



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 016659

In the matter between:

**Sycom Property Fund Collective Investment
Scheme in Property**

Primary Acquiring Firm

and

**AECI Pension Fund in respect of the property letting
enterprise known as "Somerset Mall" and
in Somerset Mall Property Management
Company (Pty) Ltd**

Primary Target Firm

Panel	:	Andreas Wessels (Presiding Member) Mondo Mazwai (Tribunal Member) Anton Roskam (Tribunal Member)
Heard on	:	24 July 2013
Order issued on	:	25 July 2013
Reasons issued	:	07 August 2013

DECISION

Conditional approval

1. On 25 July 2013, the Competition Tribunal ("Tribunal"), in terms of section 16(2)(b) of the Competition Act of 1998¹, conditionally approved the acquisition by Sycom Property Fund Collective Investment Scheme in Property of shares in the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd from AECI Pension Fund.
2. The reasons for conditionally approving the proposed transaction follow.

¹ Act No. 89 of 1998, as amended.

Parties to transaction

Acquiring firm

3. The primary acquiring firm is Sycom Property Fund Collective Investment Scheme in Property ("Sycom"), represented by FirstRand Bank Limited as Trustee and Acucap Properties Limited ("Acucap") as Manager. Sycom's major unit holders are: (i) Hyprop Investments Limited ("Hyprop") (33.88%) and Acucap (17.22%). Sycom is a closed-end property unit trust listed on the Johannesburg Securities Exchange South Africa (JSE). It invests directly and indirectly in retail and office space.
4. Acucap is a property loan stock company listed on the JSE. According to the merging parties, Sycom is controlled by Acucap. Acucap performs Sycom's asset management services and retains day to day control of the assets. More specifically, Sycom is managed by Sycom Property Fund Managers Limited, a wholly-owned subsidiary of Acucap.
5. Sycom and Acucap's combined property portfolio comprises investments in more than 50 properties both in the retail and office sectors.

Target firm

6. The primary target firm is AECI Pension Fund ("APF") in respect of a 50% undivided share in the property letting enterprise known as "Somerset Mall" and of 50% shares in Somerset Mall Property Management Company (Pty) Ltd ("Somerset Mall ManCo"). APF is a registered pension fund in terms of the Pension Funds Act². It currently *inter alia* has a 50% share in Somerset Mall and Somerset Mall ManCo respectively. Sycom currently holds the other 50% interest in Somerset Mall and Somerset Mall ManCo.
7. Somerset Mall is categorised as a major regional centre located in the Somerset node in the Western Cape. Somerset Mall ManCo is the property management company that was established for the purposes of providing a management entity to manage Somerset Mall.

² Act No. 24 of 1956, as amended.

Proposed transaction and rationale

8. Sycom through this transaction intends acquiring from APF an additional 50% interest in respectively Somerset Mall and Somerset Mall ManCo. This transaction therefore represents a change in control from the current joint control to post-merger sole control by Sycom of Somerset Mall and Somerset Mall ManCo.
9. From the Sycom Group's perspective, the rationale for this transaction is to facilitate Hyprop's exit from Sycom in order to enable Sycom's Board to maximise the investment returns for unitholders.
10. APF's rationale for the transaction is based on Regulation 28 of the Pension Funds Act, which provides that APF may not hold more than 5% of its total assets in a single property.
11. This merger was filed along with another "large" merger (Tribunal case number 016683) in terms of which Sycom plans to dispose of its 100% share in respectively Somerset Mall and Somerset Mall ManCo to Hyprop. If, however, the Hyprop-Sycom deal does not materialise, then Sycom will retain sole control over Somerset Mall and Somerset Mall ManCo.

Competition assessment

12. As stated above, Sycom already owns a 50% share of respectively Somerset Mall and Somerset Mall ManCo. Although Sycom and Acucap own retail centres in the Western Cape, the Commission found that there is no geographic overlap between the activities of the merging parties in relation to this transaction. The Sycom Group (i.e. Sycom and Acucap) does not own any shopping centre other than its 50% share of Somerset Mall in the relevant geographic market. This is the case regardless of the exact geographic market delineation, i.e. whether one considers the Commission's narrow geographic market approach (being a 10 – 15 kilometre radius around Somerset Mall) or the merging parties' broader geographic market approach (being a 35 kilometre radius around Somerset Mall).

13. Furthermore, the Sycom Group does not perform any asset management services for third parties.

14. We therefore conclude that the proposed transaction does not substantially prevent or lessen competition in any relevant market.

Public interest

Employment

15. The merging parties confirmed that the proposed transaction will have no adverse effect on employment.³

Effect on small business

16. In respect of Somerset Mall, the Commission found an exclusivity clause in the lease agreement between the landlord and one of the anchor tenants, namely Pick 'n Pay Stores Limited ("Pick 'n Pay"). This exclusivity clause has the potential effect of preventing small businesses from accessing Somerset Mall, such as grocery stores and bakeries of a certain size, cafés and delicatessen which sell fresh fish or meat; butcheries other than halaal butcheries; and fresh produce businesses.⁴

17. To date the Commission has investigated and referred a number of property transactions to the Tribunal in which it identified a public interest concern relating to the existence of exclusivity clauses in various lease agreements concluded between landlords and their respective anchor tenants.⁵ The Commission in those matters recommended that the mergers should be approved by the Tribunal subject to conditions to address the effect of the proposed transaction on the ability of small businesses to become

³ See pages 18, 58 and 82 of the merger record.

⁴ See pages 297 to 324 of the merger record, specifically page 310 which contains the exclusivity provisions of the lease agreement.

⁵ See *inter alia* *Accelerate Property Fund Limited and 15 letting enterprises being sold by Fourways Precinct (Pty) Ltd* (Tribunal case number: 016170); *Fairvest Property Holdings Limited and A portfolio of commercial properties of the South African Corporate Real Estate Fund* (Tribunal case number: 015610); *Redefine Properties Limited and Hyprop Investments Limited in respect of a 50% undivided share of the business enterprise known as "South Coast Mall"* (Tribunal case number: 014993); and *Growthpoint Properties Limited and Liberty Group Limited in respect of a 64.29% interest in the business enterprise known as "Alberton City"* (Tribunal case number: 014415).

competitive. The recommended conditions typically required the acquiring firm in a particular transaction to undertake to use its best endeavours to negotiate with the anchor tenant in good faith to remove the exclusivity clause(s) at some future date. The Tribunal, in terms of section 12A(3)(c) of the Act, approved a number of large mergers on this basis.

18. In a more recent Tribunal decision of 13 June 2013, we approved a retail property merger involving *Fortress Income 2 (Pty) Ltd* ("Fortress") (Tribunal case number: 016519) without any conditions relating to the removal of an existing exclusivity clause, given that the condition, if imposed, would be ineffectual since there was no available retail space at the relevant shopping centre (i.e. Nelspruit Plaza) to offer to new tenants and furthermore no prospect of it expanding beyond its present size.⁶ In line with the latter Tribunal decision, the Commission in this case investigated (i) the current vacancy rate at Somerset Mall; (ii) the number of entries and exits of tenants for the past three years; (iii) the number of lease agreements which terminate within the next two years; and (iv) whether any expansion of Somerset Mall is envisaged within the next two years. Having regard to these factors, the Commission concluded that there are practical possibilities for small businesses to enter Somerset Mall and that the exclusivity clause in the Pick 'n Pay lease agreement therefore has the potential of excluding small businesses from Somerset Mall. More specifically, the Commission found that there were numerous lease agreements that terminate within the forthcoming two years and further found evidence of entry and exit from Somerset Mall. The case before us now is thus factually different from the *Fortress* matter.

19. The Commission further investigated whether two shopping centres in the geographic vicinity of Somerset Mall, namely (i) the *Habitat Centre @ The Mall* and (ii) *Waterstone Village Shopping Centre* could accommodate new or expanding small businesses. The Commission concluded that these two shopping centres (both classified as neighbourhood shopping centres, as opposed to the Somerset Mall being a major regional centre) are within a five

⁶ See large merger involving *Fortress Income 2 (Pty) Ltd* and *The immovable proprietary and property letting enterprises of Pick 'n Pay Rustenburg, Central Park Bloemfontein, Nelspruit Plaza, New Redruth Alberton, Sterkspruit Plaza and Tzaneen Centre* (Tribunal case number: 016519).

kilometre radius from Somerset Mall, that they both have available retail space and that the lessors have no exclusivity clauses in their lease agreements with the lessees. The Commission, based on this information, recommend that no condition be placed on the proposed transaction to address the relevant public interest issue.

20. However, the Commission did not consult any small businesses regarding the substitutability of the above-mentioned two shopping centres and Somerset Mall from a small tenant's perspective. Furthermore, the Tribunal was concerned that one of the centres identified as a potential alternative to the affected small businesses had a relatively high vacancy rate, which raised questions regarding it being a real alternative from the perspective of a new small business or an existing small business wishing to expand. We further note that, from a small tenant's perspective, there may be important differences between Somerset Mall and the two above-mentioned centres, such as footfall, tenant mix, proximity and availability of public transport, building structure and design, size, number of parking bays and the structure thereof, mall classification and trading hours. Given the lack of this type of information and of the requirements of small businesses of the type currently excluded from entering Somerset Mall, we concluded that the above-mentioned exclusivity clause in the lease agreement between the landlord and Pick 'n Pay raises a potential substantial public interest concern in terms of section 12A(3)(c) of the Act.

21. Since the merging parties tendered a condition that addressed the public interest concern relating to small business, we approved the merger conditionally on the basis of such an undertaking, namely that:

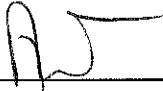
21.1. Sycom (in relation to Tribunal case number 016659) and Hyprop (in relation to Tribunal case number 016683) jointly undertake to use reasonable commercial endeavours to negotiate with Pick 'n Pay, in the utmost good faith within sixty (60) days of the Tribunal's order, to remove the exclusivity clause contained in the lease agreement between the landlord and Pick 'n Pay.

Other public interest issues

22. Apart from the above-mentioned concern relating to the ability of small businesses to become competitive, the proposed merger raises no other public interest concerns.

CONCLUSION

23. We approve the proposed transaction subject to the conditions set out in the attached "**Annexure A**".



ANDREAS WESSELS

08 August 2013

DATE

Mondo Mazwai and Anton Roskam concurring

Tribunal Researcher: Nicola Ilgner
For the Commission: Jatheen Bhima
For the merging parties: Vani Chetty Competition Law

ANNEXURE A

Sycom Property Fund Collective Investment Scheme in Property and AECI Pension Fund in respect of the remaining 50% share in the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd
Tribunal Case number: 016659

CONDITIONS

1. DEFINITIONS

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

- 1.1. "Approval Date" means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT 10);
- 1.2. "Commission" means the Competition Commission of South Africa;
- 1.3. "Conditions" means these conditions;
- 1.4. "Hyprop" means Hyprop Investments Limited;
- 1.5. "Merger" means the acquisition by Sycom of sole control over Somerset Mall and Somerset Mall Property Management Company (Pty) Ltd;
- 1.6. "Merging Parties" means Sycom and AECI Pension Fund in respect of the property letting enterprise known as "Somerset Mall" and Somerset Mall Property Management Company (Pty) Ltd;

- 1.7. Pick 'n Pay" means Pick 'n Pay (Pty) Ltd; and
- 1.8. "Sycom" means Sycom Property Fund Collective Investment Scheme in Property in respect of the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd.

2. RECORDAL

- 2.1. Sycom has agreed to the following undertakings meant to address the public interest concerns.
- 2.2. The present merger is interrelated to the acquisition of the Somerset Mall and the Somerset Mall Management Company (Pty) Ltd by Hyprop, under Tribunal Case number 016683.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

Sycom (in relation to Tribunal case number 016659) and Hyprop (in relation to Tribunal case number 016683) jointly undertake to use reasonable commercial endeavours to negotiate with Pick 'n Pay, in the utmost good faith within sixty (60) days of the Tribunal's order, to remove the exclusivity clause contained in the lease agreement between the landlord and Pick 'n Pay.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

Sycom (in relation to Tribunal case number 016659) or Hyprop (in relation to Tribunal case number 016683) undertake to provide the Commission with an affidavit setting out the outcome of the negotiations with Pick 'n Pay, as contemplated in paragraph 3 above, within ninety (90) days of the Tribunal's order.