

SOUTH AFRICA / JUDGMENT

Fortress Income 2 (Pty) Ltd v Weskus Mall

(019729) [2014] ZACT 72 (3 December 2014)

[2014] ZACT 72

COURT

Competition Tribunal

BEFORE

Norman Manoim, Imraan Valodia, Andiswa Ndoni

CASE / FILE NUMBER

019729

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019729

In the matter between:

Fortress Income 2 (Pty) Ltd.....Acquiring Firm

And

Weskus Mall.....Target Firm

Panel: Norman Manoim (Presiding Member)

Imraan Valodia (Tribunal Member)

Andiswa Ndoni (Tribunal Member)

Heard on: 05 November 2014

Order issued on : 05 November 2014

Reasons

issued on : 03 December 2014

Reasons

for Decision

Approval

1. On 05 November 2014 the Competition Tribunal (the “Tribunal”) unconditionally approved an acquisition by Fortress Income 2 (Pty) Ltd (“Fortress”) of Weskus Mall (“Weskus Mall”).
2. The reasons for the approval of the proposed transaction follow.

The Parties and their activities

3. The primary acquiring firm is Fortress, a firm incorporated in accordance with the company laws of the Republic of South Africa.

Fortress controls Evaton Plaza Shareblock (Pty) Ltd, Mantraweb Investments (Pty) Ltd and Intaba Investments 6 (Pty) Ltd. Fortress is a wholly owned subsidiary of Fortress Income Fund Ltd (“Fortress Ltd”). Fortress Ltd is a public company listed on the Johannesburg Securities Exchange and it is not controlled by any shareholder.

4. The Fortress group comprises of property firms that currently own 97 investment properties classified as retail, industrial and

residential properties located in various provinces across South Africa.

5. The primary target firm is an immovable property and letting enterprise known as Weskus Mall. Weskus Mali is owned by Witteklip

Mall (Pty) Ltd (“Witteklip”). Weskus Mail does not control any firm. Weskus Mall is a retail property classified as a minor regional centre located in Vredenburg, Western Cape Province.

Proposed transaction and rationale

6. In terms of the proposed transaction Fortress intends to acquire Weskus Mall as a going concern. Following implementation, Fortress

will have sole control over Weskus Mall.

7. Fortress submitted that the acquisition of Weskus Mali is consistent with its strategy of investing in retail properties.
8. The shareholders of Weskus Mall submitted that this transaction is in line with their overall strategy and that they are satisfied with Fortress’ offer.

Competition Analysis

9. The Commission identified a horizontal overlap between the activities of the merging parties in respect of the market for the provision of rental space in retail centres. The Commission found that regional centres such as Weskus Mail fall within a comparative centre category and that the geographic market for comparative centres is 15km. The Commission further found that the Fortress group does not own any regional centres in the Western Cape Province and consequently concluded that there is no geographic overlap between the activities of the merging parties.

Public interest

10.The landlord of Weskus Mall, i.e. Witteklip, has entered into lease agreements with two anchor tenants, namely, Shoprite Checkers (Pty) Ltd (“Shoprite”) and Salestalk 560 (Pty) Ltd t/a as Wimpy Coast Mall respectively (“Salestalk”). Both lease agreements are to terminate in [...] and contain certain exclusivity clauses.

11.The exclusivity clause in favour of Shoprite precludes Witteklip from leasing portions of Weskus Mall to certain businesses of a certain size such as bakeries and delicatessen, butcheries, fresh fruit and vegetable shop and a fish shop without Shoprite’s consent. However, this exclusivity clause does not preclude Witteklip from leasing space to Pick ‘n Pay. The exclusivity clause in favour of Salestalk excludes firms that operate businesses which are substantially similar to that conducted by Wimpy. According to the Commission, since these exclusivity clauses do not give Witteklip the unfettered right to lease space to small businesses, this is likely to raise barriers to entry and have a significant effect on these businesses, as they are precluded from competing with Shoprite and Wimpy. Further contends the Commission that the lack of competition in these categories means consumers are prejudiced in terms of reduced choice and higher prices.

12. In order to address these concerns, the Commission recommended that the transaction be approved subject to the condition that merging parties undertake to use reasonable commercial endeavours to negotiate with Shoprite and Salestalk within 60 days of the

Tribunal’s decision to remove the exclusivity clauses contained in both lease agreement.

13. In response to the proposed condition, the Chief Executive Officer and Managing Director of Fortress, namely, Mr. Mark Stevens submitted at the hearing that although Fortress does not support exclusivity clauses and that it would accept the condition, if imposed, his experience is that it is a difficult process to have the clauses removed. According to Mr. Stevens the difficulty with the condition is that it seeks to bring a change to a lease agreement which involves a third party that is not party to the merger. Mr. Stevens also submitted that in other previous mergers that he was involved in and in which the same condition as the current one was imposed, several negotiations took place in an effort to remove the exclusivity clause. However, he has not had any success in removing the clause and that in fact in one case a substantial amount of money was required by a certain tenant in order to have the clause removed. Mr. Stevens further submitted that the only way to rectify the issue of exclusivity clauses in lease agreements is through an industry wide investigation conducted by the Commission.

14. On the other hand, the Commission submitted that there has been successful removal of the clauses in certain mergers although an assessment to see how this was able to be achieved in specific centres and not in others has not been conducted yet.

15.After taking into consideration both the Commission and Mr. Stevens’ submissions, we have decided not to impose the condition.

16. Although we understand the Commission's sentiment in proposing the condition, we believe that the imposition of this type of condition through merger control, as opposed to enforcement route, is not an effective tool as it requires the buy in of third parties who are not even involved in the merger in any way. Further, the exclusivity clauses existed pre-merger and this transaction does not alter that. In addition and more importantly, apart from the presence of Shoprite/Checkers at Weskus Mall, there are also Woolworths and Game stores (both of which sell groceries) as well as Food Lovers market which sells inter alia fresh fruit and vegetables.

Conclusion

17. In light of the above we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition. In addition, there are no other public interest issues arising from the proposed transaction. Accordingly we approve the transaction unconditionally.

03 December 2014

Date

Mr. Norman Manoim

Ms Andiswa Ndoni and Professor Imraan Valodia concurring

Tribunal Researcher: Ipeleng Selaledi

For the merging parties: Nazeera Mia of Cliffe Dekker Hofmeyr

For the Commission: Dineo Mashego

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