

SOUTH AFRICA / JUDGMENT

Resilient Properties (Pty) Ltd v NAD Property Fund (Pty) Ltd in respect of Jubilee Mall Property (019216) [2014] ZACT 58; [2014] 2 CPLR 489 (CT) (22 August 2014) [2014] ZACT 58

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, I Valodia

CASE / FILE NUMBER

019216

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019216

In the matter between:

RESILIENT PROPERTIES (PTY) LTD

Primary Acquiring Firm

And

NAD PROPERTY INCOME FUND (PTY) LTD

IN RESPECT OF JUBILEE MALL PROPERTY

Primary Target Firm

Panel N Manoim (Presiding Member)

Y Carrim (Tribunal Member)

I Valodia (Tribunal Member)

Heard on

31 July 2014

Order Issued on

31 July 2014

Reasons

Issued on 22 August 2014

Reasons

for Decision

Approval

- [1] On 31 July 2014, The Competition Tribunal (“Tribunal”) unconditionally approved the acquisition by Resilient Properties (Pty) Ltd (“Resilient”) to acquire Jubilee Mall from NAD Property Income Fund (Pty) Ltd (“NAD”).
- [2] The reasons for approving the proposed transaction follow.

Parties to the transaction

- [3] The primary acquiring firm is Resilient, a wholly owned subsidiary of Resilient Properties Income Fund (“Resilient Fund”). Resilient Fund is a fund established in the laws of the Republic of South Africa and listed on the Johannesburg Securities Exchange. Resilient Fund is not controlled by a single firm, and one of its largest shareholders is Capital Properties Fund. Resilient controls various firms.
- [4] The primary target firm is NAD, which wholly owns Jubilee Mall the target property. NAD is controlled by JPJ Trust. Jubilee Mall does not control any firm.

Proposed Transaction

- [5] Resilient intends to acquire the entire issued share capital and immoveable property and enterprise trading of Jubilee Mall from NAD.

Rationale

- [6] The proposed transaction is in line with Resilient’s strategy of acquiring retail properties. For NAD, the transaction is part of its restructuring to rebalance its investment exposure.

Relevant Market and Impact on Competition

- [7] Resilient has a property portfolio comprising of 29 properties which are either retail, new development or vacant land and all located throughout South Africa in the Gauteng Province, Limpopo, North West and Mpumalanga. Jubilee Mall is a mixed use property of B-Grade office space measuring 2,384 square metres and retail space measuring 49 616 square metres. The building is located in Jubilee Road (D154) and Harry Gwala Road (D2757) in Hammanskraal, Gauteng.

- [8] The acquiring firm has no regional centres located within a 15km radius of Jubilee Mall. The closest regional centre to that of the target centre is the Grove Mall, in Pretoria which is about 51.7km from the Jubilee Mall. Given the distance the Commission is of the view that the Grove Mall is unlikely to place any competitive constraint on the Jubilee Mall. For this reason Jubilee Mall and Grove Mall are in different markets and there is no overlap in the activities of the parties.
- [9] The merger will not result in any job losses or retrenchments; in terms of the agreement between the parties the proposed property manager shall employ the employees on the substantially same terms and conditions of employment as the current employees.

Public interest

- [10] Three anchor tenants of Jubilee Mall have leases which grant them the right to seek their prior approval before Jubilee Mall can lease to their respective competitors. These rights apply for the duration of their leases. The tenants in question are Pick' n Pay, whose lease runs until 2041, Spar whose lease runs until 2021 and Gaaz Pizza which trades as Romans Pizza, a pizza outlet whose lease runs until 2016.
- [11] The Commission's concern is that the leases serve to prevent small competitors from acquiring leases in the Mall. The Commission submits that these clauses are objectionable on public interest grounds as they have an adverse effect on;
- "...(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive "...*
- [12] The Commission therefore proposed a condition for the approval of the merger that the acquiring firm, attempt to negotiate with the tenants concerned for the removal of these clauses.[1] In essence the condition requires the acquiring firm to use its best efforts. It does not make approval of the merger conditional on their deletion.
- [13] Although the acquiring firm was willing to abide by the condition, if imposed, it did not see much utility in having it. We agree and have several reasons for doing so.
- [14] In the first place the condition seeks to remedy a problem that is not merger specific. The clauses in the lease exist pre-merger and the implementation of the merger does not alter that situation.
- [15] Secondly the Commission seeks to impose the condition on a public interest ground, to protect small businesses by preventing their exclusion from large retail centres such as Jubilee. However the clauses cannot be invoked against tenants below a certain size, so it is not small businesses they are aimed at, but larger and thus more threatening competitors as explained by Mr De Beer of Resilient who said the following at the hearing.

..."what is being excluded is the more specialist shops, a green grocer or a bakery, they don't like the bakeries, and they don't like the butcheries, so an OBC Store, it's very difficult to run it economically on that size though, so that size is not a ... you can't really compete at that size, you need to have say you know a nice size might be 750 square metres, so the size is kept so small that it's really not really a serious, it's irrelevant'.

[16] Third and perhaps most importantly the condition is ineffectual. Again the submissions of Mr De Beer on this point were instructive. Resilient has had recent experience in some of its other mergers when such a condition was

imposed in trying to negotiate out of a similar exclusivity clause in a lease. He said that in every case in his experience the request to the tenant to waive the exclusionary clause had been rejected or been met with a dismissive response along the lines of, "give us a R25 million settlement and we will waive if.

[17] Mr De Beer confirmed that the conditions imposed generally are an encumbrance and add no value.

[18] It was clear from the responses of both Mr De Beer and Ms Robinson of NAD that property firms are opposed to including these clauses in their leases. The fact that they are included is a reflection of the bargaining power of the retailer at the time a centre is developed and needs to have a viable commercial proposition, particularly if it has to approach a bank for bond finance. Smaller property firms like NAD are particularly vulnerable to the bargaining power of major national tenants and hence we see the type of outcomes we see in the lease terms in this case.

[19] Certainly the property companies going forward have strong views about this practice by retailers and through their association, the South Africa Reits Association are speaking out about them. Mr De Beer spoke out unequivocally on this point:

.. "our Board has always maintained that they are very anti-competitive, apart from issues like morality etcetera, and the... however there are leases which have option clauses that run up to 40 years, so we're sitting with some of these clauses, which

we're ashamed to have, but we have them, and the new developers when they try and put a development together which is the here they have no choice, they don't have the bargaining power we have".

[20] We are sympathetic to the Commission's objective in attempting to send a signal to the market that these type of clauses may restrict competition. However as merger conditions cannot impose conditions on third parties, enforcement through the prohibited practice regime is the more effective tool.

Here one can impose an effective remedy if appropriate, whilst those who seek to defend the clause, and who are not before us in a merger case, have an opportunity to do so,[2]

[21] The Tribunal has thus decided for these reasons not to impose the recommended condition.

Conclusion

[22] In light of the above we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition. In addition, no other public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.

22 August 2014

DATE

Mr N Manoim

Prof I Valodia and Ms Y Carrim concurring

Tribunal Researcher: Moleboheng Moleko

For the merging parties: Susan Meyer and Nazeera Mia - DLA Cliffe Dekker Hofmeyr

For the Commission: Dineo Mashego and Xolela Nokele

[1] The terms of the proposed condition are, "that Resilient undertakes to use reasonable commercial endeavours to negotiate with the anchor tenants in the utmost good faith to have the exclusivity clauses removed within 60 days of the tribunal decision to have the exclusivity clauses contained in the lease agreements removed"...

[2] See for instance section 58(l)(a)(vi) which states, "In addition to its other powers in terms of this Act, the Competition

Tribunal may, (a) make an appropriate order in relation to a prohibited practice, including - (vi) declaring the whole or any

part of an agreement to be void".

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Prepared on 10 October 2026 · Esheria