

SOUTH AFRICA / JUDGMENT

Accelerate Property Fund Ltd v 15 Letting Enterprises being sold by Fourways Precinct (Pty) Ltd (16170) [2013] ZACT 28; [2013] 2 CPLR 519 (CT) (17 April 2013)

[2013] ZACT 28

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Medi Mokuena, Mondo Mazwai

CASE / FILE NUMBER

016170

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 016170

In the merger between:

ACCELERATE PROPERTY FUND LIMITED PRIMARYACQUIRING FIRM

and

15 LETTING ENTERPRISES BEING SOLD

BY FOURWAYS PRECINCT (PTY) LTD PRIMARYTARGET FIRMS

Panel : Andreas Wessels (Presiding Member) Medi Mokuena (Tribunal Member)

Mondo Mazwai (Tribunal Member)

Heard on : 13 March 2013

Order issued on : 19 March 2013

Reasons

issued on : 17 April 2013

Decision

Conditional Approval

On 19 March 2013, the Competition Tribunal (“Tribunal”), in terms of section 16(2)(b) of the Competition Act of 19981, conditionally approved the acquisition by Accelerate Property Fund Limited of 15 letting enterprises being sold by Fourways Precinct (Pty) Ltd.

The reasons for conditionally approving the proposed transaction follow.

Parties to transaction

The primary acquiring firm is Accelerate Property Fund Limited (“Accelerate”), a special purpose vehicle newly established for the purposes of the proposed transaction. Accelerate is to hold a portfolio of properties throughout South Africa and intends to list its shares on the Johannesburg Stock Exchange Limited (the “JSE”). The sole shareholder of Accelerate (as at January 2013) until the listing date is Mr. Michael Nicolas Georgiou.

We note that the Competition Commission (“Commission”) on 12 February 2013 conditionally² approved two intermediate merger notifications,³ in terms of which Accelerate will acquire a total of 72 properties, consisting of rentable retail, office, industrial and mixed use properties located throughout South Africa. These properties were taken into account as part of Accelerate’s property portfolio in the competition analysis of this transaction.

The primary target properties comprise 15 letting enterprises⁴ being sold by Fourways Precinct (Pty) Ltd (“Fourways Precinct”). These properties are all located in the Fourways node and comprise nine shopping centres and six office properties classified as rentable B-Grade office space.

Proposed transaction and rationale

Accelerate intends acquiring a property portfolio from Fourways Precinct comprising of 15 letting enterprises.

Accelerate was created to facilitate the acquisition of a number of properties and to list on the JSE to inter alia raise capital to pursue growth and investment opportunities in the future and to enhance the public profile and general public awareness of Accelerate.

Competition assessment

The Commission found no geographic overlap between the activities of the merging parties in any relevant market except for the market for rentable retail space in a convenience centre. One of the shopping centres being acquired by Accelerate is the Buzz Shopping Centre located at Witkoppen, Johannesburg. Accelerate will also own inter alia the Leaping Frog and Waterford Shopping Centre located in respectively Sandton and Fourways. However, the Commission found that there are numerous competing shopping centres within a 5 to 10 km radius from the Buzz Shopping Centre. The Commission was therefore satisfied that no competition concerns will arise as a result of this transaction. We concur with this conclusion.

Public interest

Employment

The merging parties confirmed that the proposed transaction will have no adverse effect on employment.⁵

Small business

The Commission raised a public interest concern pertaining to the exclusivity clauses contained in the lease agreements of four tenants in certain shopping centres to be acquired by Accelerate in terms of this transaction (namely the Fourways Mall Shopping Centre, Cedar Square and the Buzz Shopping Centre). The Commission was concerned that these exclusivity clauses could have the effect of preventing small businesses, such as butcheries and delicatessen stores, from gaining access to rentable retail space in the respective shopping centres. In order to address this concern, the Commission, based on certain undertakings by the merging parties, recommended that certain conditions should be attached to the approval of this merger. These recommended conditions were aimed at the removal of the respective exclusivity clauses at the renewal dates of each of the lease agreements.

We agree with the Commission's conclusion that the above-mentioned exclusivity clauses in certain lease agreements each raise a public interest concern in terms of section 12A.(3)(c) of the Act and that conditions are warranted to address such concern.

However, the Tribunal was concerned that certain of these lease agreements were only renewable on a distant future date, i.e. in 20[...] and 20[...]. Given these concerns of the Tribunal, the merging parties consequently in respect of the relevant lease agreements undertook to negotiate with the relevant tenants to have the exclusivity clauses in the lease agreements removed within a specified period of the Tribunal's approval date of the transaction, i.e. well in advance of the renewal dates contained in the lease agreements.

Based on these revised undertakings by Accelerate, the Tribunal approved the proposed transaction subject to the following conditions:

Accelerate shall negotiate with [...] (Pty) Ltd in respect of the current effective lease agreement, in the utmost good faith, to have the exclusivity clauses in the lease agreement in respect of the Fourways Mall Shopping Centre removed at the approaching renewal date (in 20[...]) as contained in the lease agreement.

Accelerate shall negotiate with [...] (Pty) Ltd in respect of the current effective lease agreement, in the utmost good faith, to have the exclusivity clauses in the lease agreement in respect of the Cedar Square, removed within [...] of the Tribunal order.

Accelerate shall negotiate with [...] (Pty) Ltd in respect of the current effective lease agreement, in the utmost good faith, to have the exclusivity clauses in the lease agreement in respect of the Cedar Square, removed within [...] of the Tribunal order.

Accelerate shall negotiate with [...] (Pty) Ltd in respect of the current effective lease agreement, in the utmost good faith, to have the exclusivity clauses in the lease agreement in respect of the Buzz Shopping Centre removed at the approaching renewal date (in 20[...]) as contained in the lease agreement.

In the context of the above-mentioned public interest concern, we have imposed the aforementioned conditions aimed at addressing likely effects on the ability of small businesses to become competitive.

Other public interest

issues

Apart from the above-mentioned concern, the proposed merger raises no other public interest concerns.

CONCLUSION

We approve the proposed transaction subject to the conditions set out in the attached “Annexure A”.

17 April 2013

ANDREAS WESSELS DATE

Medi Mokuena and Mondo Mazwai concurring

Tribunal Researcher: Nicola Ilgner

For the Commission: Dineo Mashego

For the merging parties: Glyn Marais Inc.

1Act No. 89 of 1998, as amended.

2These conditions are similar in nature to those imposed on this transaction and are aimed at addressing a public interest concern.

3See pages 8 and 10 to 13 of the Commission’s report.

4For a list of these properties, see pages 7 to 9 of the merger record.

5See pages 11, 20, 81 and 133 of the record.

5

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