



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM142Jul18

In the matter between

Cumulative Properties Ltd

Primary Acquiring Firm

And

Moolgem (Pty) Ltd

Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Halton Cheadle (Tribunal Member)
Heard on	: 10 October 2018
Order Issued on	: 10 October 2018
Reasons Issued on	: 7 November 2018

REASONS FOR DECISION

Approval

- [1] On 10 October 2018, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction in terms of which Cumulative Ltd ("Cumulative") is acquiring control over Moolgem (Pty) Ltd ("Moolgem").
- [2] The reasons for the approval of the proposed transaction follow.

Parties to the transaction

- [3] The primary acquiring firm is Cumulative. Cumulative is wholly controlled by Gemgrow Properties Ltd ("Gemgrow"), a listed Real Estate Investment Trust which is controlled by Arrowhead Properties Ltd ("Arrowhead"). Arrowhead also controls Vivident Management Group (Pty) Ltd, Vivident Income Fund Ltd, and Indluplace Properties Ltd.
- [4] Cumulative, its controllers and sister companies will hereafter be referred to as the 'acquiring group'. The acquiring group invests in and controls a diversified portfolio of commercial, retail, industrial and residential properties throughout South Africa.
- [5] The primary target firm is Moolgem, a newly incorporated company established as a joint venture investment vehicle between Gemgrow, through Cumulative, East & West Investments (Pty) Ltd ("East & West") and Luvon Investments (Pty) Ltd ("Luvon").
- [6] Pre-merger, Moolgem is controlled by East & West and its subsidiary, Luvon. Moolgem's controllers will be referred to as the 'target group'. The target group is owned by Mr Moolman, who is also the director of both entities. Moolgem and its controllers will hereafter be referred to as the 'Moolman group'.
- [7] The Moolman group controls a diversified property portfolio comprised of retail, office and industrial properties throughout South Africa.

Proposed transaction and rationale

- [8] Pre-merger, the target group will transfer 26 commercial and retail properties to Moolgem in terms of a number of property disposal agreements. Pursuant to the Moolman group restructure, Cumulative intends to acquire 75.62% of the issued shares in Moolgem. Post-merger, Cumulative will exercise sole control over Moolgem. East & West and Luvon will hold a 14.38%/10% equity interest, respectively.

Relevant market and impact on competition

- [9] The Commission did not definitively conclude on the relevant market. However, they assessed the effects of the proposed transaction on the following markets: (i) the market for the provision of rentable retail property within a 10km radius of the target properties in Polokwane, Makhado, Thohoyandou and Kimberley; and (ii) the market for the provision of rentable Grade B office and light industrial properties within a 10km radius of the target properties in Polokwane.
- [10] In the market for the provision of rentable retail property in Polokwane, the Commission found that the merging parties' market share is below 1%, with a minimal accretion. Further, the Commission found that the merged entity will be constrained by other competitors such as Resilient REIT and Theo Goosen Properties.
- [11] In the market for the provision of rentable retail property in Makhado and Thohoyandou, the Commission found that the merged entity will have a market share of approximately 17.83% and 2.73% respectively, with minimal market share accretions. The Commission further found that the merged entity will be

constrained in those affected areas by, *inter alia*, Theo Goosens Properties and Flanagan & Gerard.

- [12] In the market for the provision of rentable retail property in Kimberley, the Commission found that the merged entity's market share is below 1%, with a minimal accretion. The Commission further found that the merged entity will be constrained by, *inter alia*, Resilient REIT and the PHG Group.
- [13] In the market for the provision of rentable Grade-B office space in Polokwane, the Commission found that the merged entity's market share will be below 1%, with a minimal market share accretion. The Commission further found that the merged entity will be constrained by, *inter alia*, Resilient REIT and the Anver Family.
- [14] In the market for the provision of rentable light industrial property in Polokwane, the Commission found that the merged entity's market share is below 3%, with a minimal market share accretion. The Commission further found that the merged entity will be constrained by, *inter alia*, Network Properties.
- [15] Due to the low post-merger market shares, the minimal market share accretions and the fact that the merged entity will continue to face competition from various industry players, the Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in all the affected markets. We find no reason to disagree with the Commission.

Information exchange

- [16] However, the Commission further found that the proposed transaction is likely to facilitate the exchange of economically sensitive information. This is because

the target group owns other properties in their own right that are deemed to be in competition with properties owned by Cumulative and Moolgem. In addition to finding that Moolgem's controllers will be able to appoint directors to the board of Moolgem, the Commission found that the target group intends to appoint Mr Moolman who already serves on the boards of the target group.

- [17] The merging parties submitted that the target group is not a direct competitor of Moolgem in that the properties are differentiated in size and tenant mix. The merging parties further submitted that the target group will not have a deciding vote in Moolgem, and therefore are of the view that there are no competition concerns from Mr Moolman's appointment as director on the board of Moolgem.
- [18] The Commission is of the view that even though the target group is not a direct competitor of Moolgem, the target group still operates in the property sector and has the right to appoint a director on the board of Moolgem. Further, the Commission submitted that they are not in a position to monitor non-notifiable future acquisitions of the target group which may compete directly with the merged entity. Therefore, this still means that there is likelihood of an exchange of competitively sensitive information between competitors.
- [19] In order to assuage the concerns regarding information exchange, the Commission in agreement with the merging parties, was of the view that the proposed transaction should be approved subject to the condition that prohibits Moolgem's controllers from appointing common directors.
- [20] Given that the merging parties have agreed to the condition we do not need to decide if an information exchange concern is likely post-merger.

Public interest

[21] The proposed transaction will not have any adverse effect on employment. The proposed transaction raises no other public interest concerns.

Conclusion

[22] In light of the above and the agreed condition, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. As such, we approved the proposed transaction subject to conditions attached as "Annexure A".



Mr Norman Manoim

7 November 2018

Date

Ms Andiswa Ndoni and Mr Halton Cheadle.

Tribunal Case Manager : Kgothatso Kgobe

For the Merging Parties : M van Niekerk of Adams and Adams

For the Commission : R Ncheche



competition commission
south africa

ANNEXURE A

CUMULATIVE PROPERTIES LIMITED

AND

MOOLGEM (PTY) LTD

CC Case Number: 2018JUL0032

CT Case Number: LM142Jul18

CONFIDENTIAL CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1 **"Acquiring Firm"** means Cumulative;
- 1.2 **"Approval Date"** means the date referred to in the Competition Tribunal Order;
- 1.3 **"Commission"** means the Competition Commission of South Africa;
- 1.4 **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.5 **"Competition Act"** means the Competition Act 89 of 1998, as amended;

- 1.6 **"Competing Firms"** means the Cumulative and any other entity in which East & West and Luvon directly or indirectly hold shareholding interest that enables them to appoint or nominate a director/s to the board of those entities and which entities operate in the property letting market.
- 1.7 **"Competitively Sensitive Information"** means information that is not in the public domain which is specific or precise and which is or may reasonably be expected to be commercially sensitive from a competition perspective in that it relates to any of; current or future pricing information; business plans or strategies; customer information including plans for approaching customers or bidding for customer contracts; and marketing policies, plans, studies and forecasts as set out in the Confidentiality and Information Exchange Undertaking;
- 1.8 **"Conditions"** means these conditions;
- 1.9 **"Cumulative"** means Cumulative Properties Limited;
- 1.10 **"Days"** mean any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.11 **"East & West"** means East & West Investments (Pty) Ltd;
- 1.12 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.13 **"Luvon"** means Luvon Investments (Pty) Ltd;
- 1.14 **"Merger"** means the acquisition of control by the Cumulative over the Moolgem;
- 1.15 **"Merging Parties"** means the Cumulative and Moolgem;
- 1.16 **"Merged Entity"** means the merged business operations of the Merging Parties;
- 1.17 **"Moolgem"** means Moolgem (Pty) Ltd;
- 1.18 **"Shareholders"** means the initial shareholders of Moolgem, being East & West and Luvon;
- 1.19 **"Target Firm"** means Moolgem;
- 1.20 **"Tribunal"** means the Competition Tribunal.

2. RECORDAL

- 2.1 On 19 July 2018, the Merging Parties filed the Merger wherein Cumulative intends to acquire 75.62% of the issued shares in Moolgem.
- 2.2 Upon the implementation of the Merger, Moolgem will be solely controlled by Cumulative. The balance of the shareholding in Moolgem will be held by East & West (approximately 14.38% shareholding) and Luvon (approximately 10% shareholding).
- 2.3 Post-Merger, East & West and Luvon will each be able to appoint one director to the board of directors of Moolgem. Consequently, East & West and Luvon, will, by virtue of their representation on the board of directors of Moolgem, have access to Moolgem's Competitively Sensitive Information. Given that each of East & West, Luvon and Moolgem are competitors in the broader property sector, the Commission was concerned that the ability of East & West and Luvon to appoint directors to the board of directors of their competitor, Moolgem, may facilitate the exchange of Competitively Sensitive Information between them. Accordingly, the Commission recommended the imposition of the Conditions to address this information sharing concern and the Merging Parties have agreed to the Conditions.
- 2.4 In order to remedy the Commission's concerns, the Commission approves the transaction subject to Conditions

3. Conditions to the approval of the merger

3.1. Board seats and management

- 3.1.1. For as long as East & West and Luvon can nominate a person to be appointed a board member or a director to the board of Moolgem, East & West and Luvon shall ensure that their nominees to the board of the Moolgem:
 - 3.1.1.1. are not the same individuals serving, nominated and/or appointed on any board or management committees or sub-committee of any Competing Firms;

- 3.1.1.2. shall not receive any board documents pertaining to the property business of Competing Firms, to the extent that they contain Competitively Sensitive Information;
- 3.1.1.3. will not have served on the board of directors and/or management committees of the Competing Firms for a period of 12 (twelve) months prior to be nominated to the board of Moolgem; and
- 3.1.1.4. shall sign the Confidentiality and Information Exchange Undertaking.

3.2. Confidentiality and Information Exchange Policy

- 3.2.1. East & West and Luvon shall not disclose to the person nominated to be appointed to the board of Moolgem any Competitively Sensitive Information relating to the Competing Firms.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.
- 4.2. The Merging Parties shall within 3 (three) months of the Approval Date, develop and submit a Confidentiality and Information Exchange Policy to the Commission in line with the Conditions.
- 4.3. The Commission shall provide comments to the Confidentiality and Information Exchange Policy contemplated in these Conditions within 15 (fifteen) Days of receipt.
- 4.4. Within 20 (twenty) Days of the Implementation Date, East & West and Luvon shall submit to the Commission an affidavit, deposed to by a Senior mandated official including an Investment Principal -
 - 4.4.1. listing the names of its representative/s on the board of Moolgem;
 - 4.4.2. confirming that their representatives on the board of Moolgem meet the requirements set out in clause 3.1 above;

4.4.3. attaching a copy of the signed confidentiality undertaking referred to in clause 3.2.1 above.

4.5. For as long as East & West and Luvon can appoint a director to the board of Moolgem, on each anniversary of the Implementation Date, East & West and Luvon shall provide the Commission with an affidavit:

4.5.1. deposed to by their respective Chief Executive Officers or a Senior Officials –

4.5.1.1. attesting to compliance with clause 3.1 of the Conditions; and

4.5.1.2. attesting to compliance with clause 3.2.1 of the Conditions.

5. DURATION OF THE CONDITIONS

5.1. These Conditions shall apply for as long as East & West and Luvon can have appoint a director on the board of Moolgem and Competing Firms.

6. VARIATION

6.1. The Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

7. BREACH

7.1. In the event that the Commission receives any complaint in relation to non-compliance with the Conditions, or otherwise determines that there has been a breach by the Merging Parties of the Conditions, the breach will be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

8. GENERAL

8.1. All correspondence in relation to the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.