



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM002Apr23

In the matter between:

AFHCO Holdings Proprietary Limited

Primary Acquiring Firm

and

Indluplace Properties Limited

Primary Target Firm

Panel:	J Wilson (Presiding Member) AW Wessels (Tribunal Member) T Vilakazi (Tribunal Member)
Heard on:	28 June 2023
Date of last submission:	03 July 2023
Order issued on:	03 July 2023
Reasons issued on:	26 July 2023

REASONS FOR DECISION

- [1] On 3 July 2023, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger whereby AFHCO Holdings Proprietary Limited (“AFHCO”) intends to acquire 100% of the shares in Indluplace Properties Limited (“Indluplace”).

The Parties and their Activities

- [2] The primary acquiring firm is AFHCO, which is wholly owned by SA Corporate Real Estate Limited (“SACREL”). SACREL is a Real Estate Investment Trust (“REIT”) listed on the Johannesburg Stock Exchange (“JSE”). The shares in SACREL are widely dispersed and, as such, no single shareholder controls SACREL.

- [3] AFHCO and SACREL, and all the firms they directly and indirectly control, are collectively referred to below as the “Acquiring Group”. The Acquiring Group holds a diversified property portfolio comprising industrial, retail and residential buildings located primarily in the major metropolitan areas of South Africa with a secondary node in Zambia.
- [4] The primary target firm is Indluplace. Indluplace is a JSE-listed REIT which is controlled by Fairvest Limited (“Fairvest”) with a shareholding of 56.8%. There are various other non-controlling shareholders in Indluplace.
- [5] Indluplace, together with all the firms it directly and indirectly controls, is referred to below as the “Target Group”. The Target Group holds a diversified property portfolio primarily located in Gauteng, with further limited exposure in Mpumalanga and the Free State.

Transaction Description and Rationale

- [6] In terms of the agreement entered into by AFHCO and Indluplace, AFHCO intends to acquire 100% of the shares in Indluplace. Post-merger, AFHCO will have sole control of Indluplace.
- [7] The Acquiring Group submits that the proposed transaction will provide further exposure for SACREL to the residential sector, and will also provide a sound fit and additional scale for AFHCO.
- [8] The Target Group submits that the proposed transaction presents the shareholders of Indluplace with an opportunity to dispose of an investment they regard as non-core at an attractive price.

Competition Assessment

Relevant markets identified by the Commission

- [9] Based on case precedent, the Competition Commission (“Commission”) found that the property market can be broadly divided into categories based on the nature and usage of the property, e.g., retail property, industrial property, office property, residential property, and other property.
- [10] In the present case, the Commission identified overlaps between the merging parties’ activities in (i) the product market for rentable residential property, and (ii) the product market for rentable retail property. In the latter regard, the Commission identified overlaps in shopping centres with a Gross Lettable Area (“GLA”) of below 30 000 m², which includes small/local convenience centres (1000 – 5000 m²), neighbourhood shopping centres (5000 – 12 000 m²) and community shopping centres (12 000 – 25 000 m²) according to the Independent Property Databank (“IPD”) retail property classification.
- [11] As regards the relevant geographic market, the Commission, based on its approach in previous matters, assessed (i) the market for rentable residential property within an 8km radius of the Target Group’s properties, and (ii) the market for rentable retail property within a 15km radius of the Target Group’s properties.

Residential property market

- [12] As regards the residential property market, the Commission found that the proposed transaction would give rise to horizontal overlaps (within an 8km radius) in the following areas: Johannesburg CBD (“JHB CBD”), Johannesburg North (“JHB North”), Johannesburg East (“JHB East”), Johannesburg West (“JHB West”), Pretoria West (“PTA West”) and Pretoria North (“PTA North”).

[13] The Commission found that (based on the number of rentable residential units) the estimated market share of the merged entity, and market share accretion brought about by the merger, in each of these areas is as follows:

	Merged entity's market share (%)	Market share accretion (%)
JHB CBD	17	7
JHB North	6	3
JHB South	4	1
JHB East	8	6
JHB West	3	2
PTA West	13	8
PTA North	10	6

[14] Accordingly, in the affected Johannesburg markets, the merged entity will have a market share ranging from approximately 3% to 17%; and, in the affected Pretoria markets, it will have market shares of approximately 10% and 13% - with market share accretions ranging between 1% and 8%. The Commission also found that, in all seven affected areas, the market is fragmented with various alternative providers of residential properties.

[15] The Commission also considered a separate product market for student accommodation and found that there is no geographical overlap between the merging parties' properties in this market.

[16] The Commission did not receive any concerns regarding the proposed merger other than from A1 Capital (Pty) Ltd ("A1 Capital"), a competitor of the merging parties. A1 Capital submitted that the merger will lead to increased concentration and higher prices within the rentable residential property market and the student accommodation market. A1 Capital also argued that the merger will impact the ability of small- and medium-sized businesses ("SMEs"), or firms controlled or owned by historically disadvantaged persons ("HDPs"), to effectively enter, participate in or expand within, the market.

[17] The Commission investigated the concerns raised by A1 Capital, and found that they were based on an inaccurate product market delineation (which combined

general residential property and student accommodation) and also incorrect market shares which were materially inconsistent with the information provided by the merging parties and various other competitors. The Commission therefore dismissed these concerns.

Retail property market

[18] As regards the market for rentable retail property, the Commission found that the proposed transaction would give rise to horizontal overlaps (within a 15km radius) between the merging parties in JHB CBD, JHB North, JHB East, and PTA West.

[19] The Commission further found that (based on the combined GLA of all shopping centres with a GLA of below 30 000 m²) the estimated market share of the merged entity, and market share accretion brought about by the merger, in each of these areas is as follows:

	Merged entity's market share (%)	Market share accretion (%)
JHB CBD	21	3
JHB North	4	<1
JHB East	4	<1
PTA West	14	<2

[20] Accordingly, in the affected Johannesburg markets, the merged entity will have a market share ranging from approximately 4% to 21%; and, in the affected Pretoria market, a market share of approximately 14% – with low market share accretions in each case. The Commission also found that, in all of the affected areas, there are various alternative providers of comparable retail properties.

[21] The Commission did not receive any concerns from third parties regarding this aspect of the proposed merger.

[22] Based on the above analysis, the Commission concluded that the proposed transaction is unlikely to give rise to any competition concerns in any relevant market.

Tribunal assessment

[23] The Tribunal was satisfied with the Commission's assessment in the residential property market. However, the Tribunal requested further clarity regarding the basis upon which the Commission had concluded that all shopping centres with a GLA of below 30 000 m² in the identified areas competed effectively with the Target Group's centres.

[24] It was also unclear to the Tribunal how the 15 km radius used by the Commission had been applied in its analysis, as this should be applied by reference to the location of each of the Target Group's retail properties (rather than, for example, by reference to the boundaries of a geographic area containing the Target Group's properties; or by reference to a particular point in that geographic area). The Tribunal therefore requested the parties to provide the specific distances between (i) each of the Target Group's properties, and (ii) each of the other properties regarded in the Commission's analysis as competing properties in the relevant areas.

[25] As regards the Tribunal's first query, the Commission and the merging parties submitted that centres of different sizes may constrain one another because shoppers are more likely to take into account proximity and tenant mix than the size of shopping centres when deciding which shopping centres to visit. They accordingly submitted that all the shopping centres listed as competitors in all the different geographic areas referred to above are likely to provide a competitive constraint to the merging parties' retail properties in those areas.

[26] As regards the Tribunal's second query, the Commission indicated that it had applied the 15 km radius in each of the identified areas by reference to a particular point in each such area. However, the Commission and the merging parties also provided the Tribunal with further information reflecting the

distances between each of the Target Group's properties and each of the properties that they regarded as competing properties in the identified areas.

[27] Based on the further information provided to the Tribunal regarding the size and proximity of all the properties in the relevant retail property markets, it appears that, however the product and geographic aspects of those markets are defined, the proposed merger does not give rise to a substantial prevention or lessening of competition. It is therefore unnecessary for us to conclude on the specific parameters of the relevant retail property market(s) for purposes of this matter.

[28] We note, however, that a more detailed assessment of the relevant market(s) and dynamics may be required in future mergers in the retail property sector, depending on the relevant facts. As the Tribunal noted in *Twin City Trading/ Castle Gate*,¹ it cannot simply be assumed that different categories of shopping centres within a particular radius of the target firm's retail properties constitute equally effective competitive constraints upon those properties. In order to reach such a conclusion, the Commission would have to conduct a substantive competition analysis of the shopping centres in question, including (for example) factors such as (differences in) rental prices, size, characteristics, tenant mix and the like.

[29] In addition, closer consideration may need to be given to the proximity of each of the candidate competitor properties to each of the target firm's properties. Whilst it may (depending on the facts) be assumed that properties outside a particular radius are unlikely to pose an effective competitive constraint on a target property, it does not necessarily follow that all properties within that radius impose a competitive constraint on the target property, or at least an equally effective competitive constraint. This is particularly so where the candidate competitor properties include different categories of shopping

¹ *Twin City Trading 2 (Pty) Ltd and the commercial letting enterprise conducted by Castle Gate (Pty) Ltd and the commercial letting enterprise conducted by the Club Retail Park (Pty) Ltd* (LM004Apr23) at paras 28 and 29.

centres to the target property (as discussed above). Ultimately, each case must be determined on its own facts.

Public Interest

Effect on employment

[30] The merging parties submitted that (save for voluntary severance agreements concluded with three highly skilled employees of the Target Group who are able to find suitable alternative employment) the proposed merger will not result in an adverse effect on employment.

[31] The merging parties expressly stated in this regard that there will not be any retrenchments as a result of the proposed merger. Post-transaction, the employees of the Target Group will either be absorbed as employees of AFHCO on the same or similar terms as they are currently employed, or their contracts will be transferred to a third-party employer who will employ them on the same or similar terms as they are currently employed with the Target Group.

[32] The Commission engaged with the employee representatives of the Acquiring Group's and the Target Group's employees, and they both confirmed that the employees did not raise any concerns regarding the proposed merger.

[33] The Commission accordingly concluded that the proposed transaction does not raise employment concerns. Based on the above facts, we agree with this conclusion.

Effect on the spread of ownership

[34] The merging parties submitted that SACREL has an HDP shareholding of 29.1%. They explained that this shareholding percentage had been calculated by Alternative Prosperity, a specialist firm with proprietary access to membership information for large mandated shareholders (such as pension funds) which invest in firms like SACREL, as this information is not publicly available.

- [35] Indluplace does not have any HDP shareholding; however Fairvest, the controlling shareholder of Indluplace with a shareholding of 56.8%, has an HDP shareholding of 12.73%.
- [36] On this basis, the Commission found that, as a result of the proposed transaction, the effective HDP shareholding in the Target Group will increase from approximately 7% to approximately 29%.
- [37] A1 Capital submitted that, based on publicly available information, the proposed transaction would result in a dilution of HDP ownership of the Target Group of 8.42%. The Commission investigated this complaint and found that the information relied upon for this calculation was inaccurate, and that the HDP ownership shares submitted by the merging parties reflected the correct position.
- [38] The Commission therefore concluded that the proposed transaction does not raise any concerns from an HDP ownership perspective.
- [39] Based on the information set out above, the Tribunal agrees with this conclusion.

Other public interest concerns

- [40] A1 Capital also submitted that the proposed merger will have adverse effects on local communities, and on independent landlords and smaller residential accommodation providers who will face increased difficulty in competing with the merged entity. A1 Capital referred in this regard to various challenges it faced as an HDP property owner in the market.
- [41] The Commission investigated these complaints and found that they were unsubstantiated and/or not merger-specific. The Commission furthermore found that the Acquiring Group has various corporate social investment programmes that benefit local communities. As regards the effect of the

proposed merger on HDP property owners, the Commission found that there was no evidence that the merger would materially impact on the ability of HDP property owners to participate and compete in any relevant market.

[42] The Commission accordingly concluded that the proposed merger does not raise any substantial public interest concerns. Based on the facts above, the Tribunal agrees with this conclusion.

Conclusion

[43] The Tribunal concludes that the proposed transaction is unlikely to give rise to any significantly negative competition or public interest effects, and therefore approves the merger unconditionally.

Adv Jerome Wilson SC

26 July 2023

Date

Mr Andreas Wessels and Dr Thando Vilakazi concurring

Tribunal Case Managers: Juliana Munyembate and Mpumelelo Tshabalala

For the Merger Parties: Albert Aukema, Andries Le Grange and Nelisiwe Khumalo of CDH

For the Commission: Makati Seekane and Grashum Mutizwa