

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 19/LM/Feb07

In the matter between:

SA Corporate Real Estate Fund

Acquiring Firm

And

SA Retail Properties Ltd

Target Firm

Panel : Y Carrim (Presiding Member), N Manoim (Tribunal Member) and M Madlanga (Tribunal Member)
Heard on : 18 April 2007
Order issued on : 19 April 2007
Reasons issued on : 14 May 2007

Reasons for Decision

Approval

[1] On 19 April 2007, the Tribunal conditionally approved the merger between SA Corporate Real Estate Fund ("SA Corporate") and SA Retail Properties Ltd ("SA Retail"). The reasons follow below.

The Transaction

[2] SA Corporate will, in terms of section 440K of the Companies Act, acquire all the linked units in SA Retail. Pursuant to the implementation of the proposed transaction SA Corporate will control the SA Retail property portfolio which

includes retail properties situated in Gauteng, Kwa-Zulu Natal, Mpumalanga, Northern Cape and Western Cape Province.

- [3] The merging parties have indicated that the proposed transaction will not only increase SA Corporate's market capitalisation value, it will also raise its profile and position it to attract future domestic and international investment capital. Post the transaction SA Retail Linked Unit Holders will be invested in one of the largest property funds listed on the JSE with the immediate benefit of improved tradeability as well as diversification of risk.

The parties and their activities

- [4] Both SA Corporate, an investment property scheme, and SA Retail, a variable rate property loan stock company, are companies listed on the JSE. Neither party is controlled by a single shareholder. While SA Corporate controls various companies SA Retail does not control any firm.

- [5] SA Corporate's largest shareholders are :

| | |
|-------------------------------|--------|
| Old Mutual Asset Management | 18.27% |
| Marriot Asset Management | 9.29% |
| Outward Investments (Pty) Ltd | 5.35% |

- [6] SA Retail's largest shareholders are:

| | |
|-------------------------------|--------|
| Hyprop Investments Ltd | 46.15% |
| Whirlprops 33 (Pty) Ltd | 27.49% |
| Public Investment Corporation | 9.83% |
| Marriot Asset Management | 6.04% |

- [7] The merging parties' property portfolios are complementary. SA Corporate mostly owns industrial properties in the various provinces listed above, the majority of which is located in Kwa-Zulu Natal, while SA Retail mainly owns retail properties located in the major metropolitan areas of the country. SA Corporate does own some retail property while SA Retail doesn't own any industrial properties.

The relevant market and the impact on competition

- [8] The overlap between the parties' property portfolios are in retail property. Although SA Corporate and SA Retail both own retail property in Gauteng, Mpumalanga, Kwa-Zulu Natal and Western Cape, it is only the latter that raises competition concerns.
- [9] In the Western Cape both SA Corporate and SA Retail own retail properties in Brackenfell, Stellenbosch and Tokai. Since the merging parties jointly own the retail property in Tokai there will be no change in concentration in this geographic market post the transaction. In Brackenfell the merging parties' market share will only be 7% post the transaction. The transaction will thus not substantially prevent or lessen competition in these two markets.
- [10] In Stellenbosch SA Retail's market share and SA Corporate's market share are approximately 45% and 16% respectively. The merged entity's market shares will be 60%. Although this high market share would ordinarily warrant further enquiry into the effect of the transaction on competition this was obviated by the parties indicating during the hearing that SA Retail has reached an agreement to sell its property in Stellenbosch, the Eikestad Mall, to a third party which would lower the merged entity's market share in the Stellenbosch area considerably, its post merger gross rentable area will decrease from 38 832 m² to 10 401 m².¹ SA Corporate's market share, post the transaction, will thus remain at 16% if the Eikestad Mall property is sold.
- [11] Since the sale of the Eikestad Mall had not been concluded at the time of our hearing, the merging parties agreed that, in case the deal for some reason ultimately fails, the sale of the property be made a condition for the approval of the present transaction. For this reason we need not further enquire into the effects of the merger on competition in this market.
- [12] In light of the above divestiture, we find that the transaction would not substantially prevent or lessen competition the relevant markets.

¹ The transaction is subject to approval by the Competition Commission.

CONCLUSION

[13] There are no significant public interest issues and we accordingly approve the transaction on the condition that the merging parties divest all right, title and interest in the business comprising the letting enterprise and property known as Erven 4282, 7365 and 6083 Stellenbosch on which the Eikestad Mall is situated.²

N Manoim

14 May 2007
Date

Y Carrim and M Madlanga concurring.

Tribunal Researcher: R Badenhorst
For the merging parties: I Gaigher (Jowell Glyn & Marais)
For the Commission: G Mudzanani and M Van Hoven (Mergers & Acquisitions)

² The Tribunal's order was sent to the parties on 19 April 2007 and the non-confidential order is attached as Annexure A.

Annexure A

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 19/LM/Feb07

In the matter between:

SA Corporate Real Estate Fund

Acquiring Firm

And

SA Retail Properties Ltd

Primary Target Firms

Panel : Y Carrim (Tribunal Member) N Manoim (Tribunal Member), and M Madlanga (Tribunal Member)
Heard on : 18 April 2007
Order Issued : 19 April 2007

**ORDER
(Non-Confidential Version)**

The merger between the parties in this matter is approved in terms of section 16(2) (b) of the Act subject to the following conditions:

PART 1.

CONDITIONS IN RELATION TO THE EIKESTAD MALL.

1. The merging parties shall divest all right, title and interest in the business comprising the letting enterprise and the property known as Erven 4282,7365 and 6083 Stellenbosch on which the Eikestad Mall is situated, on the terms and conditions set out in the annexures hereto.

ANNEXURE A

DIVESTITURE CONDITIONS

1. INTERPRETATION

1.1. The headings of the clauses in this Annexure “A” to this Tribunal order are for the purpose of convenience and reference only, and shall not be used in the interpretation of, or to modify or amplify, the terms of this order, or any clause hereof.

1.2. In this Annexure “A” to this Tribunal order, unless a contrary intention clearly appears, words importing:

1.2.1. any one gender include the other genders;

1.2.2. the singular includes the plural and vice versa;

1.2.3. natural persons include legal persons and vice versa.

1.3 The following terms shall have the meanings assigned to them hereunder, both in the Tribunal order and in any annexure to the Tribunal order, and cognate expressions shall have corresponding meanings, namely:

1.3.1 **“the Act”** – means the Competition Act 89 of 1998, as amended;

1.3.2 **“the Commission”** – means the Competition Commission of South Africa;

1.3.3 **“days”** – means business days;

1.3.4 **“the divested business”** – means the business as referred to in clause 2 of this order;

- 1.3.5 “**final date**” – means the last day of any particular time period prescribed in this order wherein which any activity connected to the divestment of the divested business has to be duly completed;
- 1.3.6 “**merging parties**” – means SA Corporate Real Estate Fund and SA Retail Properties Ltd;
- 1.3.7 “**proposed purchaser**” – means any willing and able independent third party, which elects to purchase the divested business and which is approved by the Commission;
- 1.3.8 “**proposed transaction**” – means the sale of the divested business to the proposed purchaser;
- 1.3.9 “**sale agreement**” – means an agreement, to be approved by the Commission, that will be entered into by the merging parties and the proposed purchaser, whereby the divested business will be sold;
- 1.3.10 “**the Tribunal**” – means the Competition Tribunal of South Africa;
- 1.3.11 “**the Trustee**” – means the individual charged with the duty of monitoring and executing the Trustee mandate in accordance with the order to which this Trustee Mandate is attached;
- 1.3.12 “**the divestiture period**” – is the period of [CONFIDENTIAL] or further extended period in terms of clause 3.1 hereof, from the clearance date within which the merging parties must secure a proposed purchaser of the divested business;
- 1.3.13 “**Trustee divestiture period**” – means the period of [CONFIDENTIAL] or further extended period in terms of clause 3.6, within which the trustee executes his mandate to divest the divested business in terms of the power of attorney and which commences at the end of the divestiture period;

1.3.14 “**the date of disposal**” – the date on which transfer of legal title of the divested business is transferred to the proposed purchaser.

1.3.15 “**trustee team**” – advisors, assistants and other personnel appointed by the trustee to assist the trustee in the execution of his/her mandate.

1.3.16 “**clearance date**” – the date referred to in the Merger Clearance Certificate (Form CT10).

2. DIVESTED BUSINESS

2.1 The merging parties shall divest all rights, title and interest in the business of SA Retail Properties Limited comprising the letting enterprise and property known as Erven 4282, 7365 and 6083 Stellenbosch on which the Eikestad Mall is situated.

3. TIME PERIODS

3.1 The merging parties shall find a proposed purchaser for the divested business, enter into a sale agreement and transfer ownership of the divested business within **[CONFIDENTIAL]** from the clearance date. This period may be extended upon written application by the merging parties to the Tribunal for a further period on “**good cause shown**”. For the purpose of this clause “**good cause shown**” means circumstances that could not have reasonably been foreseen by the merging parties at the time the clearance certificate was issued.

3.2 If the merging parties notify the sale of the divested business to the competition authorities, the divestiture period shall, following the fulfilment of all notification requirements, be suspended, pending the approval of the transaction by the authorities, provided that the notification to the Commission complies with the requirements of the Act.

- 3.3 Notwithstanding clause 3.2, the Commission retains the right to apply to the Competition Tribunal on good cause shown for the divestiture period to continue running.
- 3.4 If the merging parties are not able to transfer the legal title of the divested business to the proposed purchaser within the divestiture period, the Trustee will have an exclusive mandate and power of attorney to sell the divested business within a further period of **[CONFIDENTIAL]** at no minimum price.
- 3.5 The specific details of the Trustee's mandate are annexed hereto marked "**Annexure B**".
- 3.6 Should the Trustee fail to dispose of the business within **[CONFIDENTIAL]** period, the merging parties may apply to the Tribunal for a further **[CONFIDENTIAL]**, on good cause shown.
- 3.7 Should the Trustee fail to dispose of the business within the Trustee divestiture period, the merging parties shall undo the merger as if it had never been implemented.

4 UNDERTAKING BY THE MERGING PARTIES

- 4.1 The merging parties undertake to do the following in respect of the divested business:
- 4.1.1. Preserve and maintain the economic and competitive value of the divested business until the date of disposal in accordance with good commercial practice and to manage the divested business in the best interest of such business;
- 4.1.2. Refrain from carrying out any act that may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the divested business.

- 4.1.3. Refrain from carrying out any act that may be of such a nature as to, in an adverse way, alter the economic value of the divested business or which could alter the commercial strategy in respect of such business in a significantly adverse way; and
- 4.1.4. Provide sufficient resources for the maintenance of the divested business, in accordance with any approved strategic business plan.

5 APPOINTMENT OF TRUSTEE

- 5.1 The merging parties shall appoint an independent trustee, subject to the prior written approval of the Commission, to ensure that the divested business is managed in the ordinary course of business, pursuant to good business practice.
- 5.2 The trustee shall be independent of the merging parties, possess the necessary qualifications to carry out its mandate, for example an investment bank, consultant or auditor and shall neither have nor become exposed to a conflict of interest.
- 5.3 The merging parties shall provide a comprehensive and duly executed power of attorney to the trustee from the date of the trustee's appointment.
- 5.4 This power of attorney will take effect on the first day of the trustee divestiture period.
- 5.5 A certified copy of the power of attorney shall be submitted to the Commission within 5 days of the trustee's appointment.
- 5.6 The power of attorney shall enable the trustee to perform all actions, which the trustee considers necessary or appropriate, including the power to appoint advisors and to execute the trustee mandate attached hereto.

- 5.7 The power of attorney shall include the authority to grant sub-powers of attorney to the members of the trustee team.
- 5.8 Any power of attorney granted by the merging parties, including any sub-powers of attorney granted pursuant to them, shall expire on the earlier of the termination of the trustee's mandate or the discharge of the trustee.
- 5.9 The merging parties shall propose a trustee for the Commission's approval within ten days from the clearance date.
- 5.10 The proposal shall contain sufficient information for the Commission to determine whether the trustee is suitable to execute the trustee mandate attached hereto and shall include *inter alia* the proposed trustee's contact details and employment history.
- 5.11 The trustee's, the trustee team's and the trustee partner firms' relationship with the merging parties for the previous 12 months must be disclosed to the Commission in writing.
- 5.12 The Commission shall have the discretion to approve or reject the proposed trustee. Such approval shall not be unreasonably withheld.
- 5.13 The merging parties shall appoint the trustee within 5 days of the Commission's approval of said trustee.
- 5.14 If the proposed trustee is rejected, the merging parties shall submit the names of at least two more proposed trustees within 5 days of being informed of the rejection.
- 5.15 If the Commission rejects all further proposed trustees, the Commission shall nominate a trustee, whom the parties shall appoint, or cause to be appointed within 5 days of being informed by the Commission.

- 5.16 All reasonable costs incurred by the trustee and/or the trustee team shall be for the merging parties' account, which costs shall be settled by the merging parties on demand of the trustee.

6 THE PURCHASER

- 6.1 The proposed purchaser of the divested business shall be independent and not related to the merging parties' or any directly or indirectly affiliated member of the merging parties' corporate groups.
- 6.2 The purchaser will possess the financial resources, proven expertise and the incentive to maintain the divested business as a viable and active competitive force in competition with the merging parties or any directly or indirectly affiliated member of the merging parties' corporate group and other competitors.
- 6.3 The proposed purchaser must obtain all necessary approvals from the Commission and other regulatory authorities for the acquisition of the divested business (taking into account any remedies that might be offered).
- 6.4 The proposed purchaser shall provide the Commission with an affidavit deposed to by a senior official of the proposed purchaser confirming the accuracy of all information provided to the trustee and the Commission.
- 6.5 In order to maintain the structural effect of this order, the merging parties or any directly or indirectly affiliated member of their corporate group, will not subsequently directly or indirectly re-acquire influence over the whole or part of the divested business.

7 PRIOR APPROVAL BY THE COMPETITION COMMISSION

- 7.1 When the merging parties have reached an agreement with a proposed purchaser they will submit to the trustee and the Commission a fully documented and reasoned proposal enabling the Commission to:

- 7.1.1 Verify in consultation with the trustee that the proposed purchaser is a suitable purchaser of the divested business.
- 7.1.2 Grant any approvals required under these commitments with respect to any ancillary arrangements.
- 7.2 Such a proposal shall be submitted no later than **[CONFIDENTIAL]** prior to the end of the divestiture period and shall include copies of the draft and/or final sale agreement and all other ancillary agreements and/or other documents related to the proposed divestment.
- 7.3 The Commission will approve or reject the merging parties' proposal in writing. The approval of the proposal shall not be unreasonably withheld.
- 7.4 Once the sale agreement with the proposed purchaser has been concluded, the merging parties shall submit a signed copy of the sale agreement, together with any other relevant documentation to the Commission.

8 DUTIES AND OBLIGATIONS OF THE PARTIES DURING THE TRUSTEE DIVESTITURE PERIOD

- 8.1 If the merging parties are not able to transfer the divested business to an approved purchaser within the divestiture period, the trustee shall have an exclusive mandate with the necessary power of attorney to sell the divested business at no minimum price.
- 8.2 At the expense of the merging parties, the trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the merging parties approval, which approval shall not be unreasonably withheld or delayed, if the trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the trustee mandate, provided that any fees and other expenses incurred by the trustee are reasonable.

- 8.3 If the merging parties refuse to approve the advisors proposed by the trustee, the Commission may approve the appointment of such advisors, after having heard the merging parties' objection thereto.
- 8.4 The merging parties will indemnify the trustee, its employees and members of the trustee team (each an "Indemnified Party") and hold each indemnified party harmless against any liabilities arising out of the performance of the trustee's duties under this order, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence of the trustee, its employees or members of the trustee team.

9 IMPLEMENTATION OF THE TRANSACTION

- 9.1 The merging parties may implement the transaction within ten days from the clearance date, subject to the appointment of the trustee as provided for in clause 5 of this order.

10 CONFIDENTIALITY

- 10.1 Save for the time periods in which the Tribunal requires the merging parties to dispose of the divested business; the contents of "Annexure A" are not confidential.
- 10.2 The entire document "Annexure B", the Trustee mandate, is confidential.

N Manoim

19 April 2007

Date

Concurring: **Y. Carrim and M Madlanga**