribunal Researcher:	Aneesha Ravat
For the merging parties:	Judd Lurie of Bowman Gilfillan
For the Commission:	Amanda Mfuphi, Lebohang Mabidikakane and Seema Nunkoo
For SACCAWU:	Nelson Nthapo and Angie Phetlhe