

SOUTH AFRICA / JUDGMENT

Growthpoint Student Accommodation Holdings (RF) Ltd v Feenstra Group Developments (Pty) Ltd (LM174Jan23) [2023] ZACT 14; [2023] 2 CPLR 21 (CT) (3 April 2023) [2023] ZACT 14

COURT

Competition Tribunal

BEFORE

Mondo Mazwai, Jerome Wilson, Andreas Wessels

CASE / FILE NUMBER

LM174Jan23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM174Jan23

In the matter between:

Growthpoint Student Accommodation Holdings (RF) Ltd Acquiring Firm

And

Feenstra Group Developments (Pty) Ltd in respect of the immovable property and letting enterprise known as Brooklyn Studios Target

Firm

Panel: Mondo

Mazwai (Presiding Member)

Jerome Wilson (Tribunal Member)

Andreas Wessels (Tribunal Member)

Heard on: 16

February 2023

Last submission on: 20

February 2023

Order issued on: 03

March 2023

Reasons

issued on: 03

April 2023

REASONS

FOR DECISION

Approval

- [1] On 3 March 2023, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger in which Growthpoint Student Accommodation Holdings (RF) Ltd (“GSAH”) will acquire the immovable property and letting enterprise known as

“Brooklyn Studios” from Feenstra Group Developments (Pty) Ltd (“Feenstra”). Post-merger, GSAH will own and control Brooklyn Studios.

Parties to the transaction and their activities

Primary acquiring firm

- [2] GSAH is an unlisted real estate investment trust and is controlled by Paramount Property Fund Ltd (“Paramount Property”). Paramount Property is a wholly-owned

subsidiary of Growthpoint Properties Ltd (“Growthpoint”), a real estate investment trust listed on the Johannesburg Stock Exchange. Shareholders in GSAH, apart from Growthpoint, include [shareholder names listed] [...]

- [3] GSAH’s investments are exclusive to purpose-built student accommodation. Its properties are situated in Johannesburg, Pretoria, and Cape Town.

Primary target firm

- [4] Brooklyn Studios is wholly owned and controlled by Feenstra, which is in turn, a wholly-owned subsidiary of the Feenstra Group (Pty) Ltd (“Feenstra Group”). Feenstra Group, controlled by the Feenstra Business Trust, is a property development and property holding company, and a non-controlling shareholder in GSAH.

- [5] Brooklyn Studios is purpose-built student accommodation located in Brooklyn, Pretoria. Brooklyn Studios is a newly constructed building comprising of 714 student beds.

Proposed transaction and rationale

Transaction

- [6] In terms of the proposed transaction, GSAH intends to acquire Brooklyn Studios from Feenstra. Following the implementation of the proposed transaction, GSAH will exercise sole control over Brooklyn Studios.
- [7] Feenstra Group will continue to hold a non-controlling share in GSAH and to provide property management services to GSAH's properties (including Brooklyn Studios) post-merger.

Rationale

- [8] GSAH submitted that the acquisition of Brooklyn Studios will allow it to expand its geographic reach within Pretoria for purpose-built student accommodation, and to respond to the increasing demand for such accommodation within this area.
- [9] Feenstra submitted that the proposed transaction follows the implementation of an earlier transaction[1] between Growthpoint and the Feenstra Group. GSAH, which was then known as Joburg Stay (Pty) Ltd and a subsidiary of the Feenstra Group, was acquired by Growthpoint, and entailed Growthpoint acquiring control of GSAH's entire purpose-built student accommodation portfolio. Brooklyn Studios was still under construction at the time of that transaction, and therefore was not included in it.

Competition assessment

- [10] The Competition Commission ("Commission") considered the activities of the merging parties, and found that the proposed transaction raises a horizontal overlap as the parties are both active in the provision of rentable space in residential property for student accommodation.

Product market

- [11] As regards the relevant product market, the Commission found that both GSAH and Feenstra are involved in the provision of rentable space in residential properties used for student accommodation and, following Respublica[2] and Urban Impact,[3], defined the relevant market as such.
- [12] Based on this market definition, the Commission found an overlap between Brooklyn Studios and four[4] of GSAH's student accommodation properties.
- [13] For purposes of its assessment, the Commission did not draw any distinction between private student accommodation and student accommodation offered in residences of the University of Pretoria ("university residence accommodation"). The Tribunal raised the question (which it has not specifically considered before) whether university residence accommodation necessarily forms part of the same market as private student accommodation. For example, university residence accommodation might be differentiated from private student accommodation insofar as factors such as subsidized accommodation, dining services and security are concerned. Mr Muchanya of GSAH explained the dynamics of student accommodation as follows:

“But what however does happen here is that Universities when it comes to fill, they’re always filling their beds first before they – before everyone else, because the first port of call is anyone who applies at the University they always apply for tuition plus accommodation. They fill their beds first and the private sector is then left to fight for whatever is there, or whatever the rest is.”[5]

- [14] For the reasons set out below, the Tribunal has concluded that the present merger does not raise competition concerns irrespective of whether university residence accommodation is included or excluded from the relevant market, and therefore leaves this question open in this matter. However, this question may warrant further investigation in future mergers in this market.

Geographic market

- [15] The Commission assessed the product market for the provision of residential properties used for student accommodation within an 8km radius from Brooklyn Studios. This geographic market definition was accepted in Respublica[6], where the Commission found that residential properties located further than 8 kilometers apart did not pose a competitive constraint

on each other.

- [16] We leave the exact parameters of the relevant geographic market open. It does not alter our conclusion on the competition effects in this case.

Impact on competition

- [17] In its market share assessment, the merging parties and the Commission calculated market shares based on the number of beds offered for student accommodation within an 8km radius of Brooklyn Studios. The Commission, based on information provided by the merging parties, found that GSAH’s four properties in the relevant market accounted for 3 538 beds, and Brooklyn Studios accounted for 714 beds, out of a total market of 22 143 beds, i.e. a total market share of approximately 19% with an accretion of approximately 3%.
- [18] The Commission found that there are several alternative providers of student accommodation in the relevant market, including university residence accommodation offered by the University of Pretoria, Respublica and others.
- [19] If the University of Pretoria’s residence accommodation is excluded from the relevant market, GSAH’s market share would (on the merging parties’ calculations) be approximately 23% and Brooklyn Studios’ market share approximately 5%, i.e. a total market share of approximately 28%.

- [20] The Commission and merging parties submitted that these market shares are all overstated because the total market figure used for their calculations excludes various firms listed by the University of Pretoria as accredited student accommodation providers, as well as various other providers of private student accommodation in the relevant market, in respect of which bed numbers were not readily available.
- [21] The Tribunal requested the Commission to obtain an estimation of the number of beds associated with the accredited student accommodation providers. According to the updated information provided by the Commission, there are (excluding the merging parties) over 35 accredited private student accommodation providers providing over 10,000 beds.
- [22] In addition, the Tribunal asked the merging parties for information on the five properties in the relevant market that are geographically

the closest to Brooklyn Studios. The merging parties submitted that these are Apartments on William[7], Brooklyn House[8], Unilofts[9], IQ Brooklyn[10], and Hatfield Square[11]. All of these properties are in a walking distance of 1.2km or less from Brooklyn Studios, and in a driving distance of 2.5km or less. These properties in total provide just under 6000 private beds for students as alternatives to the merged entity.

- [23] Given the relatively low market shares of the merging parties, and the number of alternative providers of student accommodation (irrespective of whether or not university residence accommodation is included in the relevant market), we agree with the Commission's conclusion that the proposed transaction is unlikely to give rise to any significant unilateral concerns.

Assessment of potential information exchange

- [24] The Tribunal also enquired whether Feenstra's ongoing role, post-merger, as a shareholder in GSAH, a property manager of the properties in the GSAH portfolio, and as a property manager of other properties outside GSAH, raises information exchange concerns.
- [25] The merging parties explained that Feenstra only has a minority, non-controlling, shareholding in GSAH, the purpose of which is to protect GSAH's value for incoming investors.[12]
- [26] As regards property management,[explanation by Mr Muchanya of the manner in which the GSAH property portfolio is managed] [...]. [13]
- [27] Importantly, Ms Human of Feenstra also explained that Feenstra will not, post-merger, manage any properties in the relevant market other than those contained in the GSAH portfolio.[14]
- [28] The Tribunal was therefore satisfied that the proposed merger does not raise any information exchange concerns.

[29] The Tribunal therefore concurs with the Commission's conclusion that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest

Employment

[30] The merging parties submitted that the proposed transaction will not have any negative impact on employment as there will be no job losses or changes to employment conditions as a result of the proposed transaction.

[31] The merging parties explained that GSAH does not have any direct employees, and its day-to-day operations are conducted externally by the Feenstra Group, which will continue to be the case post-merger.[15]

[32] A representative of Feenstra Group confirmed that their employees were notified and raised no concerns regarding the proposed transaction.[16]

[33] Based on the above, the Commission concluded that the proposed transaction is unlikely to have a negative impact on employment, and we agree with this conclusion.

Spread of ownership

[34] The Commission found that GSAH has an historically disadvantaged person ("HDP") shareholding of 62.38%, while Feenstra has no HDP shareholding.

[35] The merging parties submitted that the proposed transaction will thus promote the greater spread of HDP ownership through GSAH.

[36] The Commission concluded that the proposed transaction does not raise any concerns under section 12(3)(e) of the Act, or any other public interest concerns.

[37] The Tribunal agrees with this conclusion.

Conclusion

[38] Considering the above, the Tribunal concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and does not raise any public interest concerns. Accordingly, we approve the proposed transaction unconditionally.

Jerome Wilson SC

Concurring: Ms Mondo Mazwai and Mr Andreas Wessels

Date: 3 April 2023

Tribunal case manager:

Leila Raffee

For the merging parties:

Misha van Niekerk of Adams & Adams

For the Commission:

Horisani Mhlari and Grashum Mutizwa

- [1] Growthpoint Properties Ltd and Joburg Stay (Pty) Ltd (Tribunal Case Number. LM048Jul21), approved by the Tribunal on 15 September 2021.
- [2] Respublica Student Living (Pty) Ltd & Midrand Varsity Lodge (Pty) Ltd, Masingita Estates (Pty) Ltd, Sam King Investments Holdings (Pty) Ltd re target properties Midrand Student Village & White House Lodge (Tribunal Case Number: LM245Mar16)
- [3] Urban Impact Properties (Pty) Ltd & Pulse Student Lifestyle (Pty) Ltd (Tribunal Case Number: LM099Jun18)
- [4] These properties of GSAH include Hatfield Studios, Varsity Studios, Studios@Burnett, and Festival Edge.
- [5] Transcript, p29
- [6] Respublica Student Living (Pty) Ltd & Midrand Varsity Lodge (Pty) Ltd, Masingita Estates (Pty) Ltd, Sam King Investments Holdings (Pty) Ltd re target properties Midrand Student Village & White House Lodge (Tribunal Case Number: LM245Mar16)
- [7] Owned by Caliber 651 (Pty) Ltd.
- [8] Owned by Mile Investments.
- [9] Owned by Letprop (Pty) Ltd.
- [10] Flats in the building are owned by various individual investors and are specifically leased for student accommodation.
- [11] Owned by Respublica.
- [12] Transcript, p13.
- [13] Transcript, p15
- [14] Transcript, p17.
- [15] Email dated 19 January 2023 (Merger Record, p370)
- [16] Email dated 16 January 2023 (Merger Record, p368)

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