

SOUTH AFRICA / JUDGMENT

Liberty Group Ltd and 2 Degrees Properties (Pty) Ltd v Khora Investments (Pty) Ltd in respect of Khora's 30% undivided share in Botshabelo Mall Properties and the Letting business conducted thereon (LM220Nov18) [2019] ZACT 10 (11 February 2019) [2019] ZACT 10

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Imraan Valodia, Mondo Mazwai

CASE / FILE NUMBER

LM220Nov18

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM220Nov18

In the matter between:

Liberty Group Ltd and 2 Degrees Properties (Pty) Ltd

Acquiring Firms

and

Khora Investments (Pty) Ltd in respect of Khora's

Target firm

30% undivided share in Botshabelo Mall

Properties and the Letting business

conducted thereon

Panel :

Yasmin Carrim (Presiding Member)

:

Imraan Valodia (Tribunal Member)

:

Mondo Mazwai (Tribunal Member)

Heard on : 30 January 2019

Order Issued on : 30 January 2019

Reasons

Issued on : 11 February 2019

Reasons

for Decision

Approval

[1] On 30 January 2019, the Competition Tribunal ("Tribunal") approved a property transaction between Liberty Group Ltd ("Liberty"), 2 Degrees Properties (Pty) Ltd ("2 Degrees") and Khora Investments (Pty) Ltd ("Khora") in respect of Khora's 30% undivided share in the Botshabelo Mall Properties ("Botshabelo Mall") and the letting business conducted thereon.

[2] The reasons for approving the proposed transaction follow.

Parties to proposed transaction

Primary acquiring firms

[3] The primary acquiring firms are Liberty and 2 Degrees, companies duly incorporated in accordance with the laws of the Republic of South Africa.

[4] Liberty is a wholly-owned subsidiary of Liberty Holdings Limited, a company publicly listed on the Johannesburg Stock Exchange ("JSE").

Liberty Holdings is a subsidiary of the Standard Bank Group Limited which is not controlled by any firm.

[5] 2 Degrees is a wholly-owned subsidiary of Liberty Two Degrees Limited ("New L2D"). New L2D is a portfolio established under the Liberty 2 Degrees Scheme and is ultimately controlled by Liberty.

[6] Liberty is a long-term insurance provider in the financial services sector. In addition, it owns various properties in the hospitality, retail and office space sectors.

[7] New L2D is a collective investment scheme in property in the form of a trust established in terms of the Collective Investment Schemes

Control Act.[1]

[8] Collectively the acquiring firms will be referred to as the 'acquiring group'.

Primary target firm

- [9] The primary target firm is Khora's 30% undivided share in Botshabelo Mall and the letting business conducted thereon ("target business"). Botshabelo Mall is situated in the Botshabelo area of the Free State Province. It leases out rental space to a number of different tenants including, amongst others, Pick n Pay, Shoprite, Cashbuild and Truworths.
- [10] The remaining 70% of the target business is controlled by the acquiring firms.
- [11] Khora, the seller, is controlled by the Bokoena Family Trust and was, pre- transaction, afforded minority protection rights with respect to the target business in terms of the co-ownership agreement it had entered into with the acquiring firms.

Proposed transaction and rationale

- [12] The financial difficulties experienced by Khora, resulting in the company being incapable of meeting its credit obligations, have given rise to the proposed transaction. Investec Limited ("Investec"), one of Khora's creditors, instituted a High Court application for the liquidation of Khora. Investec and Khora eventually agreed to settle the litigation on the terms that Khora's 30% undivided share in the target business shall be transferred to Investec.
- [13] Following the implementation of the above-mentioned settlement agreement, Investec has agreed, by virtue of a sale agreement, to the transfer of Khora's 30% undivided share to Liberty and 2 Degrees. Post-merger, the Target Business will be wholly-owned by Liberty and New L2D. However, the shares would first have to be transferred to Investec.
- [14] Investec reassured the Commission that the proposed transaction is simply a means of recovering the loan facility provided to Khora and to comply with the terms of the settlement agreement which was made an order of court. The transfer of the shares to Investec and then to the acquiring group will take place almost simultaneously.
- [15] The Commission was satisfied that the transfer of the undivided shares to Investec will not amount to a merger according to the Commission's Practitioner's Update, Issue 4, entitled "The application of merger provisions of the Competition Act 89 of 1998, as amended, to risk mitigation financial transactions" as Investec will hold the shares for less than 12 months for the purpose of risk management and with the objective of selling them on to Liberty.[2]
- [16] In terms of the rationale, the acquiring firms submitted that the transaction presents them with the ability to exercise sole control

over the target business, enjoy the full income and benefits and allow them to manage the business better.

- [17] Khora confirmed that the proposed transaction stems from its inability to meet its credit obligations.

Impact on competition

[18] The Commission considered the activities of the merging parties and found that there appeared to be a horizontal overlap between the activities of the merging parties in relation to the provision of rentable retail properties.

[19] Although there was an overlap, the Commission concluded that there was no geographical overlap between the activities of the merging parties as the nearest retail property controlled by the Acquiring Group is situated in Johannesburg (Melrose Arch) which is 410 km from the target business.[3]

[20] The Commission was also satisfied that the current property management agent, JHI Retail (Pty) Ltd ("JHI"), would be retained

post-merger. Particularly after discovering that Liberty Holdings Limited owns 49% of the shares in, and exercises joint control over, JHI.

[21] The Commission found no vertical overlap between the activities of the parties.

Public interest

[22] The merging parties submitted that the proposed transaction will have no adverse effect on employment because it simply involves move from joint to sole control .[4]

[23] The Commission was of the view that the proposed transaction is unlikely to raise employment concerns as.

[24] The Commission was of the view that the proposed transaction is unlikely to raise concerns on any other public interest grounds.

Conclusion

[25] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and raised no public interest concerns. Accordingly, we approved the proposed transaction unconditionally.

Ms Yasmin Carrim

Prof AW Wessels and Ms Mondo Mazwai concurring

11 February 2019

DATE

Case Manager: Helena Graham

For the merging parties: Desmond Rudman of Webber Wentzel

For the Commission: Rakgole Mokolo

[1] 45 of 2002.

[2] See Competition Commission v Standard Bank of South Africa Ltd FTN228Feb16.

- [3] According to the Commission, the Competition Tribunal ("Tribunal") has, in previous cases, accepted that shopping complexes situated outside a 10 km radius of each other do not impose a competitive constraint upon one another. See Sycom Property Fund Collective Investment Scheme in Property and AECI Pension Fund in respect of the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd; and Redefine Properties Limited and Hyprop Investments Limited in respect of a 50% undivided share of the business enterprise known as South Coast Mall.
- [4] See Commission's Recommendations page 18.

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