

SOUTH AFRICA / JUDGMENT

CBD Investments (Pty) Ltd v Rebosis Property Fund Limited, Ascension Properties (Pty) Ltd, Main Street 1119 (Pty) Ltd and Cape Horizon Properties 125 (Pty) Ltd in respect of a portfolio of 22 Property Rental Enterprises (LM103OCT23) [2024] ZACT 34 (10 January 2024)

[2024] ZACT 34

COURT

Competition Tribunal

BEFORE

AW Wessels, L Mncube, G Budlender

CASE / FILE NUMBER

LM103OCT23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM103OCT23

In the matter between: CBD Investments (Pty) Ltd Primary Acquiring Firm And Rebosis Property Fund Limited, Ascension Properties (Pty) Ltd, Main Street 1119 (Pty) Ltd and Cape Horizon Properties 125 (Pty) Ltd in respect of a portfolio of 22 (twenty-two) property rental enterprises
Primary Target Firms

Panel

: AW Wessels (Presiding Member)

: L Mncube (Panel Member)

: G Budlender (Panel Member)

Heard on : 06 November 2023

Order issued on : 07 November 2023

Reasons issued on: : 10 January 2024

REASONS

FOR DECISION

Introduction

- [1] On 07 December 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger wherein CBD Investments (Pty) Ltd (“CBD Investments”) intends to acquire a portfolio of 22 (twenty-two) property rental enterprises (“Target Properties”) from Rebosis Property Fund Limited (“Rebosis”) and its subsidiaries, Ascension Properties (Pty) Ltd (“Ascension”), Main Street 1119 (Pty) Ltd (“Main Street”) and Cape Horizon Properties 125 (Pty) Ltd (“Cape Horizon”) (collectively referred to as the “Target Firms”).

The Parties

Primary acquiring firm

- [2] CBD Investments is a private company and wholly owned subsidiary of Heriot Investments (Pty) Ltd (“Heriot Investments”)[1]. Heriot Investments owns 87% shareholding in Heriot REIT, a property holding, and investment company listed on the Johannesburg Stock Exchange’s (“JSE”) AltX.[2] (“Heriot Group”)
- [3] Heriot Group owns a property portfolio comprising retail, industrial, office, residential and specialised properties as well as vacant land in South Africa. Relevant to the proposed transaction are Heriot Group’s activities in the provision of industrial and office properties.

Primary target firms

- [4] Rebosis is an approved Real Estate Investment Trust (“REIT”), established by the Billion Group in 2010 and listed on the JSE in 2011.[3] It owns a diverse property portfolio in South Africa, comprising retail, office and industrial properties. Ascension, Main Street and Cape Horizon are subsidiaries of Rebosis. The target firms were placed under business rescue in 2022.
- [5] The Target Firms own the 22 Target Properties being acquired by CBD Investments as follows:

Rebosis 16 properties Ascension 4 properties Main Street 1 property Cape Horizon 1 property

- [6] Details of the Target Properties, including their location, size, and ownership are attached hereto, marked “Annexure B”.

Transaction and Rationale

Transaction

- [7] The proposed transaction entails CBD Investments acquiring the Target Properties from the Target Group, as a going concern. Upon implementation, CBD Investments will exercise sole control over the Target Properties.

Rationale

- [8] The proposed transaction provides an opportunity for CBD Investments to turn around the financially distressed Target Properties which it has identified as lucrative and viable assets.
- [9] From the sellers' perspective, the proposed transaction is motivated by Rebosis' present business rescue plan which mandates the wind-down sale of its assets. The proposed transaction also seeks to ensure the business continuity of the Target Properties and to secure the continued employment of the current employees associated with the Target Properties.

Competition Assessment

Overlaps

- [10] In assessing the relevant market/s to determine overlaps we compared, having regard to the substitutability in terms of product classification, property grade and geographic location, Heriot Group's property portfolio to the Target Properties and found that the proposed transaction gives rise to a horizontal overlap, arising from the merging parties' involvement in the provision of office space and light industrial space.

Market Definition

Provision of Office Space

- [11] The Tribunal has previously concluded that the property market can be broadly divided into categories based on the use of the property such as retail, industrial, office, residential and other property.[4] Further, that office properties can be sub-divided into different classes such as Grade P, A, B or C. Furthermore, in Momentum Property Investments and Bonatla Property Holdings,[5] the Tribunal found that the geographic market for office properties is defined in terms of regional nodes.
- [12] In classifying the merging parties' office space, the Commission, and the merging parties, relied on data from the South African Property Owner's Association ("SAPOA") and found that 5 properties within the Heriot Group's property portfolio and 2 Target Properties, namely 124 Main and 28 Harrison (items 3 and 4 of Annexure B respectively) are classified under SAPOA as "A-Grade"[6] office spaces.
- [13] In addition, while there is no geographical overlap between the merging parties' A-Grade properties as the abovementioned Target Properties are located in the Johannesburg CBD and the Heriot Group does not own A-Grade office space in the Johannesburg CBD, the Commission and merging parties, agreed to assess the effects of the proposed transaction on the provision of A-Grade office space using a 15km radius.

- [14] On account of the evidence before us and for purpose of our analysis, we considered the effect of the proposed transaction on the market for the provision of A-Grade office space. Moreover, having received no evidence in support of broadening or narrowing the geographical market, we considered the effect of the proposed transaction on the Johannesburg CBD and surrounding nodes based on a 15km radius.

Provision of Light Industrial Space

- [15] In line with Tribunal precedent in Primegro Properties Ltd and Growthpoint Properties Ltd, the Commission and the merging parties submitted that industrial property can be divided into “light” industrial and “heavy” industrial property. Further, that the proposed transaction gives rise to an overlap in the provision of light industrial space as 4 properties in the Heriot Group’s property portfolio and 1 Target Property (i.e. Antalis, located in Selby (see item 21 to Annexure B)) are classified as light industrial space.
- [16] The merging parties submitted that Antalis is located in Selby, an area primarily surrounded by industrial properties geared towards manufacturing, warehousing, distribution and logistics. As such, they utilised a catchment area comprising all nodes and locations situated within a 12km radius of Antalis. The Commission differed with the merger parties and submitted that it is not necessary to take a definitive view on the geographic market, however, relying on Tribunal precedent in Unico Property Partners Proprietary Limited and Khumonetix Proprietary Limited in Respect of 6 Industrial Properties, it assessed the geographical market based on a 15km radius in Selby and surrounding nodes.
- [17] For purpose of our assessment, we considered the effects of the proposed transaction on the market for the provision of light industrial space. Furthermore, having received no evidence in support of broadening or narrowing the geographical market, we considered the effect of the proposed transaction in Selby and surrounding nodes based on a 15km radius.

Horizontal unilateral effects

- [18] The Commission, relying on data from SAPOA, submitted that the merged entity will have a post-merger market share of approximately 2.20% with a market share accretion of 1.53% in the market for the provision of Grade A office space in the Johannesburg CBD and surrounding nodes (based on a 15km radius).
- [19] Further, that the merged entity will have a post-merger market share of approximately 5.53% with a market share accretion of 0.89% in the market for the provision of light industrial space in Selby and surrounding nodes (based on a 15km radius).
- [20] The Commission also found, in respect of both markets, that the merged entity will face competition from market participants such as Accelerate Property Fund Limited (“Accelerate”), Emira Property Fund Limited (“Emira”), Acsion Limited (“Acsion”), Redefine Properties Limited (“Redefine”).

- [21] In assessing whether the proposed transaction will result in a significant lessening of competition, we considered that post-merger, the merged entity's market shares in the markets for the provision of (i) A-Grade office space in the Johannesburg CBD and surrounding nodes; and (ii) light industrial space in Selby and surrounding nodes (based on a 15km radius) are less than 10% and that the merged entity will remain subject to constraints from the likes of Accelerate and Redefine.
- [22] In the circumstances, we find that the merger does not give rise to a likely prospect of significantly lessening competition in the relevant markets.

Public interest assessment

Effect on employment

- [23] The merging parties submitted that the proposed transaction will not have any adverse impact on employment.
- [24] The Commission engaged the employee representative of CBD Investments and no concerns were raised.
- [25] Employee representatives of the Target Properties raised several concerns including whether the employees of the Target Properties would be employed on the same terms and conditions post-merger and whether their fixed-term contracts of employment will remain the same and at the expiry of the fixed-term contracts will they be renewed.
- [26] The Commission submitted that based on its interaction with the merging parties regarding these concerns, there is no evidence suggesting that there will be any merger-specific retrenchments arising as a result of the proposed transaction since the employees will be transferred in terms of Section 197 of the Labour Relations Act.
- [27] In light of the above, the Tribunal sought clarity as to whether the concerns raised by the employees of the Target Properties were fully addressed, specifically regarding the potential effects of the proposed transaction on fixed-term contract workers. For completeness, the Tribunal requested clarity regarding the number of fixed-term contract workers in the acquiring and target firms and the effects of the proposed transaction on these workers and their terms of employment.
- [28] In response, the merging parties submitted that there are currently six fixed-term contract workers in the target firm. CBD Investments has no contract workers and employees of the Target Properties will be taken on by the purchaser as full-time employees in terms of section 197 of the Labour Relations Act.
- [29] Considering the above, we consider it unlikely that the proposed transaction will have a negative effect on employment.

Effect on the spread of ownership

[30] The Commission noted that pre-merger, the Heriot Group does not have ownership held by HDP(s) and Rebosis has 62.28% black ownership of which 12.16% is held by black females.

[31] It is noteworthy that the Target Properties are primarily occupied by state-owned departments, as such, the Heriot Group requires the relevant BBEE rating in order for it to operate the Target Properties, including the renewal of existing leases. To achieve this, the merging parties submitted that a B-BBEE Newco will be formed to address the extent of the dilution. [7]

[32] Further, the B-BBEE Newco will be allocated a [...] % participation stake in the Target Properties. The Target Properties are currently valued at R[...] (being [...] % of R[...]).

[33] The Commission considered whether the [...] % to be allocated to the B-BBEE Newco is sufficiently responsive to section 12A(3)(e) of the Act, given the reduction of HDP shareholding in the Target Properties from 62.28% to [...] %. In this regard, the Commission considered that:

33.1. Target Properties are comprised of 22 properties out of Rebosis' total property portfolio of 42 properties. Thus, the Target Properties constitute approximately 52% of Rebosis' entire property portfolio. Post Merger, HDPs will indirectly own [...] %

of the Target Properties.

33.2. The Target Properties constitute approximately 23% (R 3 005 832 000/ R13 108 000 000 x100) of the value of Rebosis' entire property portfolio. Thus, post-merger, HDPs will indirectly own [...] % of the Target Properties. Therefore, post-merger, the HDPs will own approximately R750 million in property assets as a result of the merger.

33.3. The HDP's acquisition of a [...] % stake in the Acquiring Firm will not result in any obligation on the part of the HDPs for the debt funding required, as that debt funding obligation rests solely with the Acquiring Firm.

[34] The Commission found that the [...] % allocation is sufficiently responsive to section 12A(3)(e). Accordingly, the Commission and merging parties proposed that the proposed transaction be approved subject to a condition that within 18 months following implementation of the proposed transaction, CBD Investments shall implement an HDP transaction in terms of which HDP Shareholders shall be allotted a [...] % indirect interest in CBD Investments, through B-BBEE Newco. Further, that the HDP Shareholders are required to hold [...] % indirect ownership CBD Investments, via B-BBEE Newco, for a minimum period of [...] and that there shall be no obligation on the part of the HDP shareholders for the debt funding required for the Merger.

Conclusion on the public interest assessment

[35] For reasons set out above, we do not consider it likely that this merger will result in a negative public interest concern.

Conclusion

[36] We conclude that the proposed transaction is unlikely to significantly prevent or lessen competition in any relevant market. Furthermore, the public interest concerns that have been raised have been addressed by the Conditions, marked Annexure A.

10 January 2024

Professor Liberty Mncube

Date

Concurring: Mr Andreas Wessels and Adv Geoff Budlender SC

Tribunal case managers Baneng Naape and Matshidiso Tseki For the merging parties Vani Chetty, Melinda Pianese and Mamta Nathoo of Vani Chetty Competition Law (Pty) Ltd For the Commission Nhlakanipho Mbhense and Zanele Hadebe

CONFIDENTIAL

ANNEXURE A - CONFIDENTIAL

IN THE LARGE MERGER BETWEEN CBD INVESTMENTS (PTY) LTD AND REBOSIS PROPERTY FUND LIMITED, ASCENSION PROPERTIES (PTY) LTD, MAIN STREET 1119 (PTY) LTD AND CAPE HORIZON PROPERTIES 125 (PTY) LTD IN RESPECT OF A PORTFOLIO OF 22 (TWENTY- TWO) PROPERTY RENTAL ENTERPRISES

TRIBUNAL CASE NUMBER: LM103Oct23

1. DEFINITIONS

In this document, the expressions used below will have the appropriate meaning assigned to them and the following and related expressions will bear the following meaning:

1.1 “Acquiring Firm” means CBD Investments (Pty) Ltd;

1.2 “Approval Date” means the date on which the Merger is approved by the Tribunal in terms of the Competition Act;

1.3 “B-BBEE Newco” means a newly formed entity for the purposes of the HDP Transaction which will hold [...] % of the issued shares in the Acquiring Firm;

1.4 “Commission” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

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” means the conditions in this Annexure A;

1.8 “Days” means any day that is not a Saturday, Sunday or public holiday in South Africa;

1.9 “HDP” means a historically disadvantaged person as contemplated in section 3(2) of the Competition Act;

- [1] Heriot Investments is a wholly owned subsidiary of the Gusi Trust (“Gusi Trust”)
 - [2] Competitiveness Report, record, p 60.
 - [3] Ibid, record, p 66.
 - [4] Primegro Properties Ltd and Growthpoint Properties Ltd [LM015Jun03] ZACT.
 - [5] Momentum Property Investments (Pty) Ltd and Bonatla Property Holdings Ltd [LM020Jul03] ZACT.
 - [6] The SAPAO Office Vacancy Survey Quarter 2: June 2023 describes an A-Grade office as “High quality properties providing good access and are professionally managed with continued above average maintenance. High quality modern finishes, air conditioning, adequate on-site parking. Clearly articulated entrance, lobby with clear circulation. High ceiling heights, flexible floorplates likely.”
 - [7] [...]
-

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