

SOUTH AFRICA / JUDGMENT

Emerging Africa Property Partners (Pty) Ltd v Enigma Empowerment Fund 1 (Pty) Ltd and Another (LM119Sep20) [2021] ZACT 83 (1 February 2021)

[2021] ZACT 83

COURT

Competition Tribunal

BEFORE

M Mazwai, Y Carrim, F Tregenna

CASE / FILE NUMBER

LM119Sep20

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM119Sep20

In the matter between:

EMERGING AFRICA PROPERTY

PARTNERS (PTY) LTD Primary

Acquiring Firm

And

ENIGMA EMPOWERMENT FUND 1 (PTY) LTD

AND ENIGMA EMPOWERMENT FUND 2 (PTY)

LTD Primary

Target Firms

Panel : M Mazwai (Presiding Member)

: Y Carrim (Tribunal Member)

: F Tregenna (Tribunal Member)

Heard on : 5 November 2020

Order issued on : 5 November 2020

Reasons

issued on : 1 February 2021

REASONS

FOR DECISION

APPROVAL

[1] On 5 November 2020, the Competition Tribunal (“Tribunal”) unconditionally approved a large merger between Emerging Africa Property Partners (Pty) Ltd and Enigma Empowerment Fund 1 (Pty) Ltd and Enigma Empowerment Fund 2 (Pty) Ltd.

[2] The reasons for the approval of the proposed transaction follow.

PARTIES TO THE TRANSACTION AND THEIR ACTIVITIES

Primary Acquiring Firm

[3] The primary acquiring firm is Emerging Africa Property Partners (Pty) Ltd (“EAPP”), a public company incorporated in accordance with the laws of the Republic of South Africa. EAPP controls one firm, Lisaline Investment Holding (Pty) Ltd.

[4] EAPP is controlled by the Government Employee Pension Fund (“GEPPF”)[1] (75%) and Emerging African Property Holdings (Pty) Ltd (“EAPH”)[2] (25%). The GEPPF controls numerous firms. EAPH controls Enigma Empowerment Holdings 1 (Pty) Ltd (“EEH 1”) (71.19%).[3] EAPP and the GEPPF as well as all of the firms that they control shall jointly be referred to as the “acquiring group”.

[5] EAPP invests in sale and leaseback transactions, with a focus on industrial and big box retail warehousing properties with triple net leases.

Primary Target Firm

[6] The primary target firms are Enigma Empowerment Fund 1 (Pty) Ltd (“EEF1”) and Enigma Empowerment Fund 2 (Pty) Ltd (“EEF2”). EEF1 is ultimately controlled by EAPH (71.19%) and Enigma Property Fund (Pty) Ltd (“EPF”) (28.81%). EEF2 is ultimately controlled by Enigma Empowerment Holdings 2 (Pty) Ltd (“EEH2”), which is in turn controlled by EPF. EEF1 and EEF2 shall jointly be referred to as the “target firms”.

[7] EEF1 and EEF2 each control Camperdown Real Estate 1 (Pty) Ltd (“CRE1”) and Camperdown Real Estate 2 (Pty) Ltd (“CRE2”) respectively. CRE1 controls a light industrial property with a gross leasable area (“GLA”) of 241 110m² in Umlaas Road Mkhambathini, Kwa-Zulu Natal (“CRE 1 property”). CRE2 recently acquired sole control over a light industrial property with a GLA of 404 686m² (“CRE2 property”), which is adjacent to the CRE1 property. This was through a separate intermediate merger recently approved by the Competition Commission (“Commission”).

PROPOSED TRANSACTION AND RATIONALE

- [8] The Commission found that the proposed transaction constituted phase two[4] of a divisible transaction whereby EAPP intends to acquire 90% of the shareholding over EEF1 and EEF2. [5] Post-merger, EAPP will have sole control over EEF1 and EEF2 and ultimately gain indirect control of the CRE1 and CRE2 properties.[6]
- [9] The merging parties submitted that the combined rationale for the proposed transaction was an investment opportunity for the acquiring group to expand into the industrial property market, while the sellers of the property were reallocating their capital.

RELEVANT MARKETS AND IMPACT ON COMPETITION

- [10] The Commission considered the activities of the merging parties to the transaction and found that the proposed transaction resulted in a horizontal product overlap as both parties owned light industrial properties. Without concluding on the relevant market, the Commission assessed the impact of the proposed transaction on the market for the provision of rentable light industrial property within a 15km radius of the target properties. The Commission submitted that this assessment represented a worst-case scenario.
- [11] The Commission found that the node where the CRE1 and CRE2 properties are located is a sought-after node for industrial property as it is earmarked for a number of greenfield light industrial property developments due to its proximity to the national N3 route.
- [12] The Commission found that the GEPP controls 4 industrial properties in Kwa- Zulu Natal. The Commission found no geographic overlaps between the properties of the merging parties as the light industrial properties controlled by the acquiring group are located over 60kms away from the CRE1 and CRE2 properties. Additionally, the Commission found that there were ample alternative light industrial properties located within a 15km radius of the target properties.
- [13] In light of the above, the Commission concluded that the proposed transaction was unlikely to substantially lessen or prevent competition in the relevant market. We found no reason to disagree.

PUBLIC INTEREST

- [14] The merging parties submitted that the proposed transaction would not result in an adverse effect on employment, submitting that there would be no retrenchments or job losses that would arise as a result of the proposed transaction.
- [15] The Commission contacted the employee representative of EEF1 and EEF2 who submitted that none of the entities concerned had any employees, and therefore no employment concerns would arise. The Commission also found that the acquiring firm and its controllers similarly did not have any employees.

[16] Due to the above, the Commission found that the proposed transaction does not raise any public interest concerns.

CONCLUSION

[17] In light of the above, we concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in the relevant market. In addition, we are of the view that no public interest concerns arise from the proposed transaction.

[18] Accordingly, we approved the transaction without conditions.

DATE: 1 February 2021

Ms Mondo Mazwai

Ms Yasmin Carrim and Prof. Fiona Tregenna concurring

Tribunal Case Manager: Peter Kumbirai

For the merging parties: Albert Aukema and Duduetsang

Mogapi of Cliffe Dekker Hofmeyr

For the Commission: Nolubabalo Myoli and Wiri Gumbie

[1] The GEPF is controlled by its Board of Trustees as per the Government Employees Pension Law 21 of 1996. The GEPF is represented

by the Public Investment Corporation SOC Ltd ("PIC").

[2] EAPH has individual shareholders, none of whom have a controlling interest in EAPH.

[3] EEH1 controls Enigma Empowerment Fund 1 (Pty) Ltd ("EEF1").

[4] Phase one was an intermediate merger unconditionally approved by the Commission in October 2020, whereby EEF1 and EEF2 respectively

acquired CRE1 and CRE2.

[5] The merging parties submitted that phase one and this proposed transaction are indivisible as they are inter-conditional. However,

the Commission found that the two transactions were divisible because (i) the two phases have different shareholders; (ii) the success of phase 1 did not depend on the success of phase 2. The merging

parties subsequently notified the transaction separately as an intermediate merger.

[5] The merging parties submitted that phase one and this proposed transaction are indivisible as they are inter-conditional. However,

the Commission found that the two transactions were divisible because

- (i) the two phases have different shareholders; (ii) the success of phase 1 did not depend on the success of phase 2. The merging

parties subsequently notified the transaction separately as an intermediate merger.

- [6] The remaining non-controlling 10% will be held by Enigma Property. Phase two involves EEH1 and EEH2 now being controlled by EPF and EAPP, with EAPP replacing EAPH as a shareholder.

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