

SOUTH AFRICA / JUDGMENT

Community Property Company (Pty) Ltd v Luvon Investments (Pty) Ltd and Twin City (Pty) Ltd (LM180Feb23) [2023] ZACT 47; [2023] 2 CPLR 19 (CT) (18 May 2023) [2023] ZACT 47

COURT

Competition Tribunal

BEFORE

Geoff Budlender, Thando Vilakazi, Fiona Tregenna

CASE / FILE NUMBER

LM180Feb23

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COMPETITION

TRIBUNAL OF SOUTH AFRICA

Case

No: LM180Feb23

In

the matter between:

Community
Property Company (Pty) Ltd
Acquiring Firm
and
Luvon Investments (Pty)
Ltd and Twin City (Pty) Ltd
in
respect of Sam Ntuli Mall
Target
Firm
Panel: Geoff
Budlender (Presiding Member)
Thando
Vilakazi (Tribunal Member)
Fiona
Tregenna (Tribunal Member)
Heard

on: 21
April 2023
Order
issued on: 21
April 2023
Reasons
issued on: 18 May 2023

REASONS FOR DECISION

Approval

- [1] On 21 April 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger whereby Community Property Company (Pty) Ltd (“CPC”) will acquire the retail property letting enterprise known as Sam Ntuli Mall from Luvon Investments (Pty) Ltd (“Luvon Investments”) and Twin City (Pty) Ltd (“Twin City”). Post-merger, CPC will exercise sole control of the Target Firm.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The primary acquiring firm is CPC, which is wholly owned by Community Property Holdings (Pty) Ltd (“CPH”). CPH is, in turn, controlled by Old Mutual Life Assurance Company Limited (“Old Mutual Life Assurance”) (as to [...])%. [1] Old Mutual Life Assurance is a wholly owned subsidiary of Old Mutual Emerging Markets (Pty) Ltd (“OMEM”). OMEM is controlled by Old Mutual Group Holdings (SA) (Pty) Ltd which is a wholly owned subsidiary of Old Mutual Limited (“Old Mutual”). Old Mutual is listed on the Johannesburg Stock Exchange and is not directly or indirectly controlled by any firm.
- [3] All the firms directly or indirectly controlled by Old Mutual are referred to as the “Acquiring Group”.
- [4] CPC does not control any firm. The Acquiring Group’s activities relevant to the proposed transaction include its property holdings in Gauteng. The Acquiring Group’s property portfolio consists of property classified as retail, residential, industrial and office space

situated across South Africa.

Primary target firm

- [5] The primary target firm is the retail property letting enterprise known as Sam Ntuli Mall (the “Target Property”), situated in Gauteng, Katlehong. Luvon Investments and Twin City each hold a 50% undivided share in the Target Property and are collectively referred to as the “Sellers”.

- [6] The Target Property has a gross lettable area of 30 274m and is classified as a small regional shopping centre.

Proposed transaction and rationale

Transaction

- [7] In terms of the proposed transaction, the Acquiring Group will acquire the Target Property in its entirety, from the Sellers. Upon implementation, the Acquiring Group will exercise sole control of the Target Property.

Rationale

- [8] According to the Acquiring Group, the acquisition of the Target Property would present CPC with an opportunity to grow its investment portfolio. The Target Property has a good presence of large and listed tenants and national brands, most of which are within their initial lease period, and which can further serve the local community.[2]
- [9] The Sellers submitted that the proposed transaction allows them to realise their share values in the Target Property at a market related price, which would then free up capital to utilise in other investments.[3]

Relevant market and impact on competition

- [10] The Competition Commission ("Commission") considered the activities of the merging parties and found that the proposed merger raises a horizontal overlap as the parties are both active in the provision of rentable retail property.

Horizontal assessment

Product market

- [11] The South African Property Owners Association ("SAPOA") categorises shopping centres according to gross lettable area ("GLA") as follows[4]:

Shopping Centre Type GLA Neighbourhood 5 000m² – 12 000m² Community 12 000m² – 25 000m²
Small Regional 25 000m² – 50 000m² Regional 50 000m² – 100 000m² Super Regional More than 100 000m²

- [12] As mentioned above, the Target Property has a GLA of 30 274m². This is under 50 000m² and therefore, according to the SAPOA classification, falls within the small regional shopping centre category.
- [13] However, the Commission did not solely rely on GLA as the only determining factor in considering substitutability in this instance[5]. Based on the horizontal overlap identified, the Commission considered Tribunal precedent[6], where it was found that free standing, convenience centres, community centres, neighbourhood centres and local convenience centres may provide a direct competitive constraint to each other and as such, can fall within a single market of convenience centres. Furthermore, small regional, regional, and

super regional centres may provide a direct competitive constraint to each other and fall within a single market of comparative centres (“Comparative Centres”).

- [14] The Commission did not conclude on the relevant product market. However, it assessed the impact of the proposed transaction in the provision of comparative centers.

Geographic market

- [15] The Commission relied on Vukile/NAD, where it was established that the appropriate scope of assessment for the provision of Comparative Centres was a radius of at least 15km.
- [16] Having regard to the above, the Commission, without concluding on the relevant market, assessed the competitive effects of the proposed transaction in the provision of rentable Comparative Centres within a 15km radius of the Target Property.

Horizontal impact

- [17] The Commission found that the Comparative Centre nearest to the Target Property, within the Acquiring Group’s portfolio, is in Heidelberg, Gauteng, which is situated approximately 34km away from the Target Property. As this falls out of the 15km geographic scope, the Commission concluded that the proposed transaction does not result in any overlap in the provision of Comparative Centers.
- [18] For completeness, the Commission found that the Acquiring Group owns a community shopping centre measuring approximately 11 000m². Following case precedent outlined above, this is not substitutable from a product market perspective, however the Commission considered whether there are alternative market players in the broad market for all rentable retail properties. In this regard, the Commission found at least five alternative rentable retail properties within a 5km radius of the Target Property. These include Katlehong Crossing, Mpilo Shopping Centre, Thokoza Value Centre, Letsoho Shopping Centre, and Motse wa Lijane Shopping Centre. In a wider radius of 5km – 10km from the Target Property, there are further alternatives such as Chris Hani Mall (8km), Sky City Mall (9km), Bracken Gardens Shopping Centre (9km) and Mayberry Park (9km).
- [19] Considering the above, we agree with the Commission’s conclusion that the proposed transaction is unlikely to give rise to any significant unilateral concerns in the markets assessed.

Exclusivity

- [20] The Commission identified an exclusivity clause in the Target Property’s lease agreement in favour of Pick n Pay, which contains the following exclusivity provisions as well as Pick n Pay having a say in relation to who may occupy the Target Property as well as the amount of space that should be allocated to other retailers:

- [21] Pick n Pay entered into a consent agreement with the Commission, following recommendations made by the Commission in the Grocery Retail Market Inquiry (“GRMI”), regarding lease agreements containing exclusivity provisions. In terms of the consent agreement[7], Pick n Pay agreed to – [...].
- [22] However, as stated above, in terms of Pick n Pay’s consent agreement with the Commission, exclusivity provisions will only cease to be enforced with effect from 31 December 2026 against other supermarkets and large liquor stores.
- [23] The Commission therefore engaged with the merging parties regarding the removal of the exclusivity clause. The merging parties were amenable to this suggestion and have agreed to the removal of the exclusivity clause, and this removal is imposed herein as a condition to the approval of the proposed transaction.
- [24] Having regard to the above and the inclusion of the exclusivity condition, we agree with the Commission’s conclusion that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest

Employment

- [25] The merging parties have provided an unequivocal undertaking that the proposed transaction will not result in any negative employment effects.
- [26] The Commission found that the Target Property is managed by the Moolman Group Property Management (Pty) Ltd, a subsidiary of one of the Sellers, Luvon Investments. Post-merger, the merging parties submitted that the Target Property will be managed by Capital Land Asset Management (Pty) Ltd.
- [27] The Commission engaged a representative of the Target Property, who confirmed that no concerns had been raised by employees in relation to the proposed transaction. Furthermore, the representative confirmed that the change in property management will not result in any negative employment consequences.
- [28] Considering the above, and that the merging parties have provided an unequivocal statement that no job losses will arise as a result of the proposed transaction, we agree with the Commission’s findings that the proposed merger is unlikely to have a negative effect on employment.

Spread of ownership

- [29] The Commission found that the Acquiring Group, through Old Mutual, has an ownership of [...] % held by historically disadvantaged persons (“HDPs”), while the Sellers do not have any HDP shareholding.

[30] The Commission found that the proposed transaction promotes a greater spread of HDP ownership through the introduction of shareholding by the Acquiring Group.

[31] Furthermore, the Commission found that the proposed transaction does not raise any other public interest concerns, and the Tribunal concurs.

Conclusion

[32] In light of the above, the Tribunal found that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and does not raise any public interest concerns. We approved the proposed transaction subject to the conditions set out in Annexure A.

Date: 18 May 2023

Geoff Budlender SC

Concurring: Prof Fiona Tregenna and Dr Thando Vilakazi

Tribunal case manager: Leila Raffee

For the merging parties: Misha van Niekerk of Adams & Adams

For the Commission: Nonhlanhla Msiza and Wiri Gumbie

[1] [...].

[2] Merger Record, p65

[3] Merger Record, p65

[4] Table from merging parties Joint Competitiveness Report para 6.2.2. (Merger Record, p69)

[5] This was also the approach taken in Hyprop Investments Limited, Atterbury Investment Limited, Attfund Retail Limited, and Mantrablox

Proprietary Limited (Tribunal Case Number: LM092Jan11)

[6] Vukile Property Fund Limited and NAD Property Income Fund Proprietary Limited, in respect of Batho Plaza and Moruleng Mall ("Vukile/NAD")

(Tribunal Case Number: LM197Feb15)

[7] [https://www.comptrib.co.za/info-library/case-press-releases/tribunal-confirms-consent-agreement-pick-n-pay-exclusivity-provisions-in-lease-agreements-immediately-scrapped-against-privately-black-owned-supermarkets-](https://www.comptrib.co.za/info-library/case-press-releases/tribunal-confirms-consent-agreement-pick-n-pay-exclusivity-provisions-in-lease-agreements-immediately-scrapped-against-privately-black-owned-supermarkets-small-businesses-and-speciality-stores)

[small-businesses-and-speciality-stores](https://www.comptrib.co.za/info-library/case-press-releases/tribunal-confirms-consent-agreement-pick-n-pay-exclusivity-provisions-in-lease-agreements-immediately-scrapped-against-privately-black-owned-supermarkets-small-businesses-and-speciality-stores)

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