

SOUTH AFRICA / JUDGMENT

Hyprop investments Ltd v Sycom Property Fund Managers Ltd (016683) [2013] ZACT 86; [2013] 2 CPLR 530 (CT) (7 August 2013) [2013] ZACT 86

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Mondo Mazwai, Anton Roskam

CASE / FILE NUMBER

016683

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 016683

In the matter between:

Hyprop investments Limited Primary Acquiring Firm

and

Sycom Property Fund Managers Limited in respect of the property letting enterprise known as “Somerset Mali” and in Somerset

Mail Property Management Company (Pty) Ltd Primary Target Firm

Panel

Andreas Wessels (Presiding Member)

Mondo Mazwai (Tribunal Member)

Anton Roskam (Tribunal Member)

Heard on

24 July 2013

Order issued on :

25 July 2013

Reasons

issued :

07 August 2013

DECISION

Conditional approval

Panel

Andreas Wessels (Presiding Member)

Mondo Mazwai (Tribunal Member)

Anton Roskam (Tribunal Member)

Heard on

24 July 2013

Order issued on :

25 July 2013

Reasons

issued :

07 August 2013 DECISION

1. On 25 July 2013, the Competition Tribunal ("Tribunal"), in terms of section 16(2)(b) of the Competition Act of 19981, conditionally approved the acquisition by Hyprop Investments Limited of the property letting enterprise known as "Somerset Mall" and Somerset Mall Property Management Company (Pty) Ltd from Sycom Property Fund Managers Limited.
2. The reasons for conditionally approving the proposed transaction follow.

Parties to transaction

Acquiring firm

3. The primary acquiring firm is Hyprop Investments Limited ("Hyprop"), a property loan stock company listed on the Johannesburg Securities Exchange South Africa (JSE). It specialises in the investment in prime shopping centres. Hyprop currently owns seventeen properties comprising office and retail properties located in South Africa.
4. With regards to shopping centres, Hyprop currently owns eleven shopping centres. Seven of these properties are located in Gauteng,

being Hyde Park Corner, The Glen Shopping Centre, The Mall of Rosebank, Stoneridge Shopping Centre, Clearwater, Woodlands Boulevard

and Atterbury Value Mart. The remaining four properties are located in the Western Cape, being Canal Walk, CapeGate Regional Shopping

Precinct, Willowbridge and Somerset Value Mart. Of relevance to the competition assessment of this transaction is Somerset Value Mart which is classified as a community (value) centre and is situated within five kilometres from Somerset Mall.

5. Hyprop conducts its own asset and property management functions and does not provide external property management to third parties.

Target firm

6. The primary target firm is Sycom Property Fund Managers Limited ("SPFM") in respect of the property letting enterprise

known as "Somerset Mall" and Somerset Mall Property Management Company (Pty) Ltd ("Somerset Mall ManCo").

Somerset Mall is categorised as a major regional centre located in the Somerset node in the Western Cape. Somerset Mall ManCo is the property management company that was established for the purposes of providing a management entity to manage Somerset Mall.

7. SPFM is a wholly-owned subsidiary of Acucap Properties Limited ("Acucap") and manages Sycom Property Fund Collective

Investment Scheme in Property ("Sycom"). Sycom's major unit holders are: (i) Hyprop (33.88%) and Acucap (17.22%).

Sycom is a closed-end property unit trust listed on the JSE. It invests directly and indirectly in retail and office space. Acucap

is a property loan stock company listed on the JSE. According to the merging parties, Sycom is controlled by Acucap. Acucap performs

Sycom's asset management services and retains day to day control of the assets.² Proposed transaction and rationale ⁸. The proposed transaction represents a "buy-back" of shares.³ Ultimately Hyprop intends acquiring 100% of respectively Somerset Mall and Somerset Mall ManCo from Sycom giving Hyprop sole control of Somerset Mall and Somerset Mall ManCo post-merger. ⁹. Hyprop's rationale for this transaction is two-fold: the target property will complement Hyprop's property portfolio

and will result in Hyprop converting its indirect investment in Somerset Mai! (through its unitholding in Sycom) into a direct

property asset, thereby enabling Hyprop to exit from its investment in Sycom.⁴ 10. Sycom's rationale for this transaction is to facilitate the exit of Hyprop from Sycom and to enable Sycom's Board to maximise its investment returns for unitholders.⁵ 11. This merger was filed along with another "large" merger (Tribunal case number 016659) in terms of which Sycom acquired an additional 50% shareholding in respectively Somerset Mall and Somerset Mall ManCo from AECl Pension Fund. In order for the Hyprop-Sycom transaction to occur, the Sycom-AECl Pension Fund transaction must first take place. Competition assessment 12. Hyprop currently owns four rentable retail properties in the Western Cape, with three of them being located more than 35 kilometres away from Somerset Mall.⁶ These latter three shopping centres therefore do not represent any competition concerns in relation to the acquisition of Somerset Mall given their relative distance from Somerset Mall. 13. Hyprop's fourth property, namely Somerset Value Mart, is situated 450 metres from Somerset Mall and is classified as a community shopping centre. The Commission however concluded that this also does not raise any competition concerns since (i) Somerset Value Mart and Somerset Mall are not close competitors; (ii) a large number of other shopping centres not owned by the merging parties are located within a 10 to 15 kilometre radius around Somerset Mall; and (iii) no customers raised any competition concerns regarding the proposed transaction. 14. We have no reason to doubt the Commission's findings and therefore conclude that the proposed transaction does not substantially prevent or lessen competition in any relevant market. Public interest Employment 15. The merging parties confirmed that the proposed transaction will have no adverse effect on employment.⁷ Effect on small business 16. In respect of Somerset Mall, the Commission found an exclusivity clause in the lease agreement between the landlord and one of the anchor tenants, namely Pick 'n Pay Stores Limited ("Pick 'n Pay"). This exclusivity clause has the potential effect of preventing small businesses from accessing Somerset Mall, such as grocery stores and bakeries of a certain size, cafes and delicatessen which sell fresh fish or meat; butcheries other than halaal butcheries; and fresh produce businesses.⁸ 17. To date the Commission has investigated and referred a number of property transactions to the Tribunal in which it identified a public interest concern relating to the existence of exclusivity clauses in various lease agreements concluded between landlords and their respective anchor tenants.⁹ The Commission in those matters recommended that the mergers should be approved by the Tribunal subject to conditions to address the effect of the proposed transaction on the ability of small businesses to become competitive. The recommended conditions typically required the acquiring firm in a particular transaction to undertake to use its best endeavours to negotiate with the anchor tenant in good faith to remove the exclusivity clause(s) at some future date. The Tribunal, in terms of section 12A(3)(c) of the Act, approved a number of large mergers on this basis. 18. In a more recent Tribunal decision of 13 June 2013, we approved a retail property merger involving Fortress Income 2 (Pty) Ltd ("Fortress") (Tribunal case number: 016519) without any conditions relating to the removal of an existing exclusivity

clause, given that the condition, if imposed, would be ineffectual since there was no available retail space at the relevant shopping centre (i.e. Nelspruit Plaza) to offer to new tenants and furthermore no prospect of it expanding beyond its present size.¹⁰ In line with the latter

Tribunal decision, the Commission in this case investigated (i) the current vacancy rate at Somerset Mall; (ii) the number of entries and exits of tenants for the past three years; (iii) the number of lease agreements which terminate within the next two years; and (iv) whether any expansion of Somerset Mall is envisaged within the next two years. Having regard to these factors, the Commission concluded that there are practical possibilities for small businesses to enter Somerset Mall and that the exclusivity clause in the Pick 'n Pay lease agreement therefore has the potential of excluding small businesses from Somerset Mall. More specifically, the Commission found that there were numerous lease agreements that terminate within the forthcoming two years and further found evidence of entry and exit from Somerset Mall. The case before us now is thus factually different from the Fortress matter. 19. The Commission further investigated whether two shopping centres in the geographic vicinity of Somerset Mall, namely (i) the Habitat Centre @ The Mall and (ii) Waterstone Village Shopping Centre could accommodate new or expanding small businesses. The Commission concluded that these two shopping centres (both classified as neighbourhood shopping centres, as opposed to the Somerset Mall being a major regional centre) are within a five kilometre radius from Somerset Mall, that they both have available retail space and that the lessors have no exclusivity clauses in their lease agreements with the lessees. The Commission, based on this information, recommend that no condition be placed on the proposed

transaction to address the relevant public interest issue. 20. However, the Commission did not consult any small businesses regarding the substitutability of the above-mentioned two shopping centres and Somerset Mall from a small tenant's perspective. Furthermore, the Tribunal was concerned that one of the centres

identified as a potential alternative to the affected small businesses had a relatively high vacancy rate, which raised questions regarding it being a real alternative from the perspective of a new small business or an existing small business wishing to expand. We further note that, from a small tenant's perspective, there may be important differences between Somerset Mall and the two above-mentioned centres, such as footfall, tenant mix, proximity and availability of public transport, building structure and design, size, number of parking bays and the structure thereof, mall classification and trading hours. Given the lack of

this type of information and of the requirements of small businesses of the type currently excluded from entering Somerset Mall, we concluded that the above-mentioned exclusivity clause in the lease agreement between the landlord and Pick 'n Pay raises a potential substantial public interest concern in terms of section 12A(3)(c) of the Act. 21. Since the merging parties tendered a condition that addressed the public interest concern relating to small business, we approved the merger conditionally on the basis of such an undertaking, namely that: 21.1. Sycom (in relation to Tribunal case number 016659) and Hyprop (in relation to Tribunal case number 016683) jointly undertake to use reasonable commercial endeavours to negotiate with Pick 'n Pay, in the utmost good faith within sixty (60) days of the Tribunal's order, to remove the exclusivity clause contained in the lease agreement between the landlord and Pick 'n Pay. Other public interest issues 22. Apart from the above-mentioned concern relating to the ability of small

businesses to become competitive, the proposed merger raises no other public interest concerns.

CONCLUSION

23 We approve the proposed transaction subject to the conditions set out in the attached “Annexure A”. ANDREAS WESSELS 08 August 2013 DATE Mondo Mazwai and Anton Roskam concurring Tribunal Researcher: Nicola Ilgner For the Commission: Jatheen Bhima For the merging parties: Vani Chetty Competition Law

7. SPFM is a wholly-owned subsidiary of Acucap Properties Limited (“Acucap”) and manages Sycom Property Fund Collective

Investment Scheme in Property (“Sycom”). Sycom’s major unit holders are: (i) Hyprop (33.88%) and Acucap (17.22%).

Sycom is a closed-end property unit trust listed on the JSE. It invests directly and indirectly in retail and office space. Acucap

is a property loan stock company listed on the JSE. According to the merging parties, Sycom is controlled by Acucap. Acucap performs

Sycom’s asset management services and retains day to day control of the assets.²

Proposed transaction and rationale

8. The proposed transaction represents a “buy-back” of shares.³ Ultimately Hyprop intends acquiring 100% of respectively Somerset Mall and Somerset Mall ManCo from Sycom giving Hyprop sole control of Somerset Mall and Somerset Mall ManCo post-merger.
9. Hyprop’s rationale for this transaction is two-fold: the target property will complement Hyprop’s property portfolio

and will result in Hyprop converting its indirect investment in Somerset Mai! (through its unitholding in Sycom) into a direct

property asset, thereby enabling Hyprop to exit from its investment in Sycom.⁴

10. Sycom’s rationale for this transaction is to facilitate the exit of Hyprop from Sycom and to enable Sycom’s Board to maximise its investment returns for unitholders.⁵
11. This merger was filed along with another “large” merger (Tribunal case number 016659) in terms of which Sycom acquired an additional 50% shareholding in respectively Somerset Mall and Somerset Mall ManCo from AECI Pension Fund. In order for the Hyprop-Sycom transaction to occur, the Sycom-AECI Pension Fund transaction must first take place.

Competition assessment

12. Hyprop currently owns four rentable retail properties in the Western Cape, with three of them being located more than 35 kilometres away from Somerset Mall.⁶ These latter three shopping centres therefore do not represent any competition concerns in relation to the acquisition of Somerset Mall given their relative distance from Somerset Mall.
13. Hyprop's fourth property, namely Somerset Value Mart, is situated 450 metres from Somerset Mall and is classified as a community shopping centre. The Commission however concluded that this also does not raise any competition concerns since (i) Somerset Value Mart and Somerset Mall are not close competitors; (ii) a large number of other shopping centres not owned by the merging parties are located within a 10 to 15 kilometre radius around Somerset Mall; and (iii) no customers raised any competition concerns regarding the proposed transaction.
14. We have no reason to doubt the Commission's findings and therefore conclude that the proposed transaction does not substantially prevent or lessen competition in any relevant market.

Public interest Employment

15. The merging parties confirmed that the proposed transaction will have no adverse effect on employment.⁷

Effect on small business

16. In respect of Somerset Mall, the Commission found an exclusivity clause in the lease agreement between the landlord and one of the anchor tenants, namely Pick 'n Pay Stores Limited ("Pick 'n Pay"). This exclusivity clause has the potential effect of preventing small businesses from accessing Somerset Mall, such as grocery stores and bakeries of a certain size, cafes and delicatessen which sell fresh fish or meat; butcheries other than halaal butcheries; and fresh produce businesses.⁸
17. To date the Commission has investigated and referred a number of property transactions to the Tribunal in which it identified a public interest concern relating to the existence of exclusivity clauses in various lease agreements concluded between landlords and their respective anchor tenants.⁹ The Commission in those matters recommended that the mergers should be approved by the Tribunal subject to conditions to address the effect of the proposed transaction on the ability of small businesses to become competitive. The recommended conditions typically required the acquiring firm in a particular transaction to undertake to use its best endeavours to negotiate with the anchor tenant in good faith to remove the exclusivity clause(s) at some future date. The Tribunal, in terms of section 12A(3)(c) of the Act, approved a number of large mergers on this basis.
18. In a more recent Tribunal decision of 13 June 2013, we approved a retail property merger involving Fortress Income 2 (Pty) Ltd ("Fortress") (Tribunal case number: 016519) without any conditions relating to the removal of an existing exclusivity

clause, given that the condition, if imposed, would be ineffectual since there was no available retail space at the relevant shopping centre (i.e. Nelspruit Plaza) to offer to new tenants and furthermore no prospect of it expanding beyond its present size.¹⁰ In line with the latter Tribunal decision, the Commission in this case investigated (i) the current vacancy rate at Somerset Mall; (ii) the number of entries and exits of tenants for the past three years; (iii) the number of lease agreements which terminate within the next two years; and (iv) whether any expansion of Somerset Mall is envisaged within the next two years. Having regard to these factors, the Commission concluded that there are practical possibilities for small businesses to enter Somerset Mall and that the exclusivity clause in the Pick 'n Pay lease agreement therefore has the potential of excluding small businesses from Somerset Mall. More specifically, the Commission found that there were numerous lease agreements that terminate within the forthcoming two years and further found evidence of entry and exit from Somerset Mall. The case before us now is thus factually different from the Fortress matter.

19. The Commission further investigated whether two shopping centres in the geographic vicinity of Somerset Mall, namely (i) the Habitat Centre @ The Mall and (ii) Waterstone Village Shopping Centre could accommodate new or expanding small businesses. The Commission concluded that these two shopping centres (both classified as neighbourhood shopping centres, as opposed to the Somerset Mall being a major regional centre) are within a five kilometre radius from Somerset Mall, that they both have available retail space and that the lessors have no exclusivity clauses in their lease agreements with the lessees. The Commission, based on this information, recommend that no condition be placed on the proposed

transaction to address the relevant public interest issue.

20. However, the Commission did not consult any small businesses regarding the substitutability of the above-mentioned two shopping

centres and Somerset Mall from a small tenant's perspective. Furthermore, the Tribunal was concerned that one of the centres

identified as a potential alternative to the affected small businesses had a relatively high vacancy rate, which raised questions regarding it being a real alternative from the perspective of a new small business or an existing small business wishing to expand. We further note that, from a small tenant's perspective, there may be important differences between Somerset Mall and the two above-mentioned centres, such as footfall, tenant mix, proximity and availability of public transport, building structure and design, size, number of parking bays and the structure thereof, mall classification and trading hours. Given the lack of

this type of information and of the requirements of small businesses of the type currently excluded from entering Somerset Mall, we concluded that the above-mentioned exclusivity clause in the lease agreement between the landlord and Pick 'n Pay raises a potential substantial public interest concern in terms of section 12A(3)(c) of the Act.

21. Since the merging parties tendered a condition that addressed the public interest concern relating to small business, we approved the merger conditionally on the basis of such an undertaking, namely that:

21.1. Sycom (in relation to Tribunal case number 016659) and Hyprop (in relation to Tribunal case number 016683) jointly undertake to use reasonable commercial endeavours to negotiate with Pick 'n Pay, in the utmost good faith within sixty (60) days of the Tribunal's order, to remove the exclusivity clause contained in the lease agreement between the landlord and Pick 'n Pay.

Other public interest issues

22. Apart from the above-mentioned concern relating to the ability of small businesses to become competitive, the proposed merger raises no other public interest concerns.

CONCLUSION

23 We approve the proposed transaction subject to the conditions set out in the attached "Annexure A".

ANDREAS WESSELS

08 August 2013

DATE

Mondo Mazwai and Anton Roskam concurring

Tribunal Researcher: Nicola Ilgner

For the Commission: Jatheen Bhima

For the merging parties: Vani Chetty Competition Law

ANNEXURE A

Hyprop Investments Limited and Sycom Property Fund Collective Investment Scheme in Property, in respect of the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd

Tribunal Case number: 016683 CONDITIONS

1. DEFINITIONS

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

1.1. "Approval Date" means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT 10);

1.2. "Commission" means the Competition Commission of South Africa;

1.3. “Conditions” means these conditions;

1.4. “Hyprop” means Hyprop Investments Limited;

1.5. “Merger” means the acquisition by Hyprop of control over Somerset Mail and Somerset Mall Property Management Company (Pty) Ltd;

1.6. “Merging Parties” means Hyprop and Sycom in respect of the property letting enterprise known as “Somerset Mall” and Somerset Mall Property Management Company (Pty) Ltd;

1.7. “Pick ‘n Pay” means Pick ‘n Pay (Pty) Ltd; and

1.8. “Sycom” means Sycom Property Fund Collective Investment Scheme in Property, in respect of the property letting enterprise known as “Somerset Mall” and in Somerset Mall Property Management Company (Pty) Ltd.

2. RECORDAL

2.1. Hyprop has agreed to the following undertakings meant to address the public interest concerns.

2.2. The present merger is interrelated to the acquisition of the remaining 50% share in Somerset Mall and the Somerset Mail Management

Company (Pty) Ltd by Sycom, under Tribunal Case number 016659.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

Hyprop (in relation to Tribunal case number 016683) and Sycom (in relation to Tribunal case number 016659) jointly undertake to use reasonable commercial endeavours to negotiate with Pick ‘n Pay, in the utmost good faith within sixty (60) days of the Tribunal’s order, to remove the exclusivity clause contained in the lease agreement between the landlord and Pick ‘n Pay.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

Hyprop (in relation to Tribunal case number 016683) or Sycom (in relation to Tribunal case number 016659) undertake to provide the Commission with an affidavit setting out the outcome of the negotiations with Pick ‘n Pay, as contemplated in paragraph 3 above, within ninety (90) days of the Tribunal’s order.

1 Act No. 89 of 1998, as amended.

2 See page 67 of the merger record.

3 See merger record inter alia page 25.

4 See page 64 of the merger record.

5 See page 64 of the merger record.

6 Canal Walk, CapeGate and Willowbridge (see paragraph 4 above).

7 See pages 18, 61 and 77 of the merger record.

8 See pages 309 to 336 of the merger record, specifically page 322 which contains the exclusivity provisions of the lease agreement.

9 See inter alia Accelerate Property Fund Limited and 15 letting enterprises being sold by Fourways Precinct (Pty) Ltd (Tribunal case number: 016170); Fairvest Property Holdings Limited and A portfolio of commercial properties of the South African Corporate Real Estate Fund (Tribunal case number: 015610); Redefine Properties Limited and Hyprop Investments Limited in respect of a 50% undivided share of the business enterprise known as “South Coast Mall” (Tribunal case number: 014993); and Growthpoint Properties Limited and Liberty Group Limited in respect of a 64.29% interest in the business enterprise known as “Alberton City” (Tribunal case number: 014415).

10 See large merger involving Fortress Income 2 (Pty) Ltd and The immovable proprietary and property letting enterprises of Pick 'n Pay Rustenburg, Central Park Bloemfontein, Nelspruit Plaza, New Redruth Alberton, Sterkspruit Plaza and Tzaneen Centre (Tribunal case number: 016519).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZACT/2013/86.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hyprop-investments-ltd-v-sycom-unknown-topic-act-2013>

Prepared on 10 October 2026 · Esheria