

SOUTH AFRICA / JUDGMENT

Hemipac Investments Proprietary Limited v Ascension Properties Proprietary Limited (LM112Oct23) [2024] ZACT 41 (6 March 2024) [2024] ZACT 41

COURT
Competition Tribunal

BEFORE
A Kessery, A Ndoni, F Tregenna

CASE / FILE NUMBER
LM112Oct23

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COMPETITION TRIBUNAL OF
SOUTH AFRICA

Case no: LM112Oct23

In

the large merger
between:

Hemipac
Investments Proprietary Limited
Primary
Acquiring Firm
And
Ascension
Properties Proprietary Limited Primary
Target
Firm
(in
business rescue), in respect of a portfolio
of
ten (10) property rental enterprises

Panel:

A Kessery (Presiding Member)
A
Ndoni (Tribunal Member)
F
Tregenna (Tribunal Member)
Heard

on:

13 February 2024
Order issued

on: 13 February 2024
Reasons Issued

on: 6 March 2024

REASONS FOR DECISION

Approval

- [1] On 13 February 2024, the Competition Tribunal (“Tribunal”) conditionally approved the large merger in which Hemipac Investments Proprietary Limited (“Hemipac Investments”) will acquire, as a going concern, ten (10) property rental enterprises (the “Target Properties”) from Ascension Properties Proprietary Limited (“Ascension”). Post-merger, Hemipac Investments will have sole control of the Target Properties.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The primary acquiring firm, Hemipac Investments, is a wholly-owned subsidiary of [...] which is ultimately controlled by the [...].
- [3] Hemipac Investments, its controlling entities and all the firms controlled by its controlling entities are collectively referred to as the “SKG Group”.
- [4] The SKG Group is involved in the development, leasing and management of commercial, industrial, office and retail investment properties.

Primary target firm

- [5] The primary target firm is Ascension (in business rescue), in respect of the Target Properties. Ascension is a wholly owned subsidiary of Rebosis Property Fund Limited (“Rebosis”), a Real Estate Investment Trust listed on the Johannesburg Stock Exchange. Rebosis is currently in business rescue, under the supervision of Joint Business Rescue Practitioners.
- [6] Rebosis owns a diverse property portfolio in South Africa, comprising retail, office and industrial properties.

Proposed transaction and rationale

Transaction

- [7] In terms of the proposed transaction, Hemipac Investments entered into a Portfolio Sale Agreement with the Joint Business Rescue Practitioners and Ascension to acquire the Target Properties in a single indivisible transaction. Following implementation of the proposed transaction, Hemipac Investments will exercise sole control over the Target Properties.

Rationale

- [8] The rationale for Hemipac Investments is that a strategic decision was taken to diversify its portfolio and the proposed acquisition presents a strategic investment opportunity in the public sector market as the Target Properties are largely occupied by public sector tenants.
- [9] The rationale for Ascension in respect of the Target Properties is that the proposed transaction is motivated by Rebosis' current business rescue plan, which mandates the wind-down sale of assets. The sale of the Target Properties will maximize value to the benefit of Rebosis' current creditors. The proposed transaction will also ensure business continuity of the Target Properties and secure continued employment of the current

employees associated with the Target Properties.

Competition Assessment

- [10] The Tribunal has previously decided that office space can be defined according to different classes, for example, grades P, A, B or C.[1] In the current case, we did not receive any evidence suggesting a departure from this approach and therefore accept the Commission's definition of the relevant product market as rentable A-grade and B-grade office space.
- [11] In relation to the relevant geographic market, the Tribunal has previously accepted that office space located within a 5km radius is interchangeable. There is no reason to depart from the Tribunal's previous decision and we accept the Commission's definition of the relevant geographic market as being a 5km radius from the Target Properties (the Pretoria Central Business District ("CBD") and surrounding nodes, Johannesburg CBD and surrounding nodes, Nelspruit CBD node and Bellville node).
- [12] The Commission found that the proposed transaction raises a horizontal overlap between the activities of the merging parties in relation to the provision of rentable A-grade and B-grade office space in the Pretoria CBD and surrounding nodes, Johannesburg CBD and surrounding nodes, Nelspruit CBD node and Bellville node.
- [13] The Commission found that the merged entity will have a market share of less than [...] % with an accretion of [...] % in the market for the provision of A/B-grade office space in the Pretoria CBD and surrounding nodes within 5km of the Target Properties.
- [14] The Commission found that the merged entity will have a market share of less than [...] % with an accretion of [...] % in the market for the provision of A/B-grade office space in the JHB CBD and surrounding nodes within 5km of the Target Properties.
- [15] The Commission found that the merged entity will have a market share of less than [...] % with an accretion of [...] % in the market for the provision of B-grade office space in the Nelspruit CBD node within 5km of the Target Properties.

- [16] The Commission found that the merged entity will have a market share of less than [...] % with an accretion of [...] % in the market for the provision of A/B-grade office space in the Bellville node within 5km of the Target Properties.
- [17] The Commission further found that there are numerous A- and B-grade office properties in the relevant nodes that will competitively constrain the merged entity post-merger. Further, the market share accretions remain minimal.
- [18] Having regard to the above, and given the relatively low market shares, we are satisfied that the proposed transaction will not lead to any substantial prevention or lessening of competition in any relevant market.

Public interest assessment

Employment

- [19] The merging parties submitted that there will be no retrenchments or redundancies as a result of the proposed transaction. All employees currently employed by the Target Properties will be transferred in terms of section 197 of the Labour Relations Act, No. 66 of 1995 (as amended).
- [20] The employee representatives of the merging parties did not raise any concerns.
- [21] Having regard to the above, the Commission concluded that the proposed transaction is unlikely to raise any employment concerns post-merger.

Spread of ownership

- [22] The Commission is of the view that the proposed transaction will result in a dilution of shareholding by historically disadvantaged persons (“HDPs”). In order to mitigate the effect of this dilution, Hemipac Investments committed to a remedy relating to procurement from HDPs. To this end, Hemipac Investments intends to procure its cleaning, security, maintenance and construction requirements nationally from suppliers who are HDPs for approximately R1,000,000 (one million rand) per year for a period of 3 (three) years from the implementation date of the transaction.
- [23] The Commission noted that the proposed transaction may not have a positive impact on the promotion of a greater spread ownership, given the dilution of shareholding by HDPs in the Target Properties. However, Rebosis will retain its black ownership, and its empowerment status and BBBEE ownership levels will remain post-merger. The Commission further notes that the Target Properties will remain majority owned by HDPs post-merger.[2]
- [24] We are not aware of any other public interest concerns arising in this case. Based on the above facts, we have no reason to disagree with the Commission’s public interest assessment.

Conclusion

[25] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and the proposed transaction does not raise any other public interest concerns.

[26] We therefore, approve the proposed transaction subject to the conditions annexed hereto as Annexure A.

Signed by: Anisa Kessery

Signed at: 2024-03-06 11:52:18 +02:00

Reason: Witnessing Anisa Kessery

6 March 2024

Date

Adv. Anisa Kessery

Ms Andiswa Ndoni and Prof. Fiona Tregenna concurring

Tribunal Case Manager: Bobedi Seleke For the Merging Parties: Vani Chetty of Vani Chetty Competition Law (Proprietary) Limited For the Commission: Kgothatso Kgobe and Zanele Hadebe

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ANNEXURE A

HEMIPAC INVESTMENTS (PTY) LTD AND ASCENSION PROPERTIES (PTY) LTD (IN BUSINESS RESCUE), IN RESPECT OF A PORTFOLIO OF TEN (10) PROPERTY RENTAL ENTERPRISES

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below, and cognate expressions bear corresponding meanings –

1.1 "Acquiring Firm" means Hemipac Investments (Pty) Ltd;

1.2 "Approval Date" means the date on which the Merger is approved by the Tribunal in terms of the Competition Act;

1.3 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

1.4 "Competition Rules" means the Rules for the Conduct of Proceedings in the Commission;

1.5 "Competition Act" means the Competition Act No 89 of 1998, as amended;

1.6 "Conditions" means the conditions in this Annexure A;

1.7 "Days" means any calendar day that is not a Saturday, Sunday, or official public holiday in South Africa;

1.8 "HDP" means a historically disadvantaged person as defined in section 3(2) of the Competition Act;

1.10 "Implementation Date" means the date occurring after the Approval Date on which the Merger Parties implement the Merger;

1.11 "Merger" means the proposed acquisition by the Acquiring Firm of the Target Properties as notified to the Commission under Case No. 2023OCT0045;

1.12 "Merger Parties" means the Acquiring Firm and the Seller;

1.13 "Seller" means Ascension Properties (Pty) Ltd;

1.14 "South Africa" means the Republic of South Africa;

1.15 "Target Properties" means ten

(10) property rental enterprises owned by the Seller;

1.16 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and

1.16 "Tribunal Rules" means the Rules for the Conduct of Proceedings in the Tribunal.

2. HDP PROCUREMENT

2.1 The Acquiring Firm shall spend R1,000,000 per year (one million rands) towards procuring cleaning, security, maintenance, and construction requirements nationally from HDP Suppliers over a period of 3 (three) years from the Implementation Date.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Acquiring Firm shall inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.

3.2 For the duration of the Conditions, the Acquiring Firm shall, on each anniversary of the Implementation Date, provide the Commission with an affidavit attested to by a senior official of the Acquiring Firm, confirming its compliance with the Conditions.

3.3 The Commission may request such additional information from the Merger Parties, which the Commission may, from time to time, deem necessary to monitor the extent of compliance with these Conditions.

4. APPARENT BREACH

4.1 Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determine that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules, read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.

5. VARIATION OF CONDITIONS

5.1 The Merger Parties may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised, or amended. Should a dispute arise in relation to the variation of the Conditions, the Merger Parties may apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised, or amended.

6. GENERAL

6.1 All correspondence concerning the Conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

- [1] Primegro Properties Ltd and Growthpoint Properties Ltd 29/LMJun03; Momentum Property Investments and Bonatla Property Holdings Ltd 34/LM/Jul03. See also the Tribunal's more recent decision of Capitec Bank Limited and SPEAR REIT Limited on behalf of the immovable property and rental enterprise known as the Liberty Life Office Building LM011Apr23.
- [2] Hemipac is 51% owned and controlled by historically disadvantaged person [...] which is indirectly 51% owned by [...] a historically disadvantaged person.

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CASE PAGE	https://chat.esheria.ai/case-law/south-africa/hemipac-investments-proprietary-limited-v-ascension-unknown-topic-act-2024

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