

SOUTH AFRICA / JUDGMENT

Arch Property Fund Ltd v K2012089838 (SA) (Pty) Ltd and Another (017087) [2013] ZACT 96 (27 September 2013)

[2013] ZACT 96

COURT

Competition Tribunal

BEFORE

Anton Roskam, Mondo Mazwai, Imraan Valodia

CASE / FILE NUMBER

017087

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017087

In the matter between: ARCH PROPERTY FUND

LIMITEDPrimary Acquiring Firm And K2012089838 (SA)

(PTY) LTD AND ARMANDI PROPERTIES (PTY) LTDPrimary

Target Firms Panel: Anton Roskam (Presiding Member) Mondo Mazwai (Tribunal Member)

Imraan Valodia (Tribunal Member) Heard on: 28 August 2013 Order Issued on: 28 August 2013

Reasons Issued on: 27 September 2013

Reasons

for Decision Approval 1. On 28 August 2013, The Competition Tribunal ("Tribunal") unconditionally approved the acquisition by Arch Property Fund Limited of (1) the shares in and loan claims against which Leaf Property Fund Trust holds in K2012089838(SA) (Pty) Ltd and (2) Armandi Properties (Pty) Ltd in respect of a 50% (fifty percent) undivided share in Erf 12544, Constantia. 2. The reasons for approving the proposed transaction follow. Parties to transaction 3. The primary acquiring firm is Arch Property Fund Limited ("Listco"). Listco is wholly owned by Amdec Investments (Pty) Ltd ("Amdec"). Amdec, through its wholly owned subsidiaries, owns a portfolio of immovable properties and property letting enterprises ("Amdec Property Portfolio"). In terms of an internal restructuring, Amdec will procure that Listco will hold all the issued shares in two of its wholly owned subsidiaries, namely Melrose Arch Investment Holdings (Pty) Ltd ("Melrose Arch") and Amdec Property Investments (Pty) Ltd ("API") (hereinafter referred to as the "Amdec Restructuring"). 4. The first primary target firm is K2012089838 (Pty) Ltd ("Leaf SPV"). Leaf SPV is a newly incorporated limited liability

company solely owned by The Leaf Property Fund Trust (“Leaf Property”). In terms of an internal restructuring, Leaf

Property will procure that a portfolio of its immovable properties and property letting enterprises (“Leaf Property Portfolio”)

be transferred to Leaf SPV (“Leaf Restructuring”). 5. The second primary target firm is Armandi Properties (Pty) Ltd (“Armandi”) which owns a 50% undivided share in Erf 12544, Constantia known as “Virgin Active, Steenberg” (“Steenberg Property”). The Steenberg Property consists of gym property situated in Westlake Business Park II, Westlake Cape Town. The Steenberg Property is owned in equal shares by Listco and Armandi and is currently let to a Virgin Active gym. Listco will not acquire any interest, direct or otherwise, in Armandi and is only acquiring an undivided share in the Steenberg Property. Proposed Transaction and Rationale 6. Listco intends to acquire from Leaf Property its share in and loan claims against Leaf SPV. In addition Listco intends to acquire from Armandi a 50% undivided share in the Steenberg Property. Post-merger, Leaf SPV and the Steenberg Property will be wholly

owned and controlled by Listco. The proposed transaction was notified as a single transaction as a result of the coexistent and

indivisible nature of the transactions¹. 7. Listco currently owns a landmark property in the form of Melrose Arch. Amdec (through its 100% stake in Listco) wishes to diversify

its investment by Listco acquiring the Leaf Property Portfolio (through its acquisition of Leaf SPV), thus having access to a wider range of properties and geographic areas. 8. Leaf SPV submits that the Merger allows the current investors of Leaf Property to obtain investment exposure to a flagship asset in the form of Melrose Arch and promotes diversification of both Leaf SPV’s and Listco’s property holdings across a wider range of properties and geographic areas. 9. Leaf SPV submits further that the Merger will facilitate the proposed IPO and create the scale required for the listing of Listco on the JSE, which will unlock value, create liquidity, widen the shareholder base and offer the public access to property assets that were not previously available on the market. 10. Armandi owns a 50% undivided share in the Steenberg Property which is included within the Amdec Portfolio. Armandi does not have any other interest within the property industry and does not have a vested interest in this transaction which will ultimately result in the listing of Listco on the JSE. Relevant Market and Impact on Competition 11. Listco’s property portfolio comprises of residential estates, office property and mixed use properties throughout SA. The Leaf SPV property portfolio comprises of office property located throughout SA. The Steenberg Property (in which Leaf SPV has an undivided 50% share) comprises of gym space located in the Western Cape. Thus the merging parties both own office property and gym property. The focus of the transaction for purposes of the competition analysis was on these two types of properties. Office Property 12. The product market for purposes of this transaction is the market for rentable Grade A office property in the Western Cape. The Competition Tribunal has ruled in Primegro Properties Ltd and Growthpoint Properties Ltd² that office properties are divided into different classes according to factors such as age and quality of the buildings etc. and

that each of these classes constitutes a distinct market. 13. Two properties were singled out that may cause a geographic overlap, namely Listco's Westlake Property located in Tokai and Leaf SPV's Great Westford Property located in the Rondebosch node. According to the South African Property Owners Association ["SAPOA"] Tokai is not defined as a node on its own, but rather forms part of the greater Claremont area and the Claremont node. The Tokai area and the Rondebosch node are not adjacent to one another and are separated by numerous other areas and a distance of approximately 15.7km. 14. The two merging parties (Listco and Leaf SPV) do not own rentable Grade A office property within the same node or within close

proximity of one another. Thus the proposed transaction does not result in a geographic overlap. Gym Property 15. Listco's Westlake Property was previously let to a Curves gym which later closed down due to the Curves gym suffering financial difficulty. Leaf SPV's Great Westerford property is currently let to a private gym and the Steenberg Property is currently let to a Virgin Active gym. Thus the relevant product market identified is the market for the provision of rentable gym property. 16. The merging parties' gym properties in the Western Cape, more specifically the competitive effect in the Claremont and Rondebosch nodes in a 5-10km radius from the target gym properties, were analysed as this was the area identified to most likely raise competitive concerns. 17. Listco's Westlake Property is located in the Claremont node, Leaf SPV's Great Westerford Property is located in the Rondebosch node and the Steenberg Property is located in the Claremont node. 18. The Curves gym which was in the Westlake Property and the Virgin Active gym in the Steenberg Property are approximately 600m apart. Virgin Active Steenberg and the gym in the Great Westerford Property is approximately 2km apart. According to interviews conducted by the Commission during its investigation, Virgin Active Steenberg draws customers predominantly from the Tokai, Steenberg and Bergvliet areas, which are each within 5-10km of Virgin Active Steenberg. 19. There are several gym properties within a 5-10 km radius from the target properties which will exercise a constraint on Listco. Listco already owns an undivided 50% share in the Steenberg Property. The Commission found that the incentives of Listco will not change as a result of the shift from 50% to sole ownership of the Steenberg Property, as Listco does not have market power in relation to rentable gym property in the defined areas. We have no evidence to the contrary. 20. Moreover, the current tenants (Virgin Active Steenberg) of the Steenberg Property have concluded 20 year leases with escalation clauses thus it is unlikely that the transaction will negatively affect the existing tenants in the properties.

Conclusion

21. In light of the above, we conclude that the proposed transactions are unlikely to substantially prevent or lessen competition in the market for rentable Grade A offices or in the rentable gym property market. In addition, no public interest issues arise from the proposed transactions. Accordingly, we approve the proposed transactions unconditionally. Mondo Mazwai 27 September 2013 DATE Anton Roskam and Imraan Valodia concurring Tribunal Researcher: Derrick Bowles For the merging parties: Susan Meyer - Cliffe Dekker

Hofmeyr Inc. For the Commission: Lana Norton

In the matter between:

ARCH PROPERTY FUND LIMITEDPrimary Acquiring Firm

And

K2012089838 (SA) (PTY) LTD AND

ARMANDI PROPERTIES (PTY) LTDPrimary Target Firms

Panel: Anton Roskam (Presiding Member)

Mondo Mazwai (Tribunal Member)

Imraan Valodia (Tribunal Member)

Heard on: 28 August 2013

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Reasons

for Decision

Approval

1. On 28 August 2013, The Competition Tribunal ("Tribunal") unconditionally approved the acquisition by Arch Property Fund Limited of (1) the shares in and loan claims against which Leaf Property Fund Trust holds in K2012089838(SA) (Pty) Ltd and (2) Armandi Properties (Pty) Ltd in respect of a 50% (fifty percent) undivided share in Erf 12544, Constantia.
2. The reasons for approving the proposed transaction follow.

Parties to transaction

3. The primary acquiring firm is Arch Property Fund Limited ("Listco"). Listco is wholly owned by Amdec Investments (Pty) Ltd ("Amdec"). Amdec, through its wholly owned subsidiaries, owns a portfolio of immovable properties and property letting enterprises ("Amdec Property Portfolio"). In terms of an internal restructuring, Amdec will procure that Listco will hold all the issued shares in two of its wholly owned subsidiaries, namely Melrose Arch Investment Holdings (Pty) Ltd ("Melrose Arch") and Amdec Property Investments (Pty) Ltd ("API") (hereinafter referred to as the "Amdec Restructuring").
4. The first primary target firm is K2012089838 (Pty) Ltd ("Leaf SPV"). Leaf SPV is a newly incorporated limited liability

company solely owned by The Leaf Property Fund Trust (“Leaf Property”). In terms of an internal restructuring, Leaf

Property will procure that a portfolio of its immovable properties and property letting enterprises (“Leaf Property Portfolio”)

be transferred to Leaf SPV (“Leaf Restructuring”).

5. The second primary target firm is Armandi Properties (Pty) Ltd (“Armandi”) which owns a 50% undivided share in Erf 12544, Constantia known as “Virgin Active, Steenberg” (“Steenberg Property”). The Steenberg Property consists of gym property situated in Westlake Business Park II, Westlake Cape Town. The Steenberg Property is owned in equal shares by Listco and Armandi and is currently let to a Virgin Active gym. Listco will not acquire any interest, direct or otherwise, in Armandi and is only acquiring an undivided share in the Steenberg Property.

Proposed Transaction and Rationale

6. Listco intends to acquire from Leaf Property its share in and loan claims against Leaf SPV. In addition Listco intends to acquire from Armandi a 50% undivided share in the Steenberg Property. Post-merger, Leaf SPV and the Steenberg Property will be wholly

owned and controlled by Listco. The proposed transaction was notified as a single transaction as a result of the coexistent and

indivisible nature of the transactions¹.

7. Listco currently owns a landmark property in the form of Melrose Arch. Amdec (through its 100% stake in Listco) wishes to diversify

its investment by Listco acquiring the Leaf Property Portfolio (through its acquisition of Leaf SPV), thus having access to a wider range of properties and geographic areas.

8. Leaf SPV submits that the Merger allows the current investors of Leaf Property to obtain investment exposure to a flagship asset in the form of Melrose Arch and promotes diversification of both Leaf SPV’s and Listco’s property holdings across a wider range of properties and geographic areas.
9. Leaf SPV submits further that the Merger will facilitate the proposed IPO and create the scale required for the listing of Listco on the JSE, which will unlock value, create liquidity, widen the shareholder base and offer the public access to property assets that were not previously available on the market.
10. Armandi owns a 50% undivided share in the Steenberg Property which is included within the Amdec Portfolio. Armandi does not have any other interest within the property industry and does not have a vested interest in this transaction which will ultimately result in the listing of Listco on the JSE.

Relevant Market and Impact on Competition

11. Listco's property portfolio comprises of residential estates, office property and mixed use properties throughout SA. The Leaf SPV property portfolio comprises of office property located throughout SA. The Steenberg Property (in which Leaf SPV has an undivided 50% share) comprises of gym space located in the Western Cape. Thus the merging parties both own office property and gym property. The focus of the transaction for purposes of the competition analysis was on these two types of properties.

Office Property

12. The product market for purposes of this transaction is the market for rentable Grade A office property in the Western Cape. The Competition Tribunal has ruled in Primegro Properties Ltd and Growthpoint Properties Ltd² that office properties are divided into different classes according to factors such as age and quality of the buildings etc. and that each of these classes constitutes a distinct market.
13. Two properties were singled out that may cause a geographic overlap, namely Listco's Westlake Property located in Tokai and Leaf SPV's Great Westford Property located in the Rondebosch node. According to the South African Property Owners Association ["SAPOA"] Tokai is not defined as a node on its own, but rather forms part of the greater Claremont area and the Claremont node. The Tokai area and the Rondebosch node are not adjacent to one another and are separated by numerous other areas and a distance of approximately 15.7km.
14. The two merging parties (Listco and Leaf SPV) do not own rentable Grade A office property within the same node or within close

proximity of one another. Thus the proposed transaction does not result in a geographic overlap.

Gym Property

15. Listco's Westlake Property was previously let to a Curves gym which later closed down due to the Curves gym suffering financial difficulty. Leaf SPV's Great Westerford property is currently let to a private gym and the Steenberg Property is currently let to a Virgin Active gym. Thus the relevant product market identified is the market for the provision of rentable gym property.
16. The merging parties' gym properties in the Western Cape, more specifically the competitive effect in the Claremont and Rondebosch nodes in a 5-10km radius from the target gym properties, were analysed as this was the area identified to most likely raise competitive concerns.
17. Listco's Westlake Property is located in the Claremont node, Leaf SPV's Great Westerford Property is located in the Rondebosch node and the Steenberg Property is located in the Claremont node.

18. The Curves gym which was in the Westlake Property and the Virgin Active gym in the Steenberg Property are approximately 600m apart. Virgin Active Steenberg and the gym in the Great Westerford Property is approximately 2km apart. According to interviews conducted by the Commission during its investigation, Virgin Active Steenberg draws customers predominantly from the Tokai, Steenberg and Bergvliet areas, which are each within 5-10km of Virgin Active Steenberg.
19. There are several gym properties within a 5-10 km radius from the target properties which will exercise a constraint on Listco. Listco already owns an undivided 50% share in the Steenberg Property. The Commission found that the incentives of Listco will not change as a result of the shift from 50% to sole ownership of the Steenberg Property, as Listco does not have market power in relation to rentable gym property in the defined areas. We have no evidence to the contrary.
20. Moreover, the current tenants (Virgin Active Steenberg) of the Steenberg Property have concluded 20 year leases with escalation

clauses thus it is unlikely that the transaction will negatively affect the existing tenants in the properties.

Conclusion

21. In light of the above, we conclude that the proposed transactions are unlikely to substantially prevent or lessen competition in the market for rentable Grade A offices or in the rentable gym property market. In addition, no public interest issues arise from the proposed transactions. Accordingly, we approve the proposed transactions unconditionally.

Mondo Mazwai

27 September 2013

DATE

Anton Roskam and Imraan Valodia concurring

Tribunal Researcher: Derrick Bowles

For the merging parties: Susan Meyer - Cliffe Dekker Hofmeyr Inc.

For the Commission: Lana Norton

¹The Armandi Sale will be conditional upon the Leaf SPV Sale and the listing of Listco on the JSE. Listco currently owns the other 50% share in the Steenberg Property and the ultimate intention of the merging parties is to amalgamate and combine in Listco the Leaf Property Portfolio and the Amdec Property Portfolio which includes inter alia Listco's 50% share in the Steenberg Property and the remaining 50% share in the Steenberg Property, being acquired by Listco in this proposed transaction.

2Tribunal case No 29/LM/June03.

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