

SOUTH AFRICA / JUDGMENT

KZN Pension House (Pty) Ltd v Vividend Income Fund (LM113Sep22) [2022] ZACT 105 (29 November 2022) [2022] ZACT 105

COURT

Competition Tribunal

BEFORE

Shaista Goga, Andiswa Ndoni, Mondo Mazwai

CASE / FILE NUMBER

LM113Sep22

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM113Sep22

In the matter between:

KZN Pension House (Pty) Ltd Acquiring Firm

and

Vividend Income Fund in Respect of the Letting Target Firm

Enterprise Known as SARS Durban

Panel: Shaista Goga (Presiding Member)

Andiswa Ndoni (Tribunal Panel Member)

Mondo Mazwai (Tribunal Panel Member)

Heard on: 19

October 2022

Order issued on: 19 October 2022

Reasons

issued on: 29 November 2022

REASONS

FOR DECISION

Approval

- [1] On 19 October 2022, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger wherein KZN Pension House Proprietary Limited (“KZN Pension House”) intends to acquire the letting enterprise known as SARS Durban (“SARS Durban”) from Vividend Income Fund Limited (“Vividend Income Fund”). Post-merger, MSM Partnership, through KZN Pension House, will exercise control over SARS Durban.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The primary acquiring firm is KZN Pension House Proprietary Limited (“KZN Pension House”), which is a special purpose vehicle created for purposes of this transaction.
- [3] KZN Pension House is solely controlled by the MSM Partnership.
- [4] The general partner of the partnership is MSM Property Fund 1 GP Proprietary Limited (“MSM Property Fund 1 GP”) which is controlled by MSM Property Fund Proprietary Limited (“MSM Property Fund”) and ultimately by Mr Musi Thabang Skosana (“Mr Skosana”).
- [5] The limited partners of the partnership are Rebamoratiwa Property Investment Holdings Proprietary Limited (“RPIH”) which is a property investment company and KZN Municipal Pension Fund[1] (“KZN Municipal Fund”) which is a contribution pension fund.
- [6] For purposes of the proposed transaction, KZN Pension House, MSM Partnership, the general and limited partners, the firms controlled by the general and limited partners, their controlling entities and the firms controlled by their controlling entities will collectively be referred to as the (“Acquiring Group”).
- [7] The Acquiring Group is involved in a range of activities comprising of an asset manager and a private equity company registered with the FSCA (MSM Property Fund), a property investment company (RPIH), and a contribution pension fund (KZN Municipal Fund).

Primary target firm

- [8] The primary target firm is Vividend Income Fund Limited (“Vividend Income Fund”) in respect of the property letting enterprise known as SARS Durban.
- [9] SARS Durban comprises of 23,104.61 m² (twenty-three thousand one hundred four point six one square meters) of rentable Grade A office space situated at 201 Dr Pixley Kaseme Street, Durban, KwaZulu-Natal.
- [10] SARS Durban does not control (directly or indirectly) any firm.

- [11] The Target Property and all its subsidiaries will henceforth be referred to as the “Target Firm”.

Proposed transaction and rationale

Transaction

- [12] The proposed transaction involves the acquisition of the letting enterprise known as SARS Durban by the KZN Pension House from Vividend Income Fund. Upon implementation of the proposed transaction, MSM Partnership, through KZN Pension House, will exercise control over SARS Durban.

Rationale

- [13] The Acquiring Group submits that the transaction is done as a bespoke transaction for the KZN Municipal Fund and RPIH where the immovable property is being purchased from Vividend Income Fund, placed into a special purpose vehicle which MSM Property Fund controls, but does not own, redeveloped into an office, residential and retail property over a seven-year span and relinquished to the KZN Municipal Fund and RPIH.
- [14] The Target Firm submits that the Vividend Income Fund is disposing of the SARS Durban property as it is no longer core to Vividend Income Fund’s portfolio and no longer meets its investment criteria.

Relevant market and impact on competition

- [15] The Competition Commission (“the Commission”) assessed the possible effects of the proposed transaction in the product market for rentable Grade A office space.
- [16] The Commission considered the activities of the merging parties and found that the proposed transaction does not result in a horizontal overlap.
- [17] Also, the Commission found that there is no pre-existing relationship or vertical overlap arising as a result of the proposed transaction.
- [18] The Commission notes that the Acquiring Group’s market share post the proposed transaction in the market for rentable Grade A office space in the Durban CBD node, will increase from 0.0% to 0.88%.
- [19] Based on the above, the Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.
- [20] When assessing the proposed transaction, the Tribunal did not find any evidence suggesting that the relevant market should be broader than that defined above.

Relevant counterfactual

- [21] The Tribunal assessed the prospects for competition with the proposed transaction against the competitive status quo without the proposed transaction. Based on the above evidence, it concluded that there are no competitive concerns raised.
- [22] No third parties raised concerns regarding the effects of the proposed transaction on competition.
- [23] The Tribunal concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

Public interest

Effect on employment

- [24] The Commission engaged with the merging parties who submitted that the proposed transaction will not give rise to any retrenchments in South Africa as Vividend Income Fund does not have any employees at SARS Durban.
- [25] The employees involved in the management of SARS Durban will remain with Excellerate Real Estate Services Proprietary Limited trading as JHI and these employees will be relocated to other properties within Excellerate Real Estate Services.
- [26] The Commission thus concluded that the proposed transaction will not have adverse effects on employment.

Effect on the spread of ownership

- [27] The Commission notes that pre-merger, Vividend Income Fund's latest B-BBEE certificate reflects that it achieved a Level 3 certification with verified 12.92% black ownership.
- [28] Post-merger, KZN Pension House will be controlled by MSM Partnership which will increase ownership stakes by historically disadvantaged persons.
- [29] Also, the KZN Municipal Fund comprises 90% members who are historically disadvantaged persons.
- [30] The Commission is of the view that the proposed transaction therefore contributes towards the promotion of a greater spread of ownership by HDPs.
- [31] Accordingly, the Commission is of the view that the proposed transaction is unlikely to have a negative impact on the promotion of a greater spread of ownership. The Tribunal concurs. The change in control from a company with 12.92% black ownership to one that will be controlled by a historically disadvantaged individual, and with one limited partner being 100% black owned and the other a pension fund which is both broad-based and comprised of 90% historically disadvantaged persons (over 19 000 individuals) means the transaction is unlikely to have a negative impact on the promotion of a greater spread of ownership.

Conclusion

[32] Considering the above, The Tribunal conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Accordingly, we approve the proposed transaction unconditionally.

Date: 29 November 2022

Ms Shaista Goga

Concurring: Ms Andiswa Ndoni and Ms Mondo Mazwai

Tribunal case manager: Baneng Naape

For the merging parties: Vani Chetty of Vani Chetty Competition Law

For the Commission:

Inga Macingwane and Thabelo Masithulela

[1] KZN Municipal Pension Fund (“KZN Municipal Fund”) is a pension fund that is managed by the Board of Trustees which consist of members that are historically disadvantaged individuals.

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