

SOUTH AFRICA / JUDGMENT

Cullinan Hotel (Pty) Ltd v The Businesses and underlying Properties of The Sandton Sun, The Intercontinental Sandton Towers, The Garden Court Sandton City; The Sandton Convention Centre Property; And The Rental Enterprises Convention Centre And Virgin Active (LM110Sep16) [2016] ZACT 101; [2017] 1 CPLR 405 (CT) (7 December 2016)

[2016] ZACT 101

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Medi Mokuena

CASE / FILE NUMBER

LM110Sep16

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM110Sep16

In the matter between:

THE CULLINAN HOTEL (PTY) LTD

Acquiring Firm

And

THE BUSINESSES AND UNDERLYING PROPERTIES OF THE Target Firm

SANDTON SUN, THE INTERCONTINENTAL SANDTON

TOWERS, THE GARDEN COURT SANDTON CITY; THE

SANDTON CONVENTION CENTRE PROPERTY; AND THE

RENTAL ENTERPRISES IN RESPECT OF THE SANDTON

CONVENTION CENTRE AND VIRGIN ACTIVE

Panel

: Norman Manoim (Presiding Member)

:Yasmin Carrim (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on

: 10 November 2016

Order Issued on

: 10 November 2016

Reasons

Issued on : 7 December 2016

REASONS

FOR DECISION

APPROVAL

[1] On 10 November 2016, the Competition Tribunal approved the large merger between The Cullinan Hotel (Pty) Ltd ("Cullinan") and the businesses and underlying properties of the Sandton Sun, the Intercontinental Sandton Towers and the Garden Court Sandton City ("the transferred hotels") as well as the Sandton Convention Centre property ("SCC property") and the rental enterprises in respect of the Sandton Convention Centre ("SCC rental enterprises") and Virgin Active Alice Lane ("Virgin Active rental enterprises").

[2] The reasons for the approval follow.

PARTIES TO THE TRANSACTION AND THEIR ACTIVITIES

Primary Acquiring Firm

[3] The primary acquiring firm is Cullinan, a joint venture between Southern Sun Hotel Interest ("SSHI") and Liberty Holdings ("Liberty") in terms of which, SSHI has a 60% shareholding and Liberty 40%. In a previous decision, the Tribunal confirmed that SSHI exercises sole control over Cullinan.[1]

[4] SSHI is a wholly owned subsidiary of Southern Sun Hotels (Pty) Ltd ("SSH"). On 10 August 2016, the Tribunal conditionally approved a large merger between SSH and Hospitality Property Fund ("HPF"). The result of the approved transaction was that HPF became a majority controlled subsidiary of SSH.[2]

- [5] SSH is an indirectly wholly-owned subsidiary of Tsogo Sun Holdings Limited ("Tsogo Holdings") which is, in turn a 49.96% controlled subsidiary of Tsogo Investment Holding Company (Pty) Ltd ("Tsogo Investment"). Tsogo Investment is controlled by TIHC Investments (Pty) Ltd which is, in turn, controlled by Hosken Consolidated Investments Ltd ("HCI"), a firm listed on the Johannesburg Stock Exchange.
- [6] HCI is thus, through various investment corporations, the Tsogo Group's principle shareholder.
- [7] The Tsogo Group is a hotel, gaming and entertainment firm with operations across the globe. It's non-casino hotel interests are held through and managed by SSH and its respective subsidiaries

Primary Target Firms

- [8] The target firms consist of the business and underlying properties in respect of the Sandton Sun Hotel, the Intercontinental Johannesburg Sandton Towers Hotel and the Garden Court Sandton City Hotel ("the three transferred hotels"), and the property on which the Sandton Convention Centre ("SCC") and Virgin Active Alice Lane ("Virgin Active") are located, as well as the corresponding rental enterprises.
- [9] The business and underlying property of the three transferred hotels are owned by Liberty Holdings Limited ("Liberty") which possesses a 75% shareholding, with the remaining 25% being held by Pareto Limited ("Pareto"). Although the property underlying and the business of the hotels is owned by Liberty and Pareto, the hotels are managed by SSHI. SSHI is thus responsible for the management and operation of the hotels belonging to Liberty and Pareto, primarily because firms such as Liberty do not have the expertise in operating hotels.
- [10] The SCC and Virgin Active are both situated on separate portions of erf 596 in the Sandton Business District. The property underlying the SCC and Virgin Active is owned by Liberty and Pareto.[3] The rental enterprises of such property are conducted by Liberty, Pareto and FHP Managers (Pty) Ltd ("FHP"). Pre- transaction, Liberty, Pareto and FHP lease the portion of the property underlying the SCC to Tsogo Sun Casinos (Pty) Ltd[4] which owns and manages the SCC business conducted therefrom. Liberty, Pareto and FHP also lease the portion of the property underlying Virgin Active to a third party which owns and manages the Virgin Active business.

PROPOSED TRANSACTION AND RATIONALE

- [11] When the transaction came to the Tribunal for hearing, the merging parties indicated that they were uncertain about which entity between Cullinan or a combination of HPF and a subsidiary of SSHI called Reshub would be the primary acquiring firm/s. They sought approval for both possibilities.

- [12] Initially when the transaction was notified to the Commission Cullinan was the primary acquiring firm. However, in subsequent correspondence, the merging parties indicated that HPF, a firm that also owns the property underlying the Raddison Blu Gautrain Hotel in the Sandton node, might be the primary acquiring firm. Raddison, a rival group to the acquiring firm, operates the Raddison Blu Gautrain Hotel. During the hearing the Tribunal asked whether the Radisson had been consulted about the proposed transaction and it appeared it had not.[5] The Tribunal also queried why the identity of the primary acquiring firm had not been finalized and why the parties should be given a blank cheque in this regard.[6] The merging parties sought an opportunity to take instructions on this and later came back to advise that the Cullinan would be the primary acquiring firm. This has then been the basis on which we have analysed the submissions made to us.
- [13] In terms of the proposed transaction, Cullinan will acquire the businesses and the underlying property in respect of the three transferred hotels as going concerns. These businesses will continue to be managed and operated by SSHI.
- [14] In addition, Cullinan will acquire the property on which the sec and Virgin Active are located as well as the rental enterprises conducted by Liberty, Pareto and FHP attached thereto as a going concern. Liberty, Pareto and FHP will execute a notarial deed of cessions and delegation in respect of rights and obligations of the lessors under the existing leases to Cullinan. Post- transaction, Tsogo Sun Casinos will continue to lease the property underlying the SCC.
- [15] The acquiring firms submitted that the proposed transaction is in line with the Tsogo Group's strategy of acquiring its own assets, rather than leasing or managing properties owned by third parties.
- [16] Liberty submitted that the proposed transaction represents an opportunity for it to realize its investments in the three transferred hotels, as well as the property underlying the SCC and Virgin Active and corresponding rental enterprises.

RELEVANT MARKETS AND IMPACT ON COMPETITION

- [17] The merging parties both own properties upon which 3 and 5 star hotels are situated. The Commission assessed the impact of the merger on the market for the provision of hotel accommodation (3 star) in the Sandton area and the market for the provision of hotel accommodation (5 star) in the Sandton area.
- [18] In the market for the provision of 3 star hotel accommodation, the Commission submitted that the merged entity would possess a 36% market share with a market share accretion of approximately 27%. In the market for the provision for 5 star accommodation, the merged entity would possess a 29% market share with a market share accretion of approximately 20.4%.

- [19] The merging parties submitted that the proposed transaction will not result in any change in the competitive position of the relevant hotels given that the proposed transaction only involves a change of ownership of the underlying businesses and properties of such. They submitted that pre-merger, SSHI determines the rates and conditions of trade in respect of the three transferred hotels and the sec, and that this will continue, unaltered, post transaction. This means, on the merging parties view, that there is no accretion in market share in the provision of short term accommodation and thus no change in the competitive dynamics relating to such. The Commission agreed with this view.
- [20] Additionally, the Commission and merging parties submitted that, post- transaction, the merged entity will continue to face constraint in both markets owing to the presence of strong competition in the Sandton area.
- [21] The sec is a stand-alone commercial exhibition and conference facility and Virgin Active is a gym. The acquiring group does not own or manage similar types of properties and thus the acquisition of these properties raises no competition concerns.
- [22] The merger does not present a threat of preventing or lessening competition in any of the identified markets.

CONCLUSION

- [23] The merger is unlikely to substantially prevent or lessen competition in the market for the provision of 3 and 5 star hotel accommodation services in the Sandton area given that there is no real change in the underlying competition dynamics of such markets.
- [24] The merger additionally does not raise any public interest concerns.
- [25] Accordingly we approved the transaction without conditions.

7 December 2016

Date

Norman Manoim

Yasmin Carrim and Medi Mokuena concurring

Tribunal Reseahe Alistair Dey-Van Heerden

For the Merging Parties: Anthony Norton of Nortons Inc.

For the Commission: Zanele Hadebe

[1] Southern Sun Hotel Interests (Pty) Ltd and the Cull nan Hotel (Pty) Ltd CT Case No.:LM191Jan14 para 5.

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- [2] Southern Sun Hotels (Pty) Ltd and Hospitality Property Fund Limited CT Case No.: LM218Jan16.
- [3] Liberty possesses a 75% shareholding in the property, with the remaining 25% belonging to Pareto.
- [4] Tsogo Sun Casinos (Pty) Ltd is a subsidiary of Tsogo Sun Gaming (Pty) Ltd, which is ultimately controlled by Tsogo Holdings.
- [5] The Commission in hearing confirmed that Radisson had not been consulted. See Tribunal Transcript, 10 November 2016, page 10.
- [6] Tribunal Transcript, 10 November, page 11.
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