

SOUTH AFRICA / JUDGMENT

Fortress Income 2 (Pty) Ltd v The immovable proprietary and property letting Enterprises of: (016519) [2013] ZACT 52 (13 June 2013)

[2013] ZACT 52

COURT
Competition Tribunal

BEFORE
N Manoim, T Madima, A Ndoni

CASE / FILE NUMBER
016519

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 016519

In the matter between:

Fortress Income 2 (Pty) LtdAcquiring Firm
and

The immovable proprietary and property lettingTarget firm
Enterprises of:

Pick 'n Pay Rustenburg,

Central Park Bloemfontein,

Nelspruit Plaza,

New Redruth Alberton,

Sterkspruit Plaza, and

Tzaneen Center

Panel: N Manoim (Presiding Member)

T Madima (Tribunal Member)

A Ndoni (Tribunal Member)

Heard on: 12 June 2013

Reasons and Order issued on: 13 June 2013

Reasons for Decision and Order

Unconditional Approval

On 12 June 2013 the Competition Tribunal approved the acquisition by Fortress Income 2 (Pty) Ltd of six letting properties owned by Resilient Properties Proprietary (“Resilient”) and Diversified Properties 2 (Pty) Ltd (“Diversified”). The letting retail properties are:

Pick ‘n Pay Rustenburg,

Central Park Bloemfontein, Nelspruit Plaza, New Redruth Alberton, Sterkspruit Plaza, and Tzaneen Centre

The Reasons for approving the transaction are set out below.

Parties to the Transaction

The primary acquiring firm is Fortress Income 2 (Pty) Ltd (“Fortress”), a wholly owned subsidiary of Fortress Income Fund Limited, a public company listed on the Johannesburg Stock Exchange Ltd.

Fortress is acquiring 6 letting properties which fall within the retail property categories. These properties are owned by two

wholly-owned subsidiaries of Resilient Property Income Fund namely Resilient and Diversified. Resilient Property Income Fund is a public company listed on the Johannesburg Stock Exchange.

Resilient is selling the following letting properties:

Pick ‘n Pay Rustenburg in Rustenburg, North West

Central Park Bloemfontein in Bloemfontein, Free State Nelspruit Plaza in Nelspruit, Mpumalanga
Tzaneen Lifestyle Centre in Tzaneen, Limpopo

Diversified is selling two properties:

New Redruth Village in Alberton, Gauteng

Sterkspruit Plaza in Sterkspruit, Eastern Cape

Proposed transaction and rationale

In terms of the merger agreement Resilient and Diversified intend to sell the properties to Fortress as a single indivisible transaction.

Fortress indicated that it wants to expand its business into retail properties situated close to transport nodes in rural and central business districts and these properties fit that strategy. Resilient Property Income Fund says the target properties no longer fit its strategy as it wants to invest in regional centres that have national retailers as tenants and which have a minimum of three anchor tenants.

Competition Assessment

The activities of the merging parties overlap in the market for the provision of rentable retail space in a convenience centre. Within this product market Fortress Income 2 (Pty) Ltd owns retail properties that in some geographic markets compete with the

properties that it is acquiring. The Commission identified a narrow geographic market in all the product markets, indicating that the customer draw distance for a community sized shopping centre is up to 10 km. Based on this narrow geographic market the Commission found that there is an overlap between the merging parties' retail properties situated in Nelspruit and Alberton.

In Nelspruit the Riverside Mall, which is owned by the acquiring firm, is within a 5km radius from Nelspruit Plaza. However, the Commission found that Riverside Mall customers are predominantly from Swaziland, Mozambique and Nelspruit areas and fall within the LSM 6-9 income bracket. Nelspruit plaza's customers reside in the Nelspruit area and the surrounding rural areas and fall within the LSM 3-6 bracket. The two retail centres do therefore not consider each other as competitors. To the extent that they do constrain each other there are several alternative retail centres in the Nelspruit node to which customers can turn. Post the transaction the merged entity will have a low market share of 7.6% in the relevant product market.

In the Alberton node, Park Central Shopping Centre, which belongs to the acquiring firm, is situated within a 10 km radius from New Redruth Village. However, as in the Nelspruit node, the two shopping centres do not regard each other as competitors. Central Park focuses on customers in the lower LSM bracket, LSM 3-6, that live and work in central Johannesburg and surrounding areas, while Redruth Village draws customers in the LSM 7-9 bracket that live in Alberton. To the extent that the two centres do not constrain each other the Commission found that there are several other retail centres in the Alberton node. Post merger the merged entity will have a low market share of 2.6% in the relevant product market.

In view of the above we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any of the relevant product markets.

Public Interest

The Commission was concerned that an exclusivity clause in the Nelspruit Plaza lease agreement with The Spar Group would prevent

SMMEs, such as independent retailers, which compete with Spar and thus would be the subject of the exclusion, from operating in Nelspruit Plaza. It therefore proposed that the Tribunal approve the transaction on condition that Fortress renegotiate with Spar to removed the exclusivity clause from the current lease agreement and any future lease agreements.

The merging parties had during the Commission's investigation phase approached Spar who indicated that it would not be willing to waive its rights. Furthermore during the hearing the merging parties indicated to the Tribunal that Nelspruit Plaza did not have available retail space to offer to new tenants even if the exclusionary clause was waived nor was it possible to expand the centre beyond its present size. It also indicated that it intended to remove the exclusivity clause when it re-negotiates the lease agreement in 2016.

Given that the condition if imposed, would on the facts of this case been ineffectual, it is not necessary for us to consider the prior question, namely whether the public interest concern over the exclusivity clause was merger specific. In light of the above we decided to approve the transaction without such a condition.

There are no other public interest issues arising from this transaction.

Conclusion and Order

Having regard to the above, we find that the transaction is unlikely to substantially lessen or prevent competition in any of the relevant markets. The merger is accordingly approved without conditions.

13 June 2013

N Manoim Date

Concurring: T Madima and A Ndoni

Tribunal Researcher: Rietsie Badenhorst

For the Commission: Angelo Mason

For the merging parties: DLA Cliffe Dekker Hofmeyer

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