# COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: 11/AM/Jan12**

**In the request for consideration of an intermediate merger:**

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| Synergy Income Fund Ltd | First applicant |
| Khuthala Alliance (Pty) Ltd | Second applicant |
| And | |
| The Competition Commission | Respondent |

**In the intermediate merger between:**

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| Synergy Income Fund Ltd | Primary acquiring firm |
| And | |
| Khuthala Alliance (Pty) Ltd | Primary target firm |

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| Panel | : | Andreas Wessels (Presiding Member)<br>Medi Mokuena (Tribunal Member)<br>Takalani Madima (Tribunal Member) |
| Heard on | : | 07 March 2012 |
| Order issued on | : | 08 March 2012 |
| Reasons issued on | : | 20 July 2012 |

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**Reasons for Decision**

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## Conditional approval

1. On 08 March 2012 the Competition Tribunal ("Tribunal"), in terms of section 16(2)(b) of the Competition Act of 1998[1], conditionally approved the intermediate merger between Synergy Income Fund Ltd and Khuthala Alliance (Pty) Ltd.

2. This merger was approved subject to the following conditions:

[1] Act No. 89 of 1998, as amended.

2.1. The merging parties shall negotiate with Spar and its franchisee in the utmost good faith to have their exclusivity clause removed at the renewal of the release in the King Senzangakhona Shopping Centre in 2018.

2.2. The merging parties shall provide a report to the Competition Commission within 30 (thirty) days after entering into a new lease agreement with Spar and its franchisee in the King Senzangakhona Shopping Centre in 2018, setting out in detail the extent to which they have compiled with this condition.

**Background**

3. The Competition Commission ("Commission") on 13 January 2012 approved the proposed transaction subject to certain conditions. The merging parties on 27 January 2012, in terms of section 16(1)(a) of the Act, requested the Tribunal to consider the merger since they were not amenable to the Commission's imposed conditions. However, by the time of the Tribunal hearing the Commission and merging parties had agreed on conditions to address the Commission's identified concerns and we have imposed those conditions.

**Parties to proposed transaction**

4. The primary acquiring firm is Synergy Income Fund Ltd ("Synergy"), a company incorporated in terms of the laws of the Republic of South Africa. Synergy is a variable loan stock company in terms of which each investor acquires linked units consisting of a share and a variable rate subordinated debenture. The debenture portion of the linked unit earns interest at a variable rate. Profits are distributed to investors in proportion to each investor's participation in Synergy.

5. Of relevance to the competition assessment of this transaction is that Synergy owns certain retail property assets classified as neighbourhood shopping centres, namely the Sediba Plaza located in Hartebeespoort Dam, North West and the KwaMashu Shopping Centre in Durban, KwaZulu-Natal.

6. Synergy was established by Capital Land Asset Management (Pty) Ltd ("the Fund Manager") through its close association with Spar Group Ltd ("Spar Group"). The Fund Manager manages and administers the business and affairs of Synergy. Of specific relevance is that Spar Group has a 20% shareholding in the Fund Manager. The other shareholders of the Fund Manager are Baleine Capital (Pty) Ltd; AM Family Trust; The Brooks Family Trust; Liberty Group Properties (Pty) Ltd; and Capital Land Asset Management Employee Trust.

7. The primary target firm is Khuthala Alliance (Pty) Ltd ("Khuthala"), a private company incorporated in terms of the laws of the Republic of South Africa. The transferring firm is the letting enterprise known as King Senzangakhona Shopping Centre ("KS Shopping Centre"), situated in Ulundi, KwaZulu-Natal, which Khuthala currently owns. KS Shopping Centre is categorised as a community centre.

**Proposed transaction and rationale**

8. In terms of the Letting Enterprise Purchase Agreement, Synergy will acquire the above-mentioned letting enterprise from Khuthala, comprising the fixed and moveable assets, goodwill as well as rights and obligations of Khuthala.

9. According to Synergy the acquisition of KS Shopping Centre is in line with its strategy of investing in convenience retail property assets that demonstrate strong potential for income and capital growth.

10. Khuthala no longer wishes to own KS Shopping Centre and the shareholders of Khuthala are taking this opportunity to realise their investment to enable them to invest in other areas of the property market.

**Impact on competition and public interest**

11. The activities of the merging parties overlap horizontally in respect of the provision of rentable retail space in South Africa. As stated above, Synergy owns certain rentable retail properties classified as neighbourhood centres. Synergy however does not own any community

centre in or near Ulundi, KwaZulu-Natal. Accordingly, the proposed merger is unlikely to lead to a substantial prevention or lessening of competition in any relevant market since there is no geographic overlap between the activities of the merging parties.

12. The Commission however concluded that there is a public interest concern arising from the proposed transaction given that the lease agreement between Spar and the landlord (Khuthala) contains an exclusivity clause. The Commission found that this exclusivity clause has the effect of preventing small businesses from competing with Spar in the KS Shopping Centre.

13. The Commission has conducted a broader investigation into the property market and has found an industry practice of property developers entering into exclusive anchor tenant agreements with the major supermarket chains for lengthy periods. In the Commission's view this functions as a barrier to entry and is designed to exclude competitors or alternatively has the effect of excluding entry by competing retailers. Furthermore, the Commission's supermarkets' investigation has revealed that it is the small independent retailers whose ability to grow and compete effectively with major supermarket chains that is most hampered as they are not afforded an opportunity to trade in certain shopping malls. The Commission concluded that by gaining exclusivity in malls, the major supermarket chains foreclose small independent retailers, speciality so-called part-line stores such as bakeries, butcheries and take-away food outlets.

14. We concur with the Commission's finding that the afore-mentioned exclusivity clause in the lease agreement between Spar and Khuthala raises a public interest concern in terms of section 12A(3)(c) of the Act since it prevents certain small businesses from gaining access to rentable retail space in the KS Shopping Centre. We consider the imposition of the stated conditions (see paragraph 2 above) as appropriate and proportional in these circumstances to address this public interest concern.

15. We note that the merging parties submitted that the proposed merger will not have any adverse effect on employment in South Africa.[2]

**CONCLUSION**

16. We approve the above-mentioned proposed intermediate merger subject to the conditions attached hereto as "**Annexure A**".

____________________ 20 July 2012

**A Wessels** **DATE**

**Medi Mokuena and Takalani Madima concurring**

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| Tribunal researcher: | Thabo Ngilande |
| For the merging parties: | Webber Wentzel Attorneys |
| For the Commission: | Jabulani Ngobeni |

[2] See pages 9 and 73 of the Commission's merger record.