

SOUTH AFRICA / JUDGMENT

Nedbank Limited and Another v DiverCity Urban Property Fund (Pty) Ltd (LM083Jun18) [2018] ZACT 81 (23 October 2018) [2018] ZACT 81

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Medi Mokuena

CASE / FILE NUMBER

LM083Jun18

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM083Jun18

In the matter between

Nedbank Limited

Primary Acquiring Firms

RMH Property Holdco 5 (Pty) Ltd

And

DiverCity Urban Property Fund (Pty) Ltd

Primary Target Firm

Panel

: Norman Manoim (Presiding Member)

: Yasmin Carrim (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on : 5 September 2018; 3 October 2018; and 22 October 2018 Order Issued on : 23 October 2018

Reasons

Issued on : 22 November 2018

REASONS

FOR DECISION

Approval

[1] On 23 October 2018, the Competition Tribunal ("Tribunal") unconditionally approved the proposed transaction in terms of which Nedbank Ltd ("Nedbank") and RMH Property Holdco 5 (Pty) Ltd ("RMHP") are acquiring control over DiverCity Urban Property Fund (Pty) Ltd ("DiverCity").

[2] The reasons for the approval of the proposed transaction follow.

Parties to the transaction

Primary Acquiring Firms

[3] The primary acquiring firms are Nedbank Limited ("Nedbank") and RMH Property Holdco 5 (Pty) Ltd ("RMHP").

[4] Nedbank is controlled by Nedbank Group Ltd ("NGL"). NGL is controlled by Old Mutual Group Holdings (SA) (Pty) Ltd ("OMSA"),

which in turn, is ultimately controlled by Old Mutual plc ("OM plc"). [1] Nedbank, NGL, OMSA and OM plc will be collectively referred to as the "Nedbank group".

[5] The activities of Nedbank group which are relevant to the proposed transaction are those which relate to its investments in the

provision of rentable retail, commercial, residential and industrial properties through Vestfund, a subsidiary of the Nedbank group.

Vestfund has a controlling shareholding in DiverCity.

[6] RMHP is controlled by RMH Property (Pty) Ltd ("RMH Property"), which is in turn controlled by RMH Property AssetCo (Pty) Ltd ("RMH Asset"). RMH Asset is controlled by RMB Holdings Limited ("RMH"). RMHP, RMH Asset, RMH and entities under their respective control will collectively be referred to as the "RMH Group".

[7] Of relevance to the proposed transaction is RMH group's property investments through Propertuity Development (Pty) Ltd ("Propertuity"), Atterbury Holdings (Pty) Ltd ("Atterbury Property Holdings") and Genesis Capital Three (Pty) Ltd ("Genesis Capital Three") which are active in the provision of rentable retail, office, industrial and miscellaneous properties. Furthermore, through the abovementioned property companies, RMH group also has joint control over DiverCity.

Primary Target Firm

[8] DiverCity is controlled by Vestfund, Atterbury Property Fund[2], Genesis Properties and Propertuity.[3] DiverCity's shareholders are referred to as "Seed Partners". DiverCity controls Sterland Property Development (Pty) Ltd, Pan African Development, Situation East (Pty) Ltd, Vestfund Resi (Pty) Ltd and Morwapax (Pty) Ltd.

[9] DiverCity is an urban property investment fund focused on investing and developing inner-city precincts as well as renewing dense urban precincts on a collaborative basis with its Seed Partners. DiverCity's property portfolio includes rentable retail space

(Sterland Centre and Pan African Mall located in Arcadia and Alexandra respectively), and residential property located in Pretoria, Johannesburg and Durban.

Proposed transaction and rationale

[10] Pre-merger the acquiring firms have an indirect controlling interest in DiverCity.

The pre-merger structure is set out below:

Diagram 1; Pre-merger control structure of the primary target firm, DiverCity

[Refer to PDF Version for Image]

Source: Drawn from the merging parties submission

[11] In terms of the Subscription Agreements, Nedbank and RMHP intend to acquire 18% respectively of the ordinary issued share capital in DiverCity. Upon implementation of the proposed transaction, RMHP and Nedbank, along with the other Seed Partners will exercise joint control over DiverCity. The post- merger structure is set out below:

Diagram 2: Post-merger control structure of the primary target firm

[Refer to PDF Version for Image]

Rationale

[12] The proposed transaction is in line with DiverCity's strategy of attracting long- term foundational investors who seek a strong

focus on social impact with an attractive return on investment. For Nedbank and RMHP this represents an attractive investment vehicle for this type of property as envisioned in RMHP's urban renewal satellite strategy.

Procedural Background

[13] The Competition Commission ("Commission") found that Nedbank and RMH own properties that compete outside of the JV and concluded that while this relationship may not give rise to any unilateral effects, it did raise a potential information exchange concern. The Commission therefore approved the merger subject to conditions on cross directorships to prevent information exchanges between DiverCity and the acquiring firms' other property investments that are outside the JV.

[14] While at first it appeared that the merging parties had acceded to the Commission's proposed conditions, the merging parties later rejected the conditions on the basis that the conditions should not extend to the Investment Committee of DiverCity as this would affect their business model. They proposed their own set of conditions that the Commission, after further consultation, rejected. The merging parties then withdrew this undertaking and requested unconditional approval.

[15] The merging parties' approach to the conditions resulted in the finalisation of the matter being delayed on several occasions. Given

the merging parties new position the matter thereafter proceeded on an opposed basis and was heard on 22 October 2018.

Hearing

[16] At the hearing on 22 October 2018, the Commission maintained their initial position and argued for a conditional approval. The Commission did not lead any witnesses.

[17] The merging parties led three witnesses; Mr Louis Hiemstra (internal legal counsel for DiverCity), Mr Brian Roberts (CEO of RMH and director of RMHP) and Mr Robert Bathke (from Nedbank's property finance division) who all confirmed that there is no risk of

coordination, as the asset class of the acquiring firms' other property investments are differentiated from that of DiverCity's, and thus operate in different market segments. The Commission did not challenge this evidence in cross-examination, nor did they elicit evidence to the contrary.

[18] Further, the merging parties' witnesses testified that the prohibition on cross directorships proposed by the Commission was problematic for their business models. They contended that the pool of directors with the requisite commercial property expertise was limited. If they had to appoint different directors to the boards of their various investments this would force them to appoint non- experts and hence chill incentives to risk investment capital in these businesses which look to the institutions primarily as a source for funding.

[19] The Tribunal had to assess whether the Commission showed that the acquiring firms each have other property investments that are rivals of DiverCity to the extent that an exchange of confidential information might lead to a collusive outcome. Upon assessment of all the evidence and facts before the Tribunal, the Tribunal was of the view that the Commission has not shown that either Nedbank or RMHP control other property firms that directly

compete with DiverCity. Further, the Commission conceded that their investigation did not extend to that consideration.[4]

- [20] Given that it has not been shown that the merging parties compete, we do not discuss whether the acquiring firms' concerns about the limited pool of directors was justifiable or not.

Conclusion

on information sharing

- [21] In light of the above, the Tribunal is of the view that there is no plausible theory of harm that may arise from the proposed merger.

This is because the exchange of information is unlikely to have a collusive outcome in that the merging parties have differentiated

property asset classes and cater for different market segments in the property industry. Moreover, it appears that in the future the acquiring firms wish to situate their inner city or urban investments in DiverCity. This suggests that even going forward DiverCity will have a different focus to these other property investment companies. Therefore, an imposition of conditions to prevent information

exchange is unnecessary.

Public interest

- [22] The merging parties confirmed that the proposed transaction will not have any adverse effects on employment. The proposed transaction raises no other public interest concerns.
[5]

Conclusion

- [23] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction unconditionally.

Mr Norman Manoim

Ms Yasmin Carrim and Ms Medi Mokuena concurring.

22 November 2018

Date

Tribunal Case Manager : Kgothatso Kgobe

Tribunal Economist

: Karissa Moothoo Padayachie

For the Merging Parties : R Bhana instructed by V Chetty of Vani Chetty

Competition Law

For the Commission

: N Sakata, T Mahlangu and R Ncheche

- [1] This was the Nedbank group structure pre-merger while the proposal was still before the Competition Authorities.
- [2] Which sold an asset into DiverCity in exchange for shares. This transaction pushes up Atterbury Property Fund's shareholding and dilutes the shareholding of the remaining shareholders. See transcript, page 4 par 2-10.
- [3] It was mentioned in the hearing that Propertuity will cease to exist as their minority stake has been bought by Atterbury Property Fund. See transcript, page 4 par 4.
- [4] See Transcript , pages 175 and 178.
- [5] The merging parties led evidence that showed that the proposed transaction is pro-public interest in that it would enable the

funding of the development and revamping of inner-city buildings. See Divercity Economic Impact Analysis.

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