



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM076Aug16

In the matter between:

ARROWHEAD PROPERTIES LIMITED

Primary Acquiring Firm

and

SYNERGY INCOME FUND LIMITED

Primary Target Firm

Panel : Norman Manoim (Presiding Member)
: Yasmin Carrim (Tribunal Member)
: Andreas Wessels (Tribunal Member)
Heard on : 15 December 2017
Order Issued on : 15 December 2017
Reasons Issued on : 30 January 2017

Reasons for Decision

Approval

- [1] On 15 December 2016, the Competition Tribunal ("Tribunal") approved the proposed transaction between Arrowhead Properties Limited and Synergy Income Fund Limited.
- [2] The reasons for approving the proposed transaction follow.

Parties to proposed transaction

Primary acquiring firm

- [3] The primary acquiring firm is Arrowhead Properties Limited ("Arrowhead"), a company incorporated in accordance with the laws of the Republic of South Africa.

- [4] Arrowhead is a Real Estate Investment Trust listed on the Johannesburg Stock Exchange ("JSE") and is not controlled by any firm
- [5] Arrowhead and its subsidiaries will collectively be referred to as the Arrowhead Group.

Primary target firm

- [6] The primary target firm is Synergy Income Fund Limited ("Synergy"), a company incorporated in terms of the laws of the Republic of South Africa¹.
- [7] Synergy is currently controlled by Vukile Property Fund Limited ("Vukile") with a shareholding of 89.55%. The remaining shareholding is held by public shareholders (10.32%) and directors and associates (0,13%).

Proposed transaction and rationale

- [8] In terms of the proposed transaction Arrowhead will acquire control over Synergy from Vukile. Post transaction the shareholdings will be as follows: Arrowhead 56.9 % and Vukile approximately 30 %
- [9] However the Synergy business that emerges post transaction is not the same one as present. The rationale of the merging parties is to create Synergy as a specialist fund focused on what they describe as high yielding office and industrial properties. By turning the fund into one that specializes in certain properties they make it more attractive to investors.
- [10] To achieve this restructuring of the portfolio the following steps will be taken. First, Vukile and Synergy will enter into an agreement to exchange properties. Synergy will acquire 29 industrial and office properties from Vukile and in return, transfer certain retail properties to Vukile. In a related transaction Arrowhead will also transfer certain properties of the same high yielding type to Synergy in return for shares.
- [11] Post-merger then Synergy will be reconstituted as a specialist high-yielding, high-growth fund with a portfolio comprising of commercial, office, retail and industrial

¹ Synergy is a Real Estate Investment Trust listed on the Johannesburg Stock Exchange ("JSE")

assets, forming part of Arrowhead Group's core portfolio, and subject to its strategic oversight and control.

Impact on competition

- [12] Arrowhead Group owns a diverse portfolio of retail, commercial, industrial and residential properties throughout South Africa. Of relevance to the proposed transaction are office, retail and industrial properties of the Arrowhead Group located in the Gauteng Province, Eastern Cape Province, Western Cape Province and Kwa Zulu-Natal Province. Post internal restructuring Synergy will own a diverse portfolio of properties comprising of office, retail and industrial properties in the Gauteng Province, Eastern Cape Province, Western Cape Province and Kwa Zulu- Natal Province.
- [13] The Commission considered the activities of the merging parties and found that there is a horizontal overlap in twelve (12) markets for the provision of rentable office property and industrial property:
- [13.1.] Grade B office property in Rivonia
 - [13.2.] Grade A and Grade B office property in Rivonia node
 - [13.3.] Grade A and Grade B office property in the Sunninghill node
 - [13.4.] Grade A and Grade B office property in the Bryanston/ Epsom Downs node
 - [13.5.] Grade B office property in the Lynnwood/Menlo Park/Persequor/Hazelwood node
 - [13.6.] Grade B office property in the Lynnwood/Menlo Park/Persequor/Hazelwood and Brooklyn/Nieuw Muckleneuk/ Groenkloof/Waterkloof node
 - [13.7.] Grade B office property in Bellville node
 - [13.8.] Grade B and Grade C office property in the Bellville node
 - [13.9.] Rentable space in light industrial property in broader nodes encompassing Strijdom Park, Ferndale, Honeydew, Randburg, Roodepoort and surrounding areas
 - [13.10.] Rentable space in light industrial property in broader node comprising of Milnerton/Montague Gardens/Paarden Eiland and Goodwood/ Parrow/Bellville node

[13.11.] Rentable space the light industrial property within the geographical area comprising of Pinetown and Durban south.

- [14] In all the markets identified above the Commission found that the merged entity will continue to face significant competition constraints from other properties within the relevant rentable office, and industrial property markets. Furthermore the Commission submits that the proposed transaction does not raise any foreclosure concerns.
- [15] In light of the above, the Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition within the relevant market.
- [16] However, the Commission found that the proposed transaction will bring together Vukile and Arrowhead, who will sit on the board of Synergy. This is because post-merger Vukile will retain 30% of the shareholding interest in Synergy and Arrowhead Group will hold approximately 56.9% shareholding in Synergy. The Commission is of the view that Synergy may be used by Vukile and Arrowhead Group as a platform to exchange competitively sensitive information regarding Vukile and Arrowhead Group properties outside Synergy.
- [17] In order to remedy the Commission's concerns, the Commission and the merging parties agreed to the conditions restricting the sharing of competitively sensitive information between Vukile and Arrowhead Group. The Commission was satisfied that if the proposed condition was imposed the co-ordination concerns would be addressed.
- [18] This condition, which is self-explanatory, is set out in clause 2.1 of the conditions. In the Commission's proposal the condition applied only to the extent that Vukile held more than 5% of the shares in Synergy. However at the hearing it became clear that Vukile's nominee might still remain on the board, even if it diluted to below 5%. It is the presence of the two rival funds representatives on the same board that provides the information sharing risk the Commission was concerned about. As the Commission stated in its recommendation, the information concern arises from the fact that Vukile and Arrowhead can exchange competitively sensitive information about properties they each own outside of Synergy whilst using the opportunity to meet at Synergy board level to exchange this information.

[19] But this concern arises from the fact that the two companies nominees meet at Synergy board level. This concern is not obviated by a dilution in Vukile's holding in Synergy. Limiting the conditions' application in this way to a minimum shareholding level, is irrational and accordingly we have deleted it.²

Public interest

[20] The merging parties confirmed that the proposed transaction will have no negative effect on employment.

[21] The proposed transaction further raises no other public interest concerns.

Conclusion

[22] 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 subject to conditions attached as annexure "A"



Mr. Norman Manoim

30 January 2017
DATE

Ms Yasmin Carrim and Mr Andreas Wessels concurring

Tribunal Researcher: Busisiwe Masina

For the merging parties: Albert Aukema of Cliffe Dekker Hofmeyr.

For the Commission: Billy Mabatamela

² The previous clause was clause 6 in the Commission's proposed condition.

Annexure A

Arrowhead Properties Limited

and

Synergy Income Fund Limited

CC Case Number: 2016Jul0371

CT Case Number: LM076Aug16

Conditions

1. Definitions

The following expressions shall bear the meaning assigned to them below and cognate expressions bear a corresponding meaning:

- 1.1. **"Acquiring Firm"** means Arrowhead;
- 1.2. **"Arrowhead"** means Arrowhead Properties Limited, a public company incorporated in accordance with the laws of the Republic of South Africa;
- 1.3. **"Approval Date"** means the date referred to on the Tribunal's Clearance Certificate (Form CT 10);
- 1.4. **"Business Day"** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.5. **"Commission"** means the Competition Commission of South Africa;
- 1.6. **"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 *inter alia* relates to, but is not limited 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.

- 1.7. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.8. **"Conditions"** mean these conditions;
- 1.9. **"Confidentiality and Information Exchange Undertaking"** means the written and binding undertaking not to disclose confidential information or exchange Competitively Sensitive Information concluded by the Vukile nominees who are appointed to the Synergy board of directors, the form of which is attached as Appendix 1;
- 1.10. **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.11. **"Merging Parties"** means Arrowhead and Synergy;
- 1.12. **"Merged Entity"** means the merged business activities of Arrowhead and Synergy;
- 1.13. **"Rules"** means the Rules for the Conduct of the Proceedings in the Commission and the Tribunal;
- 1.14. **"Synergy"** means Synergy Income Fund Limited, a company incorporated in accordance with the laws of the Republic of South Africa;
- 1.15. **"Tribunal"** means the Competition Tribunal of South Africa;
- 1.16. **"Vukile"** means Vukile Property Fund Limited, a public company incorporated in accordance with the laws of the Republic of South Africa;

2. CONDITIONS TO THE APPROVAL OF THE MERGER

Cross-directorships

- 2.1. Should Vukile nominate individuals to the board of Synergy, Vukile shall ensure that its nominees to the board of Synergy:
 - 2.1.1. are not the same persons serving, nominated and/or appointed on any board or management committees or sub-committees of Vukile.
 - 2.1.2. for so long as Vukile's nominee serves as a director on the Synergy Board, such nominee shall not receive any board documents pertaining to the property business of Vukile from Vukile, to the extent that they contain Competitively Sensitive Information;
 - 2.1.3. will not have served on the board of directors and/or management committees of Vukile for a period of 12 (twelve) months prior to be nominated to the board of Synergy; and
 - 2.1.4. shall sign the Confidentiality and Information Exchange Undertaking.

3. Confidentiality of information

- 3.1. Vukile shall not disclose to the nominated Synergy board members any Competitively Sensitive Information.

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. Within 20 (twenty) Business Days of the Implementation Date, a senior official of Synergy shall submit an affidavit listing the name of the person nominated by Vukile to the board

of Synergy and the nature of their other directorships. This affidavit shall also confirm that the Vukile nominees to the board of Synergy meet the requirements set out in clause 2.1. A signed copy of the Confidentiality and Information Exchange Undertaking must be submitted to the Commission within 20 Business Days from the date of its signature.

- 4.3. The Merging Parties shall submit an affidavit deposed to by a senior official of Synergy on the anniversary of the Implementation Date confirming compliance with clause 2.1 for the duration of the Conditions.

5. Variation

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

6. General

- 6.1. 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.
- 6.2. All correspondences in relation to these conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.