

SOUTH AFRICA / JUDGMENT

Deltrade 83 (Pty) Ltd v Property Management Business of Liberty Holdings Limited Known as LP Manco and Retail Property Management Business of JHI Properties Known as JHI Retail Division (020404) [2015] ZACT 33 (15 April 2015) [2015] ZACT 33

COURT

Competition Tribunal

BEFORE

N Manoim, F Tregenna, A Wessels

CASE / FILE NUMBER

020404

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020404

In the matter between:

DELTRADE 83 (PTY) LTD Primary Acquiring Firm

And

THE PROPERTY MANAGEMENT

BUSINESS OF LIBERTY HOLDINGS

LIMITED KNOWN AS LP MANCO

AND THE RETAIL PROPERTY

MANAGEMENT BUSINESS OF JHI

PROPERTIES KNOWN AS JHI RETAIL

DIVISION Primary Target Firms

Panel

: N Manoim (Presiding Member)

: F. Tregenna (Tribunal Member)

: A Wessels (Tribunal Member)

Heard on

: 25 March 2015

Order Issued on : 25 March 2015

Reasons

Issued on : 15 April 2015

Reasons for Decision

Approval

- [1] On 25 March 2015, The Competition Tribunal ("Tribunal") conditionally approved the acquisition by Deltrade 83 (Pty) Ltd ("Deltrade") soon to be I renamed JHI Retail (Pty) Ltd ("JHI Retail") to acquire the property management business of Liberty Holdings Limited ("LHL") known as LP Manco and the retail property management business of JHI Properties known as JHI Retail Division.
- [2] The reasons for approving the proposed transaction follow.

Parties to the transaction

- [3] The primary acquiring firm is Deltrade, a newly incorporated entity formed for the purposes of housing the property management business of LHL and the retail property management business of JHI Properties.
- [4] JHI Properties provides management services to property owners, it has three operational divisions, namely, commercial, retail and brokering. LHL is a financial service group that develops, markets and manages various financial services to individuals and corporate clients. Relevant for the purposes of the proposed transaction are the activities of Liberty Group Properties (Pty) Ltd ("LGP"). LGP has two wholly owned operating subsidiaries; Liberty Property Management ("LP Manco") and Liberty Property Development ("LP Devco"). LP Manco is the appointed property manager responsible for the day-to-day operational management of LGP Property Portfolio ("LPP") and JHI Retail Division which conducts retail-focused property management for JHI Properties.

Proposed Transaction

- [5] JHI Retail intends to purchase the businesses of the JHI Retail Division and LP Manco as a going concern. Both businesses will be transferred to the Deltrade and post-merger JHI Retail will manage the retail property management businesses of LP Manco and the JHI Retail Division.

Rationale

- [6] For JHI Properties, the proposed transaction will increase its portfolio under management and strengthen its retail property management specialisation. For LHL, inter alia, entering into the joint venture will facilitate improved property management.

Relevant Market and Impact on Competition

- [7] Both the merging parties own buildings. LP Manco provides property management services internally or in-house only, whilst JHI Properties provides property management services in-house and to third parties as well.
- [8] The Commission found no product overlap between the activities of the merging parties as Liberty offers property management services for in-house purposes whilst JHI offers for third parties as well. However, in the market for management services, which is the market Deltrade will be active in, vertical overlaps do arise as LHL through LGP owns properties which could be managed by property managers. In the market for the provision of third party property management services, Deltrade will have an estimated market share of between 10-20%. It will still face strong competitors, inter alia, Broll Property Group (Pty) Ltd, Eris Property (Pty) Ltd, Finlay Retail (Pty) Ltd t/a Finlay & Associates and Capital Property Fund Ltd. There are also a number of companies that render property management services in-house such as Growthpoint Properties Limited, Acucap Properties (Pty) Ltd and Redefine Property Income Fund.
- [9] The Commission is of the view that there are no vertical foreclosure concerns that will arise as a result of the proposed transaction. Liberty did not out source these services pre-merger therefore the services are currently not available to the general market. In addition, market participants did not raise foreclosure concerns as there is an influx of customers to procure their services and property funds also outsource their property management function to different property managers. The Commission was of the view that the vertical relationship between the merging parties was unlikely to raise foreclosure concerns, as LPP is currently managed internally and therefore no property management businesses will be foreclosed. The proposed transaction is unlikely to substantially prevent or lessen competition in the provision of property management.
- [10] The Commission also considered whether Liberty might gain access to economically sensitive information about its competitors in the property ownership market through Deltrade which might lead to co-ordinated effects. Liberty submitted that it will only be privy to certain non-sensitive information as sensitive information will not be discussed at board meetings. Competitors contacted by the Commission raised no concerns except one firm, Finlay, who indicated that the proposed transaction would have a negative impact in the market. However, the customers of the merging parties have confirmed that they procure services from various property management service providers in the market indicating that there are available alternatives.

Public Interest

- [11] The Commission identified a right of first refusal clause in the Property Management Service Level Agreement whereby Liberty has a right to refuse to lease any premises in circumstances where any competitor of the Liberty Group wishes to lease any such premises. The Commission engaged the merging parties on the clause and the merging parties have agreed to remove the clause from the Property Management Service Level Agreement. The clause has since been removed.

Employment

- [12] The merger will result in potential redundancies. Both firms employ substantial work forces, many in overlapping jobs. At the same time the merger is justified on the basis of rationalisation and introducing efficiencies. The potential for merger related retrenchments is thus evident. The merging parties were unable to give an undertaking that the merger would not result in retrenchments as the necessary due diligence had not been done as the parties considered such an exercise might be considered pre-implementation of the merger. They intend to undertake this exercise once the merger is implemented. (We say more on this aspect below). As a result they were nevertheless willing to give an undertaking that there would be no merger specific retrenchments for two years, post approval of the merger.
- [13] The Commission recommended that the merger be approved subject to a two year moratorium from what it termed the 'effective' date as opposed to the 'approval' date. There was some uncertainty therefore as to what time period the Commission was recommending. [1] The Commission explained that the effective date was a date 12 months after the approval of the merger when the parties had finalised the implementation of the transaction. In effect this meant that the Commission was seeking a three year moratorium on merger specific

retrenchments.

- [14] The merging parties as noted were willing to agree to a two year moratorium on retrenchments from the approval date, but not three years. They stated that no basis had been established for requesting that the moratorium run for an additional year. This would be a burden to the merged firm and would result in costs increasing disproportionately compromising their competitiveness.

ANALYSIS

- [15] As we found that the concept of an 'effective' date was confusing we indicated to the parties that the trigger date should be the approval date i.e. the date on which the Tribunal approves the merger. Both parties were agreeable to this suggestion. The issue then was whether the period should be two or three years.

Misrepresentation

- [16] The Commission indicated that it had departed from the standard 2 years it normally recommends in such situations and added an additional year, because the merging parties had misrepresented themselves during the Commission's investigation. The Commission indicated that through its own investigation they discovered that the parties Due Diligence report contained evidence that merger related retrenchments had been contemplated but not disclosed.
- [17] The merging parties denied the misrepresentation allegations and indicated, inter alia, that detailed answers were provided in all the question and answer sessions. Mr van der Merwe, an attorney for the merging parties added further that, the confusion may have been because the Due Diligence document the Commission was referring to, contained information about possible retrenchments that had been considered at an early stage, pre-merger, but were no longer contemplated. As he pointed out the document itself indicates that the position had subsequently changed. This change in approach was contained in footnotes (as opposed to the body of the text which the Commission sought to rely on) as the document had been amended subsequently.
- [18] We are satisfied with this explanation and have concluded that the merging parties did not misrepresent themselves and that the document the Commission was referring to is no longer reflective of their current thinking. There is therefore no basis to justify an extended period beyond the two years offered by the parties.

Notification

- [19] Furthermore, the Commission was also of the view that the merging parties had failed to properly consult with the employees. Liberty for its part had informed the employees of the merger but it seems that specifics of the implications of the possible retrenchments were not discussed. The merging parties conceded that a thorough consultation process had not been followed. They justified this by claiming that a more detailed process pre-merger might be construed as pre-implementation of the merger.
- [20] The Commission had invited employee representatives to be present and asked if they could be given an opportunity to address us which we agreed to. Ms Ferguson, an employee of Liberty Properties representing the staff, confirmed that consultations had taken place. She added that the only concern from the employees was with regards to employment being guaranteed for a certain period of time and the kind of benefits they would be receiving from JHI. She further indicated that that the staff would have liked more consultation with JHI to address those concerns. Lastly she indicated that they would like a three year moratorium but they would leave this decision to the Tribunal to decide.
- [21] We indicated to the merging parties during the hearing that we would like to see a condition relating to notification being given to affected employees before the end of the two year period. The parties indicated a willingness to do so. Discussion was held about whether notice could be given three months after the approval date to the employees concerned. The merging parties indicated that specifying individual names might contravene their Labour

Relations Act obligations because employees have a right to be consulted on retrenchments and alternatives before a final decision is taken.

[22] The merging parties proposed instead that after three months the merged firm would indicate in which divisions retrenchments might take place and the proposed numbers. In our view this is a reasonable compromise that meets the interests of both statutes. The parties drafted an amendment to the proposed

condition to reflect this.[2]

CONCLUSION

[23] We are satisfied with the Commission's reasoning that the proposed merger is unlikely to substantially prevent or lessen competition.

[24] Furthermore we are satisfied that the public interest concerns concerning the merger's effect on employment are adequately dealt with the two conditions proposed; a two year moratorium on merger related retrenchments, post approval and a limited notification to employees within three months of the approval date. These conditions are made part of our order and are contained in Annexure A hereto.

[25] Given the fact that merging parties had not adequately consulted with employees pre-merger on possible retrenchments because they felt this might constitute implementation of a merger in contravention of section 13(4)[3] of the Act, we asked the Commission to clarify its position on this issue.

[26] We were fortunate to have attending the hearing Mr Hardin Ratshisusu, the Head of Mergers at the Commission who clarified that;

"We encourage merging parties to consult with the employees to provide the files of these mergers and inform employees on what is going to happen to them after the merger'.

[27] This a vice is worth noting for other merging parties.

Mr N Manoim

15 April 2015

Prof F Tregenna and Mr A Wessels concurring

Tribunal Researcher: Moleboheng Moleko

For the merging parties: Vani Chetty of Baker McKenzie

For the Commission: Lindiwe Khumalo and Maanda Lambani

[1] See transcript pages 24- 25.

[2] See clause 3.1.2 of the condition.

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- [3] A party to a merger contemplated in subsection (3) may take no further steps to implement that merger until the merger has been approved or conditionally approved.
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