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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 103/LM/Nov11
013706

In the matter between:

Synergy Income Fund Ltd	**Acquiring Firm**
And	
Certain letting enterprises owned by SA Corporate Real Estate Fund	**Target Firms**

Panel	:	Andreas Wessels (Presiding Member) Medi Mokuena (Tribunal Member) Taki Madima (Tribunal Member)
Heard on	:	11 April 2012
Order issued on	:	11 April 2012
Reasons issued on	:	16 May 2012

Reasons for Decision

Conditional approval

1. On 11 April 2012 the Competition Tribunal ("Tribunal") conditionally approved the acquisition by Synergy Income Fund Ltd of certain letting enterprises owned by SA Corporate Real Estate Fund. The reasons for this conditional approval follow below.

Parties to transaction

2. The primary acquiring firm is Synergy Income Fund Ltd ("Synergy"), a variable loan stock company in terms of which each investor acquires linked units consisting of a share and a variable rate subordinate debenture. Synergy does not control any other firm.

3. Of relevance is that Synergy currently owns certain retail properties classified as shopping centres. Of further relevance to the competition and public interest assessment of the proposed transaction is that Synergy has an existing management agreement with Capital Land Asset Management (Pty) Ltd ("the Fund Manager"), which is responsible for the day-to-day management of the fund. The shareholders of the Fund Manager include Spar Group Ltd ("Spar"), which has a 20% interest in the Fund Manager.

4. The primary target (or transferred) firms consist of a portfolio of seven letting enterprises owned by SA Corporate Real Estate Fund ("SA Corporate"), a collective investment scheme in property, also known as Property Unit Trust. The target properties consist of the following retail shopping centres:

   (i) The Village Centre (also known as Richdens) located in Hillcrest in Pinetown;

   (ii) Hubyeni Shopping Centre located in Elim, Limpopo;

   (iii) Nzhelele Valley Shopping Centre located in Makhado, Limpopo;

   (iv) Renbro Shopping Centre located in Hammanskraal, Pretoria;

   (v) Van Riebeeckshof Centre located in Bellville, Western Cape;

   (vi) Highland Mews[1] located in Witbank, Mpumalanga; and

   (vii) Ermelo Game Centre[2] located in Ermelo, Mpumalanga.

5. A Spar franchisee is an anchor tenant in the shopping centres identified in (i) to (v) above.

[1] Currently anchored by Woolworths.
[2] Currently anchored by Game.

Proposed transaction and rationale for transaction

6. In terms of the proposed transaction Synergy will acquire the target properties from SA Corporate each as a going concern. These target properties will post-merger be managed by the Fund Manager.

7. Synergy's rationale for the proposed transaction is to generate attractive income and capital appreciation with long term sustainable growth from profitable investments in retail property assets in South Africa.

8. SA Corporate no longer wishes to hold the to be transferred part of its retail property portfolio.

Assessment

No horizontal overlap

9. There is no geographical overlap between the activities of Synergy and the target properties since Synergy does not own any community and neighbourhood shopping centres in the same nodes or adjacent to the nodes where the target properties are located. Therefore, the proposed transaction raises no competition concerns form a horizontal perspective.

Vertical competition and public interest concerns

10. The Commission raised certain concerns relating to Synergy's relationship with Spar. As stated in paragraph 3 above, Spar currently holds a 20% interest in the Fund Manager which post-merger will manage the target shopping centres. The Commission's concerns related to the risk that such a relationship may exclude small competitors of Spar franchisees, i.e. so-called "line stores" such as bakeries, butcheries, green grocers and superettes, from the retail space controlled by Synergy.

11. More specifically, the Commission concluded that Synergy's strategy to invest in shopping centres that are anchored by Spar is of a concern since it could lead to the foreclosure of certain of Spar's rivals from these shopping centres. According to the Commission, given Spar's relationship

with the Fund Manager, a Spar franchisee could be put in an advantageous position within a shopping centre and Spar could have the incentive to exclude potential competitors from a local area by denying them access to a particular shopping centre. The Commission noted that this is of particular concern due to certain exclusive lease agreements that are in place between the Spar franchisees and the respective landlord(s). These exclusivity provisions exclude certain rivals from setting up shops within the same shopping centre as the incumbent, i.e. the Spar franchisee.

12. The Commission further concluded that the proposed transaction raises public interest concerns in terms of section 12A(3)(c) of the Competition Act, 1998[3] since the above-mentioned exclusive leases explicitly deny space in a particular shopping centre to "part-line" retailers which are likely to qualify as small businesses in terms of the Act.

13. Given the above concerns the Commission recommended, and the merging parties agreed, that two conditions be placed on the approval of the proposed transaction:

13.1. First, Spar should dispose of its shares in the Fund Manager in order to alleviate the concern around Spar's relationship with the Fund Manager. Such an undertaking by Synergy has been made a condition for the approval of the proposed transaction. In terms of the Tribunal's order Synergy shall undertake to procure that the Spar Group shall dispose of its 20% shareholding in the Fund Manager (see paragraph 3.1 of the imposed conditions).

13.2. Second, to address the concerns relating to exclusivity the Commission recommended and the merging parties offered to use their best endeavours to negotiate with Spar to have certain identified exclusivity provisions removed from the lease agreements with Spar franchisees in the relevant target shopping centres. This undertaking has also been made a condition for the

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

approval of the proposed transaction. The Tribunal's order states that Synergy shall negotiate with Spar and its relevant franchisee in the utmost good faith to have the exclusivity clause in the lease agreement removed at the renewal of the lease in respect of the relevant centre (see paragraph 3.2 of the imposed conditions).

Effect on employment

14. The merging parties confirmed that the proposed transaction will not have any effect on employment in South Africa, more specifically that no retrenchments are envisaged as a result of the proposed transaction.[4]

CONCLUSION

15. We concur with the Commission's finding that in the context of this merger the imposed conditions adequately address and are proportional to any likely competition and/or public interest concerns arising from the proposed transaction. For the sake of completeness, the full set of the Tribunal's imposed conditions is attached hereto as "**Annexure A**".

Andreas Wessels

16 May 2012
DATE

M Mokuena and T Madima concurring

Tribunal researcher:	Londiwe Senona
For the merging parties:	Webber Wentzel Attorneys
For the Commission:	Jabulani Ngobeni and Zanele Hadebe

[4] Merger record, page 14.

ANNEXURE A

Synergy Income Fund Limited / SA Corporate Real Estate Fund

CC CASE NUMBER: 2011Nov0369

CONDITIONS

1. **Definitions**

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

1.1 "Approval Date" means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT 10);

1.2 "Commission" means the Competition Commission of South Africa;

1.3 "Conditions" means these conditions;

1.4 "Fund Manager" means SA Corporate Real Estate Fund;

1.5 "SA Corporate" means SA Corporate Real Estate Fund;

1.6 "Merger" means the acquisition of control over seven SA Corporate's letting enterprise by Synergy;

1.7 "Merging Parties" means Synergy and SA Corporate Real Estate Fund;

1.8 "Spar Group" means the Spar Group Limited; and

1.9 "Synergy" means Synergy Income Fund Limited.

2. **Recordal**

2.1 Synergy has agreed to the following undertakings meant to address the public interest concerns.

2.2 It is the Commission's view that the conditions, in current form, are necessary to address the public interest concerns.

3. Conditions to the approval of the merger

3.1 Synergy undertakes to procure that:

3.1.1 The Spar Group shall dispose of its 20% shareholding in Capital Land Asset Management (Pty) Ltd ("CLAM") to other shareholders in CLAM being Baleine Capital (Pty) Ltd, AM Family Trust, The Brooks Family Trust, Liberty Holdings Ltd and Capital Land Asset Management Employees trust within a period of six (6) months from the date of the approval of the proposed transaction. Should the other shareholders, for whatever reasons, not buy the Spar group shareholding, the Spar Group shall sell to any other shareholder.

3.1.2 In order to maintain the structural effect of this order, the Spar Group, shall not subsequent to its disposal of its 20% shareholding in CLAM, directly or indirectly re-acquire influence or control over the whole or part of the disposed shareholding.

3.2 Synergy shall negotiate with Spar and its franchisee in the utmost good faith to have the exclusivity clause in the lease agreement removed at the renewal of the lease in respect of each of the following centres and on the dates indicated below:

- Village Centre in 2014;
- Hubyeni Shopping Centre in 2017;
- Nzhelele Valley Shopping Centre in 2017;
- Renbro Centre in 2018; and
- Van Riebeeckshof Centre in 2014.

4. Monitoring of compliance with the Conditions

4.1 Synergy shall within seven (7) months after the approval date provide proof of the disposal of the Spar Group's shares in CLAM to the Commission. Such proof shall be in the form of an affidavit attested to by the CEO of Synergy together with supporting documents.

4.2 Synergy shall within thirty (30) days after entering into a new lease agreement with Spar and its franchisee in the centres listed in 3.2 above provide a report setting out in detail the extent to which they have complied with condition 3.2 above.