

## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM050Jun22

In the large merger between:

**Sasol Pension Fund**

Primary Acquiring Firm

And

**Luvon Investments (Pty) Ltd, PHG Property Holdings (Pty) Ltd and Park Road Trading 7 (Pty) Ltd**

Primary Target Firms

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Panel:	M Mazwai (Presiding Member) A Wessels (Tribunal Member) I Valodia (Tribunal Member)
Heard on:	21 July 2022
Date of last submission:	28 July 2022
Order issued on:	29 July 2022
Reasons Issued on:	23 September 2022

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### REASONS FOR DECISION

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#### Introduction

- [1] On 29 July 2022, the Competition Tribunal (“the Tribunal”) conditionally approved the acquisition of Ferndale on Republic from Luvon Investments (Pty) Ltd (“Luvon”), PHG Property Holdings (Pty) Ltd (“PHG Property”), and Park Road Trading 7 (Pty) Ltd (“Park Road”) by Sasol Pension Fund (“the Fund”).
- [2] In terms of the proposed transaction, the Fund intends to acquire a 50% interest in a property known as Ferndale on Republic (“Target Property”) from Luvon, PHG, and Park Road.

*Primary acquiring firm*

- [3] The Fund is registered as a Type B Umbrella Fund<sup>1</sup> in terms of the Pension Funds Act No 24 of 1956 ( Pension Funds Act) and is a retirement provision option for employees of Sasol South Africa Ltd (“Sasol South Africa”) and its affiliates within South Africa.<sup>2</sup> Sasol South Africa is a subsidiary of Sasol Limited (“Sasol”). The Fund is not controlled by any external entity but has a controlling interest in Formprops 87 (Pty) Ltd.
- [4] The Fund’s assets are invested in a variety of asset classes, in accordance with the Rules of the Fund and the Pension Funds Act and within the guidelines set out in the Fund’s Investment Policy Statement with the direct property portfolio being one of the sanctioned asset classes within the Fund’s portfolio. The Fund currently owns properties that are categorised as regional shopping centres, office, retail, industrial, hospital, fuel service station, fast food, and drive-through properties in and around Gauteng.

*Primary target firms*

- [5] The shares in the Target Property are held by Luvon, PHG Property, and Park Road.
- [6] Luvon is controlled by East and West Investments (Pty) Ltd (“East and West”). East and West are jointly controlled by FS Moolman Investments (Pty) Ltd (“FS Moolman”) and Mestoclox (Pty) Ltd (“Mestoclox”). FS Moolman is controlled by the Friederich Sonke Moolman Family Trust (“FSM Family Trust”).<sup>3</sup> Mestoclox is controlled by the Johannes Zacharias Moolman Junior Family Trust (“JZM Family Trust”).<sup>4</sup> The JZM Family Trust controls a diversified property portfolio (directly and indirectly through its subsidiaries) comprising of retail, office, and industrial properties throughout South Africa.

<sup>1</sup> These are usually industry/sector-specific funds with the result that only employers who participate in the industry/sector may or must participate in a particular fund, for example, Bargaining Council funds.

<sup>2</sup> The Fund has 18 956 contributing members and 6 609 pensioners as of 31 March 2021.

<sup>3</sup>

<sup>4</sup>

- [7] PHG Property is controlled by Boschoff Investment Holdings, which is ultimately held by Susarah Johanna Boschoff, who also controls PHG Group (Pty) Ltd, which acts as a managing agent for PHG Property. PHG Property wholly controls Invest In Property 18 (Pty) Ltd and Moto Citi Bloemfontein (Pty) Ltd, and has a vested interest in the Victorian Park Trust, the WB Kellner Trust, and the WB Properties Trust. The PHG Group is involved in the management and letting of rentable retail properties.
- [8] Park Road is wholly controlled by AJVH Holdings (Pty) Ltd (“AVJH”). AVJH is wholly controlled by the Sport City Trust.<sup>5</sup> Park Road is a property holding company, involved in the management and letting of retail property.
- [9] The Target Property, Ferndale on Republic, is a mixed-use development with both retail and office space and is situated at Republic Drive, Randburg, Gauteng. It has a gross lettable area of 53,778 m<sup>2</sup>.

### **Competition assessment**

- [10] The Competition Commission (“the Commission”) did not conclude on the relevant product market. However, based on the activities of the parties the Commission, assessed the effects of the proposed transaction on rentable retail property within a 16km radius of the Target Property.<sup>6</sup> The Commission considered the activities of the merging parties and found that the proposed transaction results in a horizontal overlap in relation to the holding and management of rentable retail properties as the Fund holds a 50% interest in retail space within a 10km radius of the Target Property.
- [11] According to the Commission the Fund has an interest in Northgate Shopping Centre, located 8km away from the Ferndale on Republic. In its assessment, attributing the entire gross lettable area of Northgate Shopping Centre to the

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<sup>5</sup> The Trustees of Sport City Trust are A J van Huyssteen and B E Mostert.

<sup>6</sup> In *Redefine Retail Proprietary Limited and the Trustees for the time being of Maponya Mall Property Trust and Redefine Retail Proprietary Limited* (case number: LM176Jan14), the Tribunal defined the market as the market for rentable retail property within a 16km radius of the Target Property.

Fund, the Commission found that post-transaction the Fund will have a [REDACTED] % market share with an accretion of [REDACTED] %.

- [12] The Commission submitted that the parties will continue to face competition from a number of other players within the relevant geographic market.
- [13] In assessing the proposed transaction, the Tribunal considered written and oral submissions by the merging parties, the Commission and the Minister of the Department of Trade, Industry and Competition (“dtic”) on public interest issues arising from the proposed transaction and the remedies proposed (since there were concerns relating to exclusivity in a lease agreement between the merging parties and Pick n Pay). In doing so, the Tribunal also sought clarification on certain aspects of the proposed conditions before conditionally approving the transaction.
- [14] We concluded that the proposed transaction will not lead to any substantial prevention or lessening of competition in any relevant market due to the low market shares and existence of other competitors in the relevant geographic markets.

## **Public interest**

### *Employment*

- [15] The merging parties submitted that there will be no job losses nor changes to employment conditions as a result of the proposed transaction.
- [16] The Commission concluded after investigation that there will be no negative effect on employment as a result of this merger. The Commission engaged the employee representatives of the Fund and the Moolman Property Management Group (which is responsible for the day-to-day management of the Target Property), and both confirmed that all employees that they represent were notified and no concerns were raised. Furthermore, the employee representative of Moolman Property Management Group confirmed that the Target Property will

be sold as a going concern and therefore all the employees will be transferred to the new owners.<sup>7</sup>

[17] We concluded based on the above, that the proposed transaction is unlikely to raise any employment concerns post-merger.

#### *Spread of ownership*

[18] Sasol South Africa is a level 4 broad-based black economic empowerment (“B-BBEE”) contributor, with a B-BBEE procurement recognition level of 100%, black ownership voting rights percentage of 42.48% and black woman ownership voting rights percentage of 10.54%.

[19] Luvon, PHG Property, and Park Road do not have any shareholding that is held by historically disadvantaged persons (“HDPs”).

[20] Due to the above, the merging parties submitted and the Commission concluded there will be an increase in the ownership held by HDPs due to the implementation of the proposed transaction. No concerns arose from this.

#### *Exclusivity*

[21] The Commission identified an exclusivity clause in a heads of agreement between Pick n Pay Retailers (Pty) Ltd (“Pick n Pay”) and Park Road in relation to future leases that the Target Property may allow for other retailers.<sup>8</sup> In terms of the heads of agreement, Pick n Pay has the right to determine which retailers may occupy the Target Property as well as the amount of space that should be allocated to such retailers. According to the heads of agreement, the Target property is permitted to lease retail space only to Checkers supermarket and Woolworths, as well as Checkers liquor, Food Lover’s Market and Game.

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<sup>7</sup> Under section 189 of the Labour Relations Act 66 of 1995.

<sup>8</sup> See paragraph 12 of the Heads of Agreement between Park Road and Pick n Pay dated 30 October 2017 (Merger Record p69-80).

- [22] During the Commission's investigations the dtic was concerned about the impact of this exclusivity and its the effect on a particular industrial sector or region, the ability of small and medium businesses or firms controlled or owned by HDPs to effectively enter into, participate in or expand within the rentable retail market.
- [23] Following engagement with the merger parties, the Commission and merger parties agreed to a condition regarding the removal of the exclusive clause within six months of the date of approval of the merger.
- [24] The Tribunal sought clarity from the parties regarding the effects of the removal of the exclusivity as a condition – whether this would apply to HDP and small medium enterprise ("SME") firms, and the enforceability of the condition since Pick n Pay is not a party to the merger.
- [25] It was clarified at the hearing that the removal of exclusivity would fall away for any grocery retailer and for HDP and SME firms. Further, the merging parties confirmed that Pick n Pay had agreed to have the said exclusivity clause removed.
- [26] The Commission and merging parties were requested by the Tribunal panel during the hearing to enhance the exclusivity conditions in certain respects, to ensure notice of the conditions to potential new entrants into the Target Property's shopping centre.
- [27] Following numerous iterations and submissions by the merging parties on amended conditions, the conditions were acceptable to the Tribunal.

## **Conclusion**

- [28] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market and the proposed transaction does not raise any other public interest concerns.

[29] In order to give effect to the removal of the exclusivity provision in the Target Property's lease, Tribunal imposed conditions, as agreed between the Commission and merger parties, and enhanced during the hearing, annexed hereto as "**Annexure A**" as conditions to the approval of the merger.



**Ms Mondo Mazwai**

**23 September 2022**

**Date**

**Prof Imraan Valodia and Mr Andreas Wessels concurring**

Tribunal Case Managers:	Juliana Munyembate and Leila Raffee
For the Merging Parties:	Misha van Niekerk of Adams & Adams
For the Commission:	Mishkah Abdool Sattar and Thabelo Masithulela