

SOUTH AFRICA / JUDGMENT

Ultimo Properties (Pty) Ltd and Another v Part of the Rental Enterprises of Steinhoff Properties (Pty) Ltd and Others (LM189Jan21) [2021] ZACT 90 (10 March 2021)

[2021] ZACT 90

COURT

Competition Tribunal

BEFORE

E Daniels, M Mazwai, Y Carrim

CASE / FILE NUMBER

LM189Jan21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM189Jan21

In the matter between:

Ultimo Properties (Pty) Ltd and JD Consumer

Electronics and Appliances (Pty) Ltd Primary

Acquiring Firms

And

Part of the Rental Enterprises of Steinhoff Properties (Pty) Ltd and JD Group Property Holdings (Pty) Ltd and Tanzanite Treasure Trading 7 (Pty) Ltd and Showboat Trade and Invest 17 (Pty) Ltd and Copperzone 185 (Pty) Ltd Primary Target Firms

Panel: E Daniels (Presiding Member)

M Mazwai (Tribunal Panel Member)

Y Carrim (Tribunal Panel Member)

Heard on: 10

March 2021

Order Issued on: 10 March 2021

Reasons

Issued on: 10 March 2021

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 (“the Act”) the Competition Tribunal orders that–

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached

hereto; and

2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).

Presiding Member Mr Enver Daniels

Concurring: Ms Mondo Mazwai and Ms Yasmin Carrim

DATE: 10 March 2021

Merger Clearance Certificate

Date :10 March 2021

To : Werksmans Attorneys

You applied to the Competition Commission on 13 January 2021 for merger approval in accordance with Chapter 3 of the Competition Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal

approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to: no conditions. The conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

This form is prescribed by the Minister of Trade and Industry in terms of section 27 (2) of the Competition Act 1998 (Act No. 89 of 1998).

Electronics and Appliances (Pty) Ltd

Primary Acquiring Firms

Part of the Rental Enterprises of Steinhoff Properties (Pty) Ltd and JD Group Property Holdings (Pty) Ltd and Tanzanite Treasure Trading 7 (Pty) Ltd and Showboat Trade and Invest 17 (Pty) Ltd and Copperzone 185 (Pty) Ltd Primary Target Firms

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meaning assigned to them below and cognate expressions bear corresponding meaning: –

- 1.1. “Acquiring Firms” means Ultimo and CEA;
- 1.2. "Act" means the Competition Act of 1998, as amended;
- 1.3. “Affected Employees” means the 9 (nine) employees of the Steinhoff Group engaged in Steinhoff Property Services in South Africa who may be retrenched as a result of the Merger and/or the Disposal Process;
- 1.4. “Approval Date” means the date on which the Merger is approved by the Tribunal and as set out in the Tribunal’s clearance certificate;
- 1.5. “CEA” means JD Consumer Electronics and Appliances Proprietary Limited;
- 1.6. “Commission” means the Competition Commission of South Africa;
- 1.7. “Competition Act” means the Competition Act, No. 89 of 1998, as amended;
- 1.8. “Conditions” means the conditions set out herein;
- 1.9. “Copperzone” means Copperzone 185 Proprietary Limited;
- 1.10. “Days” means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.11. “Disposal Process” means the disposal of Steinhoff Property Services' remaining portfolio of properties identified in the list attached hereto as MC1 within 24 months from Approval Date;
- 1.12. “Implementation Date” means the date/s, occurring after the Approval Date, on which the first off the rental enterprises disposed pursuant to the Merger is delivered to the Acquiring Firms;
- 1.13. “JD Group” means JD Group Property Holdings Proprietary Limited;
- 1.14. “LRA” means the Labour Relations Act 66 of 1995, as amended;
- 1.15. “Merger” means the acquisition of control by the Acquiring Firms over the Target Firms;

- 1.16. "Merging Parties" means the Acquiring Firms and the Target Firms;
- 1.17. "Showboat" means Showboat Trade and Invest 17 Proprietary Limited;
- 1.18. "Steinhoff Group" means Steinhoff Investment Holdings Limited and all its South African subsidiaries, including Steinhoff Properties, Tanzanite, Showboat, JD Group and Copperzone;
- 1.19. "Steinhoff Property Services" means that part of Steinhoff Group's business that pertains to the holding of and managing, administration and any other services of Steinhoff's portfolio of properties in South Africa and engaging the Affected Employees;
- 1.20. "Steinhoff Properties" means Steinhoff Properties Proprietary Limited;
- 1.21. "Tanzanite" means Tanzanite Treasure Trading 7 Proprietary Limited;
- 1.22. "Target Firms" means part of the rental enterprises of Steinhoff Properties, JD Group, Tanzanite, Showboat and Copperzone;
- 1.23. "Tribunal" means the Competition Tribunal of South Africa;
- 1.24. "Ultimo" means Ultimo Properties Proprietary Limited.

2. EMPLOYMENT CONDITIONS

- 2.1. If any of the Affected Employees' services are terminated within 24 months from the [....].
- 2.3. These Conditions will be applicable to all merger notifications under the Act within a 24 (twenty-four) month period from the Approval Date relating to the retrenchment of the Affected Employees as a result of the Disposal Process only.
- 2.4. Should the Disposal Process continue beyond the above mentioned 24 (twenty-four) month period, these Conditions will not be applicable to any retrenchments of the Affected Employees that may occur thereafter.
- 2.5. For the avoidance of doubt, these Conditions do not cover the retrenchment of any employees of Steinhoff Group and the Acquiring Firms arising outside the Disposal Process and do not regulate any employment concerns that may arise in future merger notifications involving Steinhoff Group which are unrelated to the Disposal Process.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1. The Acquiring Firms shall inform the Commission in writing of the Implementation Date of the Merger within 5 (five) Days of it becoming effective.
- 3.2. Steinhoff Property Services shall deliver a copy of the Conditions to the Affected Employees within 5 (five) Days of the Approval Date.

3.3. As proof of compliance thereof, the head of human resources of the Steinhoff Group, shall within 10 (ten) Days of delivery of the Conditions, submit an affidavit to the Commission attesting to the delivery of the Conditions and provide a copy of the notice that was sent to the Affected Employees.

3.4. Any Affected Employee who believes that the Steinhoff Group has not complied with or have acted in breach of these Conditions may approach the Commission.

4. BREACH

4.1. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of any of the above Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.

5. VARIATION

5.1. The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for a waiver, relaxation,

modification, variation and/or substitution of one or more of the Conditions.

6. GENERAL

6.1. All correspondence in relation to the Conditions must be submitted to the following e- mail addresses: mergerconditions@compcom.co.za.

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Electronics and Appliances (Pty) Ltd (Primary Acquiring Firms)

and

Part of the Rental Enterprises of Steinhoff Properties (Pty) Ltd and JD Group Property Holdings (Pty) Ltd and Tanzanite Treasure Trading 7 (Pty) Ltd and Showboat Trade and Invest 17 (Pty) Ltd and Copperzone 185 (Pty) Ltd (Primary Target Firms)

REASONS

FOR DECISION

[1] On 10 March 2021, the Competition Tribunal conditionally approved a large merger between Ultimo Properties (Pty) (“Ultimo”) Ltd and JD Consumer Electronics and Appliances (Pty) Ltd (“CEA”) (collectively the acquiring group)[1] and Part of the Rental Enterprises of Steinhoff Properties (Pty) Ltd (“Steinprop”) comprising 11 properties.

- [2] The Target Properties are all directly or indirectly owned by Steinhoff Africa Property Services (Pty) Ltd (“Steinhoff Africa”) which is ultimately owned by Steinhoff Investment Holdings N.V and comprise of offices and warehouses. For that reason, the Competition Commission (“Commission”) considered the transaction as one indivisible transaction since the rental properties to be acquired are owned and controlled by the Steinhoff Group.
- [3] Relevant to this transaction are the acquiring firms’ 16 properties located in the Western Cape.
- [4] Further relevant to the transaction are the target firms’ properties, namely: an undivided share of Copperzone in the Nelspruit Property in Mpumalanga; JD Group’s Jet Park Property in Gauteng, PE Property in Eastern Cape, Polokwane Property in Limpopo, Tzaneen Property in Limpopo and Vryburg Property in North West; Showboat’s Kokstad Property and Richards Bay Property in Kwa-Zulu Natal; Steinprop’s East Gate Property in Gauteng, Cliffdale Property in Kwa-Zulu Natal and Kuils River Property in Western Cape as well as Tanzanite’s right, title and interest in and to, and its obligations under the written lease agreement in respect of portion A of the Groblersdal Property (“Groblersdal lease agreement”) in Limpopo.[2]
- [5] The Commission identified horizontal overlaps in the merging parties’ provision of rentable warehouses and rentable office space. The Commission found no geographic overlap in the rental of warehouses and office space respectively.
- [6] For the above reasons, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.
- [7] In its public interest consideration, the Commission noted that the Management Board of Steinhoff has decided to sell the entire property portfolio of Steinhoff Africa.
- [8] The Commission contacted the employee representative of the Target Properties and no concerns were raised by them.
- [9] The Acquiring Group’s employees were represented by South African Commercial Catering and Allied Workers Union (“SACCAWU”), Southern African Clothing & Textile Workers’ Union (“SACTWU”) and Entertainment Catering Commercial Allied Workers Union of South Africa (“ECCAWUSA”). SACTWU and ECCAWUSA raised no concerns, while SACCAWU proposed certain employment conditions, which the Commission viewed as unrelated to the proposed merger. This is because the remedies identified by SACCAWU did not appear to address any merger specific concerns and there are no employees of the Acquiring Group who are likely to be affected by the proposed transaction.
- [10] The Commission noted that there are 9 employees who are likely to be affected in future when the properties of Steinhoff Africa are sold off. The Commission considered that such retrenchments would be merger specific. It suggested a 24-month moratorium on retrenchments.

- [11] The merging parties committed that, should it be necessary to retrench these nine [....].
- [12] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. We were of the view that the condition tendered by the merging parties and recommended by the Commission sufficiently addressed any potential retrenchment concern of the nine employees. The merger has no negative impact on the any other public interest.
- [13] We therefore approved the merger subject to the attached conditions.

Date: 10 March 2021

Mr Enver Daniels

Ms Mondo Mazwai and Ms Yasmin Carrim concurring

Tribunal Case Manager: C Mathonsi

For the Merging Parties: P Krusche and S Rodze

For the Commission: R Darji and T Mahlangu

- [1] Ultimo is ultimately owned by Pep Investments (Pty) Ltd (“Pep Investments”). CEA is ultimately owned by Pepkor Trading (Pty) Ltd (“Pepkor”). In South Africa, the Acquiring Group operates retail businesses.
- [2] In terms of the Sale Agreements, Ultimo will acquire the Cliffdale and Kuils River properties (properties of Steinprop). CEA will acquire the Nelspruit, Eastgate, Jet Park, PE, Polokwane, Tzaneen, Vryburg, Kokstad and Richards Bay properties as well as the Groblersdal lease agreement.

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