



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM010Apr16

In the matter between:

**VUKILE PROPERTY FUND LIMITED & DICEL TRADE
& INVEST (PTY) LTD**

Primary Acquiring Firm

and

PROTEA GLEN SHOPPING CENTRE (PTY) LIMITED

Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Andiswa Ndoni (Tribunal Member)
Heard on	: 20 July 2016
Order Issued on	: 20 July 2016
Reasons Issued on	: 17 August 2016

Reasons for Decision

Approval

- [1] On 20 July 2016, the Competition Tribunal ("Tribunal") approved the proposed transaction with conditions between Vukile Property Fund Limited & Diecel Trade & Invest (Pty) Ltd and Protea Glen Shopping Centre (Pty) Ltd.
- [2] The reasons for approving the proposed transaction follow.

Parties to proposed transaction

Primary acquiring firm

- [3] The primary acquiring firms are Vukile Property Fund Limited (“Vukile”) and Diecel Trade & Invest (Pty) Ltd (“DTI”).
- [4] Vukile is a public company registered in accordance with the laws of the republic of South Africa. Vukile is listed on the Johannesburg Stock Exchange (“JSE”) and is not controlled by any firm.
- [5] Vukile is a property owning company whose property portfolio is diversified across sectors of the rental property market, including office property, retail property, industrial property, as well as land under development and other speciality properties, such as motor related outlets, hotels and leisure properties throughout South Africa.
- [6] DTI is a private company incorporated in accordance with the laws of the Republic of South Africa. DTI is a wholly-owned subsidiary of Operation Network Enterprise Property Holdings (Pty) Ltd (“One Property Holdings”), a company registered in terms of the laws of the Republic of South Africa. DTI, ONE Property Holdings and all companies controlled by ONE Property Holdings will collectively be referred to as ONE Property Holdings Group.
- [7] One Property Holdings Group holds a diverse portfolio of properties comprising of rentable retail, special retail, industrial and office properties in the Free State, Gauteng and Mpumalanga Provinces.
- [8] Vukile and DTI will hereon collectively be referred to as the Acquiring Firms.
- [9] Relevant to the analysis of this transaction are the Acquiring Firms’ retail properties that are located in the Gauteng Province.

Primary target firm

- [10] The primary target firm is Protea Glen Shopping Centre (Pty) Ltd (“PGSC (Pty)” Ltd), in respect of a letting enterprise known as Protea Glen Shopping Centre (“the Target

Property”). PGSC (Pty) Ltd is a private company incorporated in accordance with the laws of the Republic of South Africa¹. The Target Property does not control any firm.

Proposed transaction and rationale

- [11] The Acquiring Firms submits that in terms of a series of inter-related transactions, Vukile intends to acquire 60% undivided share in the Target Property which will give it control and DTI will acquire 40% undivided share in the Target Property and will exercise control by virtue of veto rights over strategic decisions.
- [12] Post-transaction, the Acquiring Firms will have joint control over the Target Property.

Impact on competition

- [13] The Commission considered the activities of the merging parties and found that there is a horizontal overlap in the provision of rentable space in comparable centres within a 15km radius
- [14] The Commission (“Commission”) found that the merged entity will have an estimated combined post-merger market share of 7.2% with an accretion of 4.1% in the provision of rentable space in comparative centres within a 15km radius of the Target Property. Furthermore the Commission found that the merged entity will continue to face competition from several retail shopping centres. The Commission submits that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for provision of retail space in comparative centres within a 15km radius of the Target Property as the merged entity will continue to be constrained by other players.
- [15] Upon analysis of the proposed transaction, the Commission identified a competition concern relating to potential information exchange of competitively sensitive information arising from Co-Ownership Agreement between the Acquiring Firms in respect of the Target Property. The Commission found that the Acquiring Firms compete with each other in the provision of rentable retail space in the markets outside the Target Property.

¹ PGSC (Pty) Ltd is controlled as to 67% by Masingitha Property Investments Holdings (“Masingitha”). The remaining 33% is held by Gold Bid Properties (Pty) Ltd (Gold Bid Properties).

- [16] The Agreement provides for the creation of a Management Committee which will be responsible for the budget the overall strategy, the monthly management of accounts, marketing activities maintenance agreement and/or lease agreements entered into with entered into with tenants, contractors and suppliers, as well as discussions relating to future improvements, redevelopments or refurbishments of the Target Property.
- [17] In order to allay the abovementioned concern the Commission recommended that the proposed transaction to be approved subject to conditions that would prevent sharing of competitively sensitive information.
- [18] We concur with the Commission's conclusion.

Public interest

- [19] The merging parties confirmed that the proposed transaction will have no negative effect on employment.
- [20] The proposed transaction further raises no other public interest concerns.

Conclusion

- [21] In light of the above, we conclude 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. Accordingly, we approve the proposed transaction with conditions attached as **Annexure "A"**.



Mr. Norman Manoim

17 August 2016
DATE

Ms Medi Mokuena and Ms Andiswa Ndoni concurring

Tribunal Researcher:	Busisiwe Masina
For the merging parties:	Andries Le Grange of Cliffe Dekker Hofmeyr Inc.
For the Commission:	Maanda Lambani

C. ANNEXURE A

Commission Case Number: 2016Apr0154

CONDITIONS

1. Definitions

Unless the context indicates a contrary intention, the following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Acquiring Firms"** mean Vukile and DTI;
- 1.2. **"Act"** means the Competition Act 89 of 1998, as amended;
- 1.3. **"Approval Date"** means the date referred to on the Tribunal's Clearance Certificate (Form CT 10);
- 1.4. **"Business Day"** means any day other than Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time;
- 1.5. **"Commission"** means the Competition Commission of South Africa;
- 1.6. **"Competitively Sensitive Information"** includes but is not limited to rentals charged for retail or advertising space, customer information, marketing activities and strategies, investment strategies, monthly management accounts, budgets, business models and business plans, promotional plans, redevelopment or refurbishment plans, expansion plans, as well as any agreement entered into with tenants, contractors and/or suppliers;
- 1.7. **"Conditions"** mean these conditions;
- 1.8. **"DTI"** means Diecel Trade & Invest Proprietary Limited, a limited liability private company incorporated in accordance with the laws of the Republic of South Africa;
- 1.9. **"Implementation Date"** means the date occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.10. **"Management Committee"** means the management committee established by the Acquiring Firms to undertake the day-to-day management, supervision and control of the

Target Property;

- 1.11. **"Merger"** means the acquisition of control by the Acquiring Firms over the Target Property through the acquisition of the undivided 60% shareholding in the Target Property by Vukile and 40% undivided shareholding in the Target Property by DTI;
- 1.12. **"Merging Parties"** means Vukile, DTI and the Target Firm;
- 1.13. **"Protea Glen"** means Protea Glen Shopping Centre Proprietary Limited, a limited liability private company incorporated in accordance with the laws of the Republic of South Africa;
- 1.14. **"Protea Glen Mall"** means the commercial letting enterprise which will be operated jointly between the Acquiring Firms;
- 1.15. **"Rules"** mean the Rules for the Conduct of the Proceedings in the Commission and the Tribunal;
- 1.16. **"Target Firm"** means Protea Glen;
- 1.17. **"Target Property"** means Protea Glen Mall;
- 1.18. **"Tribunal"** means the Competition Tribunal of South Africa; and
- 1.19. **"Vukile"** means Vukile Property Fund Limited, a public company incorporated in accordance with the laws of the Republic of South Africa.

2. Recordal

- 2.1. The Merging Parties notified a large merger to the Commission on 08 April 2016 in terms of which Vukile and DTI intend to acquire the Target Property. The merger will be implemented by means of the acquisition of the 60% shareholding in the Target Property by Vukile and the acquisition of 40% shareholding in the Target Property by DTI. Post-merger, the Target Property will be jointly controlled by the Acquiring Firms.
- 2.2. Upon the analysis of the Merger, the Commission identified a competition concern relating to potential exchange of Competitively Sensitive Information arising from the Co-Ownership Agreement between Vukile and DTI in respect of the Target Property. The

Acquiring Firms compete with each other in the provision of rentable retail space outside the Target Property. The Acquiring Firms have entered into a Co-Ownership Agreement which provides, *inter alia*, for the creation of Management Committee which will be comprised of 3 representatives from Vukile and 2 representatives from DTI.

- 2.3. The Management Committee will be comprised of 3 representatives from Vukile and 2 representatives from DTI. The Acquiring Firms indicated that the members of the Management Committee will also be involved in the management of other properties outside the Target Property. Given the above, the proposed transaction creates a structure for information sharing between Vukile and DTI who are competitors in the property market. Therefore, the Commission is of the view that the proposed transaction can be used as a conduit to facilitate the sharing of competitively sensitive information between the Acquiring Firms regarding their businesses outside the Target Property. In order to address this concern, the Commission recommends that the proposed transaction be approved subject to the following conditions.

3. Conditions to the approval of the merger

3.1. For as long as the Acquiring Firms can appoint representatives to the Management Committee, the Acquiring Firms shall ensure that:

- 3.1.1. The representatives of the Acquiring Firms who sit on the Management Committee shall not exchange Competitively Sensitive Information regarding their businesses outside the Target Property with each other.
- 3.1.2. Any person appointed by the Acquiring Firms to the Management Committee shall sign a confidentiality undertaking confirming that he/she will not exchange any Competitively Sensitive Information regarding their businesses outside the Target Property. For the sake of clarity it is recorded that the person appointed by the Acquiring Firms to the Management Committee may discuss Competitively Sensitive Information regarding the Target Property.

4. Monitoring of compliance with the Conditions

- 4.1. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Business Days of it becoming effective.
- 4.2. The Merging Parties shall submit the confidentiality undertakings referred to in 3.1.2 to the Commission within 10 (ten) Business Days of the Implementation Date.
- 4.3. The Merging Parties shall on an annual basis, on the anniversary of the Implementation Date, submit an affidavit from a senior official of the Acquiring Firms confirming compliance with the Conditions.

5. Duration

- 5.1. These Conditions shall apply for as long as Vukile and DTI have shareholding in the Target Property. Should either Vukile or DTI dispose of its interest in Target Property, it shall inform the Commission in writing within 15 (fifteen) Business Days of concluding a sale agreement and provide a copy of the sale agreement to the Commission, notwithstanding whether or not the transaction is notifiable in terms of the Act.

6. Variation

- 6.1. The Merging Parties shall be entitled to approach the Tribunal for a variation of these conditions on good cause shown.

Breach

- 6.2. An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules of the Commission read together with Rule 37 of the Tribunal Rules.
- 6.3. All correspondence in relation to these Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.