

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 01/LM/Jan09

In the matter between:

ApexHi Properties Limited

Acquiring Firm

And

Business Venture Investments No. 1232 (Pty) Ltd

Target Firm

Panel : D Lewis (Presiding Member) N Manoim, (Tribunal Member),
and Y Carrim (Tribunal Member)

Heard on : 25 February 2009

Order Issued : 26 February 2009

Reasons Issued: 11 June 2009

Reasons for Decision

Approval

- [1] On 26 February 2009, the Tribunal conditionally approved the merger between ApexHi Properties Limited and Business Venture Investments No. 1232 (Pty) Ltd. The reasons for approving the transaction with conditions follow.

The parties

- [2] The primary acquiring firm is ApexHi Properties Limited ("ApexHi"), a public company incorporated under the company laws of the Republic of South Africa and is listed on the JSE Securities Exchange. ApexHi is not controlled by any single shareholder but controls ApexHi Charitable Trust. The major shareholders in ApexHi are Old Mutual Group Limited (with 8.18% A Units; 12.42% B Units; and 11.38% C Units); Outward Investment (Pty) Ltd (with 7.21% A Units; 17.86% B Units; and 3.51% C Units); Coronation (with 6.50% A Units); Investec Limited (with 5.48% A Units; 5.47% B Units; and 6.15% C Units); and Clearwater Property Holdings (Pty) Ltd (with 23.62% C Units).
- [3] The primary target firm is Business Venture Investments No. 1232 (Pty) Ltd ("Business Venture"), a private company incorporated in accordance with the company laws of the Republic of South Africa. Business Venture is controlled

by Cape Empowerment Trust Limited (“Cape Empowerment”). Business Venture does not control any firm. Its only asset is the 21.8% non-controlling interest in Ambit Properties Limited (“Ambit”).

Description of the transaction

- [4] In terms of the proposed transaction, ApexHi intends to acquire the entire issued share capital of Business Venture from Cape Empowerment. As a result of this acquisition, ApexHi will indirectly acquire the 21.8% share of business Venture in Ambit. The parties submitted that ApexHi is also acquiring 13% of the shareholding in Ambit from various shareholders. Upon completion of the transaction, ApexHi will control business Venture and will have 34.8% shareholding in Ambit, being the 21.8% it holds through Business Venture and 13% it will acquire directly from shareholders in Ambit.

THE PARTIES’ ACTIVITIES

Primary acquiring firm

- [5] ApexHi is a property loan stock company, which owns a portfolio of properties comprising offices, retail, industrial and residential properties. It is listed on the JSE Securities Exchange in the “Financial Services-Real Estate” sector.

Primary target firm

- [6] Business Venture is an investment holding company, which was created by the Cape Empowerment Trust solely to hold 21.8% interest in Ambit, the only interest it holds. The parties and the Commission refrained from considering the activities of Ambit in the assessment of this transaction as they contend that Business Venture does not control Ambit.

Rationale for the transaction

- [7] ApexHi submitted that this transaction provides it with indirect exposure to a sizeable portfolio of properties that is complimentary to ApexHi’s existing portfolio.
- [8] For Business Venture, the sale of the shares in Ambit was due to the opportunity offered to de-gear Business Venture’s balance Sheet. The merger parties submitted that since the asset being disposed of was the most geared

of Cape Empowerment Trust's assets, the latter found it more logical to accept ApexHi's offer in light of the current economic conditions.

Competition analysis

- [9] The Commission found that there is no overlap in the activities of ApexHi and Business Venture, as Business Venture does not have any business activity except for its non-controlling stake in Ambit. The Commission acknowledged that there may be overlaps in the activities of ApexHi and Ambit but refrained from analysing the extent and effect of the overlap as it argued that post merger ApexHi shall not have control or influence over Ambit. Moreover, so the Commission argues, ApexHi has made its intentions clear that it intends to acquire control over Ambit, only at that time shall ApexHi's stake in Ambit be analysed to determine its impact on competition.
- [10] At the hearing, the Tribunal raised its concerns that the information was insufficient to warrant a conclusion that post merger ApexHi will not have control over Ambit because *prima facie* it seemed like ApexHi will exercise control over Ambit prior to ApexHi acquiring control over Ambit in a forthcoming transaction to be notified. This was because post merger ApexHi would be one of the largest shareholders in Ambit through its post-merger 34.8% interest in Ambit together with ABSA which has an interest of just under 35%. In addition, there was no analysis that was done to clearly show that post merger ApexHi shall not have control over Ambit and no analysis was done to determine the impact on competition should control be exercised by ApexHi over Ambit. To address the Tribunal's concerns, the parties informed the Tribunal that they would not object to the transaction being approved with conditions that ApexHi will not exercise control over Ambit at all and that should control be found to be exercised, then ApexHi will be compelled to divest its interest in Ambit. Subsequent to the hearing the Tribunal issued an order on 26 February 2009, attached hereto as Annexure "A", to address the concerns it raised with the parties.

Public Interest

- [11] There are no public interest issues.

Conclusion

[12] The merger is approved with conditions for the reasons mentioned above.

N Manoim

Tribunal Member

11 June 2009

DATE

D Lewis and y Carrim concurring.

Tribunal Researcher : R Kariga

For the merging parties: Vani Chetty Competition Law (Pty) Ltd

For the Commission : M Van Hooven (Mergers and Acquisitions)