

COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: 83/CR/Dec10

In the matter between:

The Competition Commission South Africa Applicant

and

Liberty Group Limited Respondent

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member) and A Wessels (Tribunal Member)

Heard on : 12 January 2011

Decided on : 04 March 2011

ORDER

The Tribunal hereby confirms the consent agreement annexed hereto, marked annexure A and the addendum to the consent agreement, marked as annexure B.



N Manoim

Concurring: Y Carrim and A Wessels

A

83/CR/Dec 10



competitiontribunal south africa

Form CT 6

Notice of Motion

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division F of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 12(3).

Date: 22-Dec-2010 **File #** cc case no:2009Jul4569/JH

To: The registrar of the Competition Tribunal

Concerning the matter between:

The Competition Commission (Applicant)

and Liberty Group Limited (Respondent)

Take notice that the The Competition Commission intends to apply to the Tribunal for the following order:

The Consent Agreement between the Competition Commission and Liberty Group in terms of section 49D be confirmed as an order of the Competition Tribunal in terms of section 58(1)(b) of the Competition Act, no 89 of 1998 (as amended)

Name and Title of person authorised to sign:

Bongani Ngcobo -Acting Chief Legal Counsel

Authorised Signature:

Date:

22/12/10

RECEIVED BY: M. G. L. L. L.
TIME: 14h 26
2010-12-22

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Summerville
20132
Republic of South Africa
tel: 27-12-391-0300
fax: 27-12-391-0169
e-mail: ccsa@comptrib.co.za

For Office Use Only: Tribunal file number: _____ Date filed: _____

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA



(Held In Pretoria)

CT Case No. _____

CC Case No. 2009Jul4569/2009Jul4571

In the matter between:

THE COMPETITION COMMISSION

Applicant

And

LIBERTY GROUP LIMITED

Respondent

In re:

THE COMPETITION COMMISSION

Applicant

BEDFORD SQUARE PROPERTIES (PROPRIETARY)
LIMITED

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

ERF 179 BEDFORDVIEW (PROPRIETARY) LIMITED

Third Respondent

WIN TWICE PROPERTIES (PROPRIETARY) LIMITED

Fourth Respondent



**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND LIBERTY GROUP
LIMITED IN TERMS OF SECTION 49D READ WITH SECTION 58(1) (b) OF THE COMPETITION ACT,
NO. 89 OF 1998 (AS AMENDED)**

The Competition Commission of South Africa and Liberty Group Limited hereby agree that application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of section 49D read with section 58(1) (b) of the Competition Act, No. 89 of 1998 (as amended,) on the terms set out below.

1. Definitions

1.1. For the purposes of this Consent Agreement the following definitions shall apply:

1.1.1. "the Bedford" means the Bedford development, being a mixed-used development featuring a retail component, and which is a combination of Bedford Square and Bedford Centre (which centres have been linked via an subterranean passage);

1.1.2. "Bedford Centre" means the erstwhile Bedford Centre shopping centre, the retail component of which was classified as a community shopping centre at the time that the Bedford Centre Restraint was concluded and which is situate in the suburb of Bedfordview in Johannesburg;



- 1.1.3. "Bedford Centre Restraint" means clause 2.3 of the Bedford Centre Settlement Agreement and the entirety of the notarial deed of restraint concluded between Win Twice, Liberty Group and Erf 179 on 14 June 2004 under notarial deed number 000002659 / 2004, in terms of which the Bedford Centre was precluded for a period from letting space to Woolworths;
- 1.1.4. "Bedford Centre Settlement Agreement" means the agreement concluded between Win Twice, Liberty Group, Erf 179, BOE Bank and Nedbank Limited on or about 4 November 2003;
- 1.1.5. "Bedford Square" means the erstwhile Bedford Square shopping centre, the retail component of which was classified as a community shopping centre at the time that the Bedford Square Restraint was concluded and which is situate in the suburb of Bedfordview in Johannesburg;
- 1.1.6. "Bedford Square Properties" means Bedford Square Properties (Proprietary) Limited, a company duly incorporated and registered in accordance with the laws of the Republic of South Africa with its principal place of business being at 9 Gordon Hill Road, Parktown Johannesburg. Bedford Square Properties is the ultimate owner of the Bedford;
- 1.1.7. "Bedford Square Restraint" means clause 3.1 of the Bedford Square Settlement Agreement and the entirety of the notarial deed of restraint concluded between Bedford Square Properties, Liberty Group and Erf 179 on 21 June 2004 under notarial deed number 000002655 / 2004, in terms of which Bedford Square was precluded for a period from letting space to Woolworths or Mica;
- 1.1.8. "Bedford Square Settlement Agreement" means the agreement concluded between Cavaleros, Liberty Group and Bedford Square Properties on or about 4 November 2003;



- 1.1.9. "BOE Bank" means BOE Bank Limited, being the financiers of Bedford Centre;
- 1.1.10. "Cavaleros" means the Cavaleros Group, being the controllers of Erf 179;
- 1.1.11. "Competition Act" means the Competition Act, No. 89 of 1998 (as amended);
- 1.1.12. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;
- 1.1.13. "Commissioner" means the Commissioner of the Commission, appointed in terms of section 22 of the Competition Act;
- 1.1.14. "Consent Agreement" means this agreement duly signed and concluded between the Parties;
- 1.1.15. "DTI" means the Department of Trade and Industry;
- 1.1.16. "Eastgate" means the Eastgate shopping centre, a super regional shopping centre situate in the suburb of Bedfordview in Johannesburg. Liberty Group owns Eastgate;
- 1.1.17. "Erf 179" means Erf 179 Bedfordview (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered place of business at 7D Geldenhuis Road, Malvern East, Germiston. Erf 179 owns Village View;
- 1.1.18. "LCGG" means the Local Council of Greater Germiston;



- 1.1.19. "Liberty Group" means Liberty Group Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1 Ameshoff Street, Johannesburg. Liberty Group owns Eastgate;
- 1.1.20. "Liberty Properties" means Liberty Group Properties (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 25 Ameshoff Street, Johannesburg. Liberty Properties is a wholly owned subsidiary of Liberty Group and focuses on property development, property management and property related investments of Liberty Group's property portfolio;
- 1.1.21. "Parties" means the Commission and Liberty Group;
- 1.1.22. "Mica" refers to Supergroup Limited t/a Mica Hardware, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 27 Impala Road Chiselhurst, Sandton. Mica is a chain of hardware stores;
- 1.1.23. "Respondents" means Bedford Square Properties, Liberty Group, Win Twice and Erf 179;
- 1.1.24. "Restraints" means the Bedford Square Restraint and the Bedford Centre Restraint collectively;
- 1.1.25. "Settlement Agreements" means the Bedford Square Settlement Agreement and the Bedford Centre Settlement Agreement collectively;



- 1.1.26. "Summons" means the summons issued by the Commission on 1 October 2009 and served on Liberty Group;
- 1.1.27. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;
- 1.1.28. "Village View" means the Village View neighbourhood shopping centre situate in Bedfordview Johannesburg and which is owned by Erf 179;
- 1.1.29. "Win Twice" means Win Twice Properties (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at the Smit Road, Bedford Shopping Centre. At the time that the Bedford Centre Restraint was concluded, Win Twice was the owner of Bedford Centre;
- 1.1.30. "Woolworths" means Woolworths Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 93 Longmarket Street Cape Town. Woolworths is the owner / franchisor of various retail supermarkets throughout South Africa.

A handwritten signature in blue ink, consisting of stylized initials that appear to be 'MK' or similar, located in the bottom right corner of the page.

2. The Complaint and the Commission's Investigation


2.1. During July 2009, the Commission initiated two complaints against the Respondents concerning allegations of a contravention of section 4(1)(b)(ii) of the Competition Act in relation to certain notarial deeds of restraint and a settlement agreement entered into between the Respondents pursuant to various objections lodged in relation to town planning issues, and which are more fully described below :

2.1.1. The Bedford Square Settlement Agreement, comprising a settlement agreement dated 4 November 2003 containing various terms of settlement, including that the Bedford Square Restraint is registered;

2.1.2. The Bedford Square Restraint, comprising a notarial deed of restraint registered on 12 July 2004 over the title deed of Erf 39 Bedford Gardens owned by Bedford Square Properties (i.e. Bedford Square) in favour of Liberty Group and Erf 179, which restricts Bedford Square Properties or its successors in title from leasing retail space to Woolworths and Mica for a period of 11 years; and

2.1.3. The Bedford Centre Restraint, comprising a notarial deed of restraint registered on 12 July 2004 over the title deeds of properties described as Erf 50, 51, 54 and 64 of Bedford Gardens Township (i.e. the Bedford Centre) owned by Win Twice in favour of Liberty Group and Erf 179, which restricts Win Twice from leasing retail space to Woolworths for a period of 15 years.

2.2. These complaints were initiated after the Commission had investigated and non-referred a complaint lodged by Bedford Square Properties against Liberty Group in respect of alleged contraventions of section 8(d)(i) of the Competition Act. The Commission consolidated the two complaints for purposes of its investigation in accordance with Rule 17(2) of the Commission Rules.



3. The Commission's findings

3.1. The Commission's investigations established that the Bedford Square Restraint was concluded between Liberty Group, Erf 179 and Bedford Square Properties, in settlement of an objection lodged by the former two parties with the Townships Board against the LCGG's decision to approve a rezoning application brought by Bedford Square Properties to develop a mixed offering shopping centre ultimately comprising Bedford Square.

3.2. Further, the Commission found that the Bedford Centre Restraint was concluded to settle disputes concerning an application by Win Twice for the rezoning of the Bedford Centre so as to extend the Bedford Centre's bulk (square meterage) in a node in which, at the time, Liberty Group felt there to be an oversupply of retail space. Before such rezoning application was heard by the appropriate town planning authority, Liberty, Erf 179, BOE Bank and Win Twice entered into the Bedford Centre Settlement Agreement giving rise to the Bedford Centre Restraint.

3.3. The Commission however found that although the Settlement Agreements were entered into by the Respondents in settlement of objections and negotiations regulated by town-planning legislation, a consequence of the Restraints was that they exceeded the scope of such legislation in that Liberty, Erf 179, Bedford Square Properties and Win Twice, in agreeing the terms set out in the Restraints, contravened section 4(1)(b)(ii) of the Competition Act as follows :

3.3.1. Liberty Group as owner of Eastgate, Erf 179 as owner of Village View and Bedford Square Properties as owner of Bedford Square divided markets by agreeing that Bedford Square Properties be restrained from leasing retail space to Woolworths and Mica in Bedford Square for a period of 11 years; and

3.3.2. Liberty Group as owner of Eastgate, Erf 179 as owner of Village View and Win Twice as owner of Bedford Centre divided markets by agreeing that Win Twice

be restrained from leasing retail space to Woolworths in Bedford Centre for a period of 15 years.

4. Admission of Liability

Liberty Group admits that the Restraints contravened section 4(1)(b)(ii) of the Competition Act.

5. Future Conduct

5.1. Liberty Group confirms that the conduct under investigation has already ceased and it undertakes -

5.1.1. not to divide markets by allocating customers in contravention of section 4(1)(b)(ii) of the Competition Act;

5.1.2. not to enforce the Restraints nor to require any of either Bedford Square Properties or Win Twice (or their successors in title) to abide by the Restraints;

5.1.3. to develop and implement a compliance programme, with corporate governance, designed to ensure that all its relevant employees are aware of the provisions of the Competition Act and do not contravene them; and to submit a copy of the aforementioned compliance programme outlined above to the Commission within 90 business days of the date of confirmation of this Consent Agreement as an order of the Tribunal.

6. **Administrative Penalty**

6.1. In terms of section 58(1) (a) (iii), and 59(2) and (3) of the Competition Act, Liberty Group is liable to pay an administrative penalty.

6.2. The parties have agreed that Liberty Group should pay an administrative penalty of 2.5% of Liberty Group's retail property portfolio's total turnover for the financial year ended 2008, being an amount of R18 811 708.55 within thirty days of the confirmation of this Consent Agreement as an order of the Tribunal.

6.3. Liberty Group shall pay the administrative penalty into the following bank account of the Commission:

Name of Account: THE COMPETITION COMMISSION

Bank name: ABSA BANK PRETORIA

Account No: 4050778576

Branch Code: 323345

6.4. The Commission will pay the administrative penalty into the National Revenue Fund in terms of Section 59(4) of the Competition Act.



7. Full and Final Settlement

This agreement, upon confirmation as a consent order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Liberty Group relating to the alleged contravention of section 4(1)(b) by Liberty Group and/or its subsidiaries of the Competition Act that are the subject of the Commission's investigations under case numbers 2009Jul4569 and 2009Jul4571.

Dated and signed at *Mossburnside* on the *10th* day of *December* 2010



Donald Samuel Ogbu

Chief Executive Officer - Liberty Group Properties (Proprietary) Limited, duly authorised representative of Liberty Group Limited

Dated and signed at Pretoria on the *21* day of *December* 2010



Shan Ramburuth

Commissioner: Competition Commission

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(Held In Pretoria)



CT Case No. 83/CR/DEC10

CC Case No. 2009Jul4569/2009Jul4571

In the matter between:

THE COMPETITION COMMISSION

Applicant

And

LIBERTY GROUP LIMITED

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In re:

THE COMPETITION COMMISSION

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BEDFORD SQUARE PROPERTIES (PROPRIETARY)
LIMITED

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

ERF 179 BEDFORDVIEW (PROPRIETARY) LIMITED

Third Respondent

WIN TWICE PROPERTIES (PROPRIETARY) LIMITED

Fourth Respondent



ADDENDUM TO CONSENT ORDER AGREEMENT ENTERED INTO BETWEEN THE COMPETITION COMMISSION OF SOUTH AFRICA ("THE COMMISSION") AND LIBERTY GROUP LIMITED ("LIBERTY") ON 20-DECEMBER 2010 AT PRETORIA IN TERMS OF SECTION 49D READ WITH SECTION 58(1) (b) OF THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED)

WHEREBY IT IS AGREED AS FOLLOWS:

1. In this addendum -

1.1. save as defined herein or where the context clearly indicates to the contrary, terms defined in the designated agreement shall bear the meaning ascribed to them therein when used in this addendum;

1.2. "designated agreement" means the consent order agreement entered into between the parties hereto on 20 December 2010 at Pretoria.

2. With effect from the date of last signature of this addendum, the parties agree to amend the designated agreement as follows, namely :

2.1. By inserting a new clause 5.1.2 A after the existing clause 5.1.2 and before clause 5.1.3 -

" 5.1.2 A to engage in all such conduct necessary, as is within its power, to partially cancel the notarial deeds of Restraint as between it, Win Twice and Bedford Square Properties. For the avoidance of doubt, Liberty hereby waives all and any right conferred upon it in terms of the notarial deeds of Restraint."

3. The designated agreement shall be amended only to the extent expressly contemplated herein and save as specifically contemplated in this agreement, the designated agreement shall continue to be of force and effect on the basis of its original terms and conditions.



4. This addendum constitutes the whole agreement between the parties relating to subject matter hereof.
5. No amendment or consensual cancellation of this addendum and no extension of time, waiver or relaxation or suspension of or agreement not to enforce or to suspend or postpone the enforcement of any of the provisions or terms of this addendum shall be binding unless recorded in a written document signed by the parties.
6. No extension of time or waiver or relaxation of any of the provisions or terms of this addendum shall operate so as to preclude any party thereafter from exercising its rights strictly in accordance with this addendum.

Dated and signed at BRAMFORSSTEIN on the 8th day of February 2011



Melville Urdang

Director - Liberty Group Properties (Proprietary) Limited, duly authorised representative of Liberty Group Limited

Dated and signed at Pretoria on the 28 day of February 2011



Shan Ramburuth

Commissioner: Competition Commission