

SOUTH AFRICA / JUDGMENT

# Competition Commission v Pangbourne Properties Limited and Others (16246) [2013] ZACT 15; [2013] 1 CPLR 103 (CT) (13 March 2013)

[2013] ZACT 15

## COURT

Competition Tribunal

## BEFORE

A Wessels, M Mazwai, M Mokuena

## CASE / FILE NUMBER

016246

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## COMPETITION TRIBUNAL

## REPUBLIC OF SOUTH AFRICA

Case No: 016246

In the matter between: THE COMPETITION COMMISSION OF SOUTH AFRICA .....APPLICANT and PANGBOURNE PROPERTIES LIMITED .....1st respondent MORULAT PROPERTIES INVESTMENTS 2 (PTY) LTD .....2nd respondent PROUD HERITAGE PROPERTIES 283 (PTY) LTD .....3rd respondent Panel: A Wessels (Presiding Member) M Mazwai (Tribunal Member) M Mokuena (Tribunal Member) Heard on: 13 March 2013 Decided on: 13 March 2013 The Tribunal hereby confirms the consent agreement as agreed to between the Competition Commission and the Respondents, dated 12 February 2013 and annexed hereto as “Annexure A”. Presiding Member Concurring: M Mazwai and M Mokuena IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA CC CASE NOS.: 2012FEB0050 AND 2012FEB0051 CT CASE NO; 014456

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA .....APPLICANT

and

PANGBOURNE PROPERTIES LIMITED .....1st respondent

MORULAT PROPERTIES INVESTMENTS 2 (PTY) LTD .....2nd respondent

PROUD HERITAGE PROPERTIES 283 (PTY) LTD .....3rd respondent

Panel: A Wessels (Presiding Member)

M Mazwai (Tribunal Member)

M Mokuena (Tribunal Member)

Heard on: 13 March 2013

Decided on: 13 March 2013

The Tribunal hereby confirms the consent agreement as agreed to between the Competition Commission and the Respondents, dated 12 February 2013 and annexed hereto as “Annexure A”.

Presiding Member

Concurring: M Mazwai and M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CC CASE NOS.: 2012FEB0050 AND 2012FEB0051

CT CASE NO; 014456

In the matter between: THE COMPETITION

COMMISSION .....Applicant and PANGBOURNE

PROPERTIES LIMITED .....1st Respondent MORULAT

PROPERTIES INVESTMENTS 2 (PTY) LTD .....2nd Respondent PROUD

HERITAGE PROPERTIES 283 (PTY) LTD .....3rd Respondent CONSENT

AGREEMENT IN REGARD TO AN ALLEGED CONTRAVENTION OF SECTION 13A OF THE  
COMPETITION ACT 89 OF 1998 (AS AMENDED)

THE COMPETITION COMMISSION .....Applicant

PANGBOURNE PROPERTIES LIMITED .....1st Respondent

MORULAT PROPERTIES INVESTMENTS 2 (PTY) LTD .....2nd Respondent

PROUD HERITAGE PROPERTIES 283 (PTY) LTD .....3rd Respondent

CONSENT AGREEMENT IN REGARD TO AN ALLEGED CONTRAVENTION OF SECTION 13A OF  
THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

The Competition Commission and Pangbourne Properties Limited, Morulat Properties Investments 2 (Pty) Ltd and Proud Heritage Properties 283 (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of Section 49D read with Section 58(1)(b) and 59(1)(d)(i) of the Competition Act 89 of 1998, as amended, on the terms set out below: 1. Definitions For the purposes of this Consent Agreement the following definitions shall apply: 1.1. Act- means the Competition Act 89 of 1998 {as amended}; 1.2. Commission- means the Competition Commission of South Africa, a statutory body established in terms of Section 19 of the Act, with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies &

Esselen Streets, Pretoria, Gauteng; 1.3. Consent Agreement - means this written consent agreement duly signed by the Commission, Pangbourne, Morulat and Proud Heritage; 1.4. Morulat

- means Morulat Property Investments 2 (Pty) Ltd, a private company incorporated in South Africa, which has its principal place of business at 21 Porter Avenue, Melrose North, Johannesburg. Morulat is a wholly-owned subsidiary of an investment trust called MWS Investment Trust ("MWS Trust"); 1.5. Pangbourne- means Pangbourne Properties Limited, a public company incorporated in South Africa, which has its principal place of business at 3rd Floor, Rivonia Village, Rivonia Boulevard, Rivonia. Pangbourne is a wholly owned subsidiary of Capital Property Fund, which is a property unit trust fund; 1.6. Proud Heritage - means Proud Heritage Properties 283 (Pty) Ltd, a private company incorporated in South Africa which has its principal place of business is 21 Porter Avenue, Melrose North, Johannesburg. Proud Heritage is a wholly-owned subsidiary of MWS Trust; 1.7. Respondents - mean Pangbourne, Morulat and Proud Heritage; 1.8. Tribunal- means the Competition Tribunal of South Africa, a statutory body established in terms of Section 26 of the Act with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies & Esselen Streets, Pretoria, Gauteng. 2. Background facts 2.1. The Pangbourne and Moruiat Transactions 2.1.1. During 2008, Pangbourne's Board of Directors offered for sale to the market a list of seventy six (76) property letting enterprises from Pangbourne's overall property portfolio - each with separate leases and service, maintenance and supply contracts. 2.1.2. The trustees of the MWS Trust, acting through two wholly owned subsidiaries, namely Morulat and Proud Heritage, agreed to purchase seventy one (71) of the seventy six (76) Benrose property enterprises in two separate sale agreements. The first sale agreement related to the sale of forty-six (46) property letting enterprises to Morulat (the "Morulat transaction"), and the second sale agreement related to the sale of twenty-five (25) property letting enterprises to Proud Heritage (the "Proud

Heritage transaction"). 2.1.3. At the time of the Moruiat and Proud Heritage transactions, the two transactions were not notified to the Commission and the parties implemented the transactions on the understanding they constituted small mergers. 2.1.4. The Commission contended that both transactions should have been considered as one intermediate merger for purposes of the Act and that the turnover and asset values of the property letting enterprises that were sold in terms thereof should be aggregated for purposes of calculating whether or not the merger met the thresholds for notification at the time. 2.1.5. An interlocutory application was launched by the Respondents seeking an order from the Tribunal to set aside the Commission's opinion that the transactions should be notified as a single intermediate merger but was postponed sine die by the Tribunal on 8 August 2012. 2.1.6. By agreement between the Respondents and the Commission, the Respondents filed the two transactions as a single intermediate merger with the Commission.

The Competition Commission and Pangbourne Properties Limited, Morulat Properties Investments 2 (Pty) Ltd and Proud Heritage Properties 283 (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of Section 49D read with Section 58(1)(b) and 59(1)(d)(i) of the Competition Act 89 of 1998, as amended, on the terms set out below:

## 1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

1.1. Act- means the Competition Act 89 of 1998 {as amended};

1.2. Commission- means the Competition Commission of South Africa, a statutory body established in terms of Section 19 of the Act, with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies & Esselen Streets, Pretoria, Gauteng;

1.3. Consent Agreement - means this written consent agreement duly signed by the Commission, Pangbourne, Morulat and Proud Heritage;

### 1.4. Morulat

- means Morulat Property Investments 2 (Pty) Ltd, a private company incorporated in South Africa, which has its principal place of business at 21 Porter Avenue, Melrose North, Johannesburg. Morulat is a wholly-owned subsidiary of an investment trust called MWS Investment Trust ("MWS Trust");

1.5. Pangbourne- means Pangbourne Properties Limited, a public company incorporated in South Africa, which has its principal place of business at 3rd Floor, Rivonia Village, Rivonia Boulevard, Rivonia. Pangbourne is a wholly owned subsidiary of Capital Property Fund, which is a property unit trust fund;

1.6. Proud Heritage - means Proud Heritage Properties 283 (Pty) Ltd, a private company incorporated in South Africa which has its principal place of business is 21 Porter Avenue, Melrose North, Johannesburg. Proud Heritage is a wholly-owned subsidiary of MWS Trust;

1.7. Respondents - mean Pangbourne, Morulat and Proud Heritage;

1.8. Tribunal- means the Competition Tribunal of South Africa, a statutory body established in terms of Section 26 of the Act with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies & Esselen Streets, Pretoria, Gauteng.

## 2. Background facts

### 2.1. The Pangbourne and Moruiat Transactions

2.1.1. During 2008, Pangbourne's Board of Directors offered for sale to the market a list of seventy six (76) property letting enterprises from Pangbourne's overall property portfolio - each with separate leases and service, maintenance and supply contracts.

2.1.2. The trustees of the MWS Trust, acting through two wholly owned subsidiaries, namely Morulat and Proud Heritage, agreed to purchase seventy one (71) of the seventy six (76) Benrose property enterprises in two separate sale agreements. The first sale agreement related to the sale of forty-six (46) property letting enterprises to Morulat (the "Morulat transaction"), and the second sale agreement related to the sale of twenty-five (25) property letting enterprises to Proud Heritage (the "Proud Heritage transaction").

2.1.3. At the time of the Morulat and Proud Heritage transactions, the two transactions were not notified to the Commission and the parties implemented the transactions on the understanding they constituted small mergers.

2.1.4. The Commission contended that both transactions should have been considered as one intermediate merger for purposes of the Act and that the turnover and asset values of the property letting enterprises that were sold in terms thereof should be aggregated for purposes of calculating whether or not the merger met the thresholds for notification at the time.

2.1.5. An interlocutory application was launched by the Respondents seeking an order from the Tribunal to set aside the Commission's opinion that the transactions should be notified as a single intermediate merger but was postponed sine die by the Tribunal on 8 August 2012.

2.1.6. By agreement between the Respondents and the Commission, the Respondents filed the two transactions as a single intermediate merger with the Commission.

2.2. Following investigation, the Commission found that the transaction did not raise any competition concerns as it did not result in any substantial prevention or lessening of competition in any market, and did not give rise to any public interest concerns. Consequently, on 11 December 2012 the Commission approved the transaction without conditions.

3. Commission's investigation and findings After concluding its investigation into and approving the merger, the Commission concluded that the two transactions should have been notified as a single intermediate merger and that the implementation of the transactions constituted a breach of section 13A(3) of the Act.

4. Future conduct The Respondents agree and undertake:

4.1. Not to engage in prior implementation of a notifiable merger in contravention of section 13A(3) of the Act; and

4.2. To implement a compliance program within twelve (12) months from date of which this Consent Agreement is confirmed as an order of the Tribunal. The compliance program will be designed to ensure that the Respondents' employees and directors are informed of and comply with their obligations under the provisions of the Act.

5. Administrative penalty

5.1. The Respondents agree that they are jointly and severally liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act.

5.2. The Respondents agree that they are jointly and severally liable to pay an administrative penalty of R75 000 (Seventy Five Thousand Rand), one party paying, in full the others to be absolved.

5.3. The penalty shall be paid within seven days (7) of the confirmation of this Consent Agreement as

an order of the Tribunal. 5.4. The administrative penalty is payable into the bank account of the Commission whose, banking details are: Bank; ABSA Bank Name of account: Competition Commission Account Number: 4050778576 Branch Code: 323345

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### 3. Commission's investigation and findings

After concluding its investigation into and approving the merger, the Commission concluded that the two transactions should have been notified as a single intermediate merger and that the implementation of the transactions constituted a breach of section 13A(3) of the Act.

### 4. Future conduct

The Respondents agree and undertake:

4.1. Not to engage in prior implementation of a notifiable merger in contravention of section 13A(3) of the Act; and

4.2. To implement a compliance program within twelve (12) months from date of which this Consent Agreement is confirmed as an order of the Tribunal. The compliance program will be designed to ensure that the Respondents' employees and directors are informed of and comply with their obligations under the provisions of the Act.

### 5. Administrative penalty

5.1. The Respondents agree that they are jointly and severally liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act.

5.2. The Respondents agree that they are jointly and severally liable to pay an administrative penalty of R75 000 (Seventy Five Thousand Rand), one party paying, in full the others to be absolved.

5.3. The penalty shall be paid within seven days (7) of the confirmation of this Consent Agreement as an order of the Tribunal.

5.4. The administrative penalty is payable into the bank account of the Commission whose, banking details are:

Bank; ABSA Bank

Name of account: Competition Commission

Account Number: 4050778576

Branch Code: 323345

5.5. Proof of payment of the administrative penalty amounts will emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions. 5.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act, Full and final settlement This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to all matters investigated under the Commission's case numbers: 2012Feb0050 and 2012Feb0051 in relation to the alleged contravention of section 13A(3) of the Act. 7. Effect of this Agreement The Respondents record that nothing in this Agreement amounts to, or should be taken to imply an admission of liability or wrongdoing on the part of any of them. Signed at Rivonia on 7 February 2013 Pangbourne Properties Limited Authorised and Warranting that authority Signed at Rivonia on 7 February 2013 Morulat Properties Investments 2 (Pty) Ltd Authorised and Warranting that authority Signed at Rivonia on 7 February 2013 Proud Heritage Properties (Pty) Ltd Authorised and Warranting that authority Signed at Pretoria on 12 February 2013 Shan Ramburuth Competition Commissioner

5.5. Proof of payment of the administrative penalty amounts will emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions.

5.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act,

Full and final settlement

This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to all matters investigated under the Commission's case numbers: 2012Feb0050 and 2012Feb0051 in relation to the alleged contravention of section 13A(3) of the Act.

## 7. Effect of this Agreement

The Respondents record that nothing in this Agreement amounts to, or should be taken to imply an admission of liability or wrongdoing on the part of any of them.

Signed at Rivonia on 7 February 2013

Pangbourne Properties Limited

Authorised and Warranting that authority

Morulat Properties Investments 2 (Pty) Ltd

Proud Heritage Properties (Pty) Ltd

Signed at Pretoria on 12 February 2013

Shan Ramburuth

Competition Commissioner

### Source & reproduction note

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Prepared on 11 October 2026 · Esheria