COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM181Feb23

In the matter between:

Units On Park Street (Pty) Ltd	**Primary Acquiring Firm**
and	
WHBO Construction (Pty) Ltd in respect of a 50% Undivided Share in the Units On Park Assets	**Primary Target Firm**

Panel:	I Valodia (Presiding Member) T Ngcukaitobi (Tribunal Member) A Ndoni (Tribunal Member)
Heard on:	25 April 2023
Order issued on:	25 April 2023
Reasons issued on:	25 May 2023

REASONS FOR DECISION

[1] On 25 April 2023, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger whereby WBHO Construction (Pty) Ltd (“WBHO”) is selling its 50% undivided share in the property letting enterprise known as “Units on Park Street” (the “Target Business”) to Units on Park Street (Pty) Ltd (“Units on Park Street”). Post-merger, The Target Business will be 100% owned by Units on Park Street.

The Parties and the Proposed Transaction

[2] The primary acquiring firm is Units on Park Street (Pty) Ltd (“Units on Park Street”), a property investment company. Its primary activity is its current 50% holding in the Target Business. Units on Park Street is a wholly owned

subsidiary of South African Student Accommodation Impact Investments (Pty) Ltd ("SASAII").

[3] SASAII is controlled by the Eskom Pension and Provident Fund;[1] The Danish Sustainable Development Goals Investment Fund K/S;[2] Momentum Metropolitan Life Limited ("MML") and The International Finance Corporation[3] (Units on Park Street and its controllers will collectively be referred to as "the Acquiring Group"). SASAII is a holding company that develops, owns and mobilises global and local institutional capital for investment in Purpose Built Student Accommodation in South Africa. SASAII wholly owns Units on Jorissen (Pty) Ltd[4] and Units on Station Square (Pty) Ltd.[5]

[4] The primary target firm is WBHO's 50% undivided share in the student accommodation property letting enterprise located in Hatfield, Gauteng; and it comprises the student accommodation building known as "Units on Park Street" and all leases in that respect.

[5] WBHO is a wholly owned subsidiary of Wilson Bayly Holmes-Ovcon Ltd, a company listed on the Johannesburg Stock Exchange (JSE). WBHO is engaged in civil engineering and building construction activities in Africa and the United Kingdom.

[6] Of relevance is the background to WBHO's pre-merger holding in the Target Business and the proposed transaction. WBHO funded and conducted the construction of the Target Business' buildings; the *quid pro quo* for which was its 50% undivided share. [redacted]

[1] As to [redacted]%.
[2] As to [redacted]%.
[3] Each as to [redacted]%.
[4] Located in Braamfontein, Gauteng (under construction to be completed November 2023)
[5] Located in Cape Town, Western Cape (under construction to be completed November 2023) SASAII also holds, dormant, Nala Units (Pty) Ltd.

[redacted].

Competition Assessment

[7] The Commission considered the activities of the merging parties and found a notional horizontal overlap in that there is a pre-existing relationship between the Acquiring Group and the Target Business, as the Acquiring Group holds 50% of the Target Business's shares.

[8] The Commission investigated the merging parties' claim that the proposed transaction does not change the competitive position of the firms falling within the Acquiring Group in any market post-merger because there is no accretion in market share.

[9] In assessing the geographic market, the Commission noted that SASAII does not own any other rentable student accommodation within the Hatfield node.[6] SASAII's other rentable student accommodation is based in Braamfontein, Johannesburg[7] and Cape Town.

[10] The Commission also found sufficient alternative accommodation in the Hatfield node where the 988-bed, 244-unit Target Business is located. In this regard, the Commission observed that there are over 100 sites offering student housing with roughly 43 000 beds within 12km of the Target Business.

[11] Based on the above, the Commission concluded that the proposed transaction is unlikely to give rise to any competition concerns. We agree with this assessment.

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[6] The relevant geographic node included areas within a 12km radius of Units on Park and includes Annlin, Arcadia, Brooklyn, Capital Park, Danville, GroenKloof, Hatfield, Hillcrest, Koedoesport, Mopani, Murrayfield, Nel Park, Ondestepoort, Phillip Nel Park, Pretoria Central, Pretoria Gardens, Pretoria North, Pretoria West, Prinshof, Proclamation Hill Riviera, Sunnyside and Waterkloof Glen.

[7] Approximately 64km away.

Public Interest

Effect on employment

[12] The merging parties submitted that the proposed transaction will not result in any retrenchments, as the Target Business is currently managed by Eris Property Group (Pty) Ltd's ("Eris")[8] less than 10 employees, and this will continue post-merger.

[13] The Commission contacted Eris' employee representatives, who confirmed that the employees were notified of the proposed merger and that no concerns were raised. Furthermore, the Commission considered the fact that Eris will continue to manage the Target Business so the employees currently managing the Target Business should remain with Eris following the merger.

[14] We agree with the Commission's conclusion that the proposed transaction does not raise employment concerns.

Effect on the spread of ownership

[15] Units on Park Street is controlled by SASAII, which is in turn held by MML; and MML is ultimately controlled by Momentum Metropolitan Holdings Ltd (MMH) which is 37% HDP owned. The Commission found that the Acquiring Group has 6.4% HDP ownership value.[9]

[16] The Commission and merging parties disagreed on the assessment of the Target Business' pre-merger HDP ownership value; and, therefore, the effect of the proposed transaction on HDP ownership. On the one hand, the Commission, found that the proposed transaction results in an HDP dilution of 41.25%; whereas the merging parties submitted that the true dilution is 3.75%. Where the Commission found that, pre-merger, the Target Business has

[8] We note that Eris is held as to 73.75% by MML's ultimate controller - Momentum Metropolitan Holdings Ltd.

[9] MMH holds 17.34% in the Acquiring Group. Based on this, the Acquiring Group has (17.34% * 37%) = 6.4% HDP ownership.

47.65% HDP ownership based on WBHO's 88.9% HDP ownership[10] and the Acquiring Group's 6.4% HDP ownership. The merging parties say that the Commission's inflated value is the result of the Commission's inclusion of mandated investments – which the Commission has previously omitted as a basis for HDP ownership – and its taking into account of voting rights as opposed to economic interest. Rather, say the merging parties, from WBHO's 88.9%, the 75% in mandated investments should be discounted, and the 13.9% should be halved to take into account WBHO's 50% share – resulting in 6.95%, which when added to the Acquiring Group's HDP share produces a pre-merger HDP ownership of 10.15% in the Target Business.

[17] The Commission ultimately maintained its stance regarding its view on the proposed transaction's true HDP-ownership dilution effect. However, it considered that WBHO's HDP shareholding remains unchanged as a result of the merger and that the Target Business is one property which accounts for less than 2% of WBHO's asset value. Further to this, the Commission considered the fact that WBHO contemplated its exit from the Target Business in 2018 (when it signed the agreement with Units on Park Street) prior to the amendments to the Act. As such, the Commission ultimately did not press for a public interest greater spread of ownership remedy.

[18] We note the merging parties' submission that an employee share ownership program (ESOP) would not be feasible as the Target Business's property does not have any employees. The de minimus nature of this transaction in market value and alongside the contestation between the Commission and the merger parties regarding the proper appreciation of the HDP ownership (where on the merger parties' interpretation the change in HDP is less than 5%); and the inability of the Commission to propose a public interest, spread of ownership remedy. Taken alongside the background to the proposed transaction and the negligible change that this transaction will have to competition dynamics in in the property market (a market which seldom occasions competition

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[10] WBHO holds a 50% share, as such the Target Business's pre-merger HDP ownership is (88.9% * 50%) = 47.2% HDP ownership.

intervention), we do not view the transaction's effect on the public interest to be sufficiently substantial to warrant the imposition of a spread of ownership remedy, or any public interest remedy.

[19] For these reasons as well as the reasons espoused by the Commission, we conclude that the proposed transaction does not raise sufficient negative public interest concerns.

Conclusion

[20] The Tribunal concludes that the proposed transaction is unlikely to give rise any significantly negative competition or public interest effects.

	25 May 2023
Presiding Member **Professor Imraan Valodia**	**Date**

Concurring: Adv. Tembeka Ngcukaitobi and Ms Andiswa Ndoni

Tribunal Case Managers:	Mpumelelo Tshabalala and Sinethemba Mbeki
For the Competition Commission:	Raksha Darji and Wiri Gumbie
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