competition tribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019042

In the matter between:

OCTODEC INVESTMENTS LIMITED Primary Acquiring Firm

And

PREMIUM PROPERTIES LIMITED Primary Target Firm

Panel	: Yasmin Carrim (Presiding Member)
	: Fiona Tregenna (Tribunal Member)
	: Anton Roskam (Tribunal Member)
Heard on	: 3 September 2014
Order Issued on	: 3 September 2014
Reasons Issued on	: 1 October 2014

Reasons for Decision

Approval

[1] On 3 September 2014, The Competition Tribunal ("**Tribunal**") conditionally approved the acquisition by Octodec Investments Limited ("**Octodec**") for the remaining issued share capital of Premium Properties Limited ("**Premium**")

[2] The reasons for approving the proposed transaction follow.

Parties to the transaction

[3] The primary acquiring firm is Octodec, a company listed on the Real Estate Holding and Development sector on the Johannesburg Securities Exchange ("**JSE**"). Octodec is controlled by the Wapnick Family, Stanlib, Old Mutual Life Assurance Company and Government Employee Pension Fund ("**GEPF**"). Octodec currently owns 14% of Premium properties.

[4] The primary target firm is Premium, a company listed on the JSE and has Estate Investment Trust status. Major shareholders include the Wapnick Family, Octodec, Stanlib (Pty) Ltd, Old Mutual Life Assurance Company and GEPF.

Proposed Transaction

[5] Octodec intends to increase its shareholding and acquire the remaining 86% shares in Premium. Post-transaction Octodec will have sole-control of Premium.

Rationale

[6] The merging parties will benefit in the following manners; tax efficiency, enlarged property fund with diverse asset base, increased market capitalisation, increased liquidity of shares, re-rating of merged company, improved debt capital market terms, financial and operating efficiencies, time savings and administrative cost saving.

Relevant Market and Impact on Competition

[7] The merging parties are both active in the market for the provision of office property, retail space in convenience centres, light industrial space and residential space.

[8] There are overlaps in the merging parties' activities in the following product and geographic markets:

- The market for the provision of rental space in B-Grade office property in the Pretoria node;
- The market for the provision of rental space in C-Grade office property within the Johannesburg CBD, Pretoria CBD, Arcadia and Sunnyside node;
- The market for the provision of retail space in a convenience centre within 10km radius from the merging parties convenience centres in the Johannesburg and Pretoria CBD node;
- The market for the provision of light industrial space within Pretoria and Environs node; and
- The market for the provision of residential space within the Johannesburg CBD, Pretoria and Environs nodes.

[9] The merging parties' post-merger estimates in all of the abovementioned markets are mostly low, ranging between <05 <14%. The only higher market share is in the market for the provision of rental space in C-Grade office property in the Johannesburg CBD. It will have a post-merger market share of between <30 -<40% but the Competition Commission ("**Commission**") is of the view that even this market share raises no competition concerns. Furthermore the Commission is of the view that the current vacant space available in the nodes not only places a constraint on the merging parties but also acts as an incentive to the merging parties, who also have vacant space within their properties, to refrain from unilateral conduct.

Public Interest

Exclusivity clauses

[10] Three anchor tenants, consisting of large retail chain stores, have leases with Premium which grant them the right to seek their prior approval before

Premium can lease to their respective competitors. These rights apply for the duration of their leases. The leases have a 10 year duration period and are due to expire in 2021.

[11] The Commission's concern is that the leases serve to prevent small competitors from acquiring leases in the Mall. The Commission submits that these clauses are objectionable on public interest grounds as they have an adverse effect on, in terms of section 12A (3);

> "...*(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive*..."

[12] The Commission has therefore proposed that the merger be approved on condition that the acquiring firm use its best efforts to negotiate with its tenants for the removal of these clauses.

[13] The Tribunal notes that in this merger one of the lease agreements with an anchor tenant contains the following clause -

> "*the LANDLORD **shall not** during the period of this lease, or any renewal hereof, lease any other portion of the SHOPPING CENTRE or any extension or addition thereto, to a tenant whose business in whole or part comprises:*
>
> 1. *a bakery*
> 2. *fresh meat;*
> 3. *fresh produce;*
> 4. *groceries; and*
> 5. *delicatessen...*"

[14] This clause places an absolute restriction on the lessor from offering premises of any size whatsoever, no matter how small, to businesses who might, in whole or in part, compete with the chain stores' businesses. A similar clause is to be found in the other anchor tenant agreements, however in this latter instance the clause requires the prior written approval of the tenant if the lessor wishes to lease to a supermarket or store containing food departments

in excess of 100 square metres and/or certain categories of business such as bakery, pie shop, butchery, fishery or fresh produce. In essence it applies to the typical type of small business who might compete with one or other product type offered by the larger chain stores, which would be typically small businesses.

[15] The merging parties explained that while they had no objection to the imposition of the proposed condition. In their view the condition, "*is neither here nor there*" seemingly because the 'type of tenant' that their centres attracted did not include small businesses and their physical design would enable them to put in an additional anchor tenant.

[16] If indeed this were the case, such restrictive clauses in the leases would serve no purpose whatsoever and one would expect no objection, from the merging parties or the relevant tenants, to their deletion. Furthermore no explanation or supporting evidence, such as LSM analysis or customer profiles, was provided by the merging parties as to how they arrived at this definitive view, or why it was that there was no likelihood whatsoever that the centres would in future attract smaller businesses. The merging parties did not put forward any efficiency arguments, on their own behalf or on behalf of their tenants, for the inclusion of these provisions.[1] Given this, we find that it would be preferable, in the circumstances of this case, that the merging parties endeavour to have these clauses removed.

Conclusion

[17] In light of the above we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in the markets mentioned. In addition, no other public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction conditionally.

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[1] The only explanation provided was that the head offices of these stores required these types of clauses. See Transcript page 6

Yasmin Carrim

1 October 2014
DATE

Fiona Tregenna and Anton Roskam concurring

Tribunal Researcher:	Moleboheng Moleko
For the merging parties:	Vani Chetty – Baker Mckenzie
For the Commission:	Zanele Hadebe and Grace Mohamed