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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM185Oct18

In the matter between:

Glencore South Africa Oil Investment (Pty) Ltd Primary Acquiring Firm

And

Chevron South Africa (Pty) Ltd Primary Target Firm

Panel	:	Yasmin Carrim (Presiding Member)
	:	Andiswa Ndoni (Tribunal Member)
	:	Imraan Valodia (Tribunal Member)
Heard on	:	13 March 2019
Order Issued on	:	15 March 2019
Reasons Issued on	:	25 April 2019

Reasons for Decision (Non-Confidential)

Conditional approval

[1] On 15 March 2019, the Competition Tribunal ("Tribunal") conditionally approved the transaction involving Glencore South Africa Oil Investment (Pty) Ltd ("Glencore SA") and Chevron South Africa (Pty) Ltd ("CSA").[1]

[2] The reasons for conditionally approving the proposed transaction follow.

[1] CSA is now trading as Astron Energy (Pty) Ltd ("Astron").

Background to the proposed transaction

[3] Previously, on 24 April 2017, the Competition Commission ("Commission") received a notice of a large merger, whereby SOIHL Hong Kong Holding Limited ("Sinopec") intended to acquire 75% of the issued share capital of CSA from Chevron Global Energy Inc ("CGEI"), an American firm ("the Sinopec Transaction").[2]

[4] The Commission had recommended to the Tribunal that the Sinopec transaction be approved with conditions. The Sinopec transaction was conditionally approved by this Tribunal on 08 March 2018.

[5] In terms of the *Shareholders Agreement* entered into between the shareholders of CSA, Off the Shelf 56 (RF) (Pty) Ltd ("OTS"), had a pre-emptive right to acquire the 75% of the issued share capital held by CGEI in CSA. OTS has the pre-emptive right to acquire CGEI shares in CSA, on the same terms and conditions as CGEI intends to sell its shares to a third party ("the pre-emptive right").

[6] The Sinopec transaction triggered the mechanisms of the pre-emptive right resulting in CGEI extending an offer to sell its shares to OTS on the same terms and conditions as CGEI had agreed with Sinopec. OTS accepted the CGEI offer subject to regulatory approvals ("the OTS Transaction").[3] The OTS transaction was conditionally approved on 13 September 2018.

[7] In the OTS transaction, the parties had submitted that OTS had engaged Glencore Energy UK Limited ("Glencore UK") as its technical and financial advisor in respect of that transaction. Glencore, independently and separately from the OTS transaction, had already at that stage made its intention clear to purchase the majority shareholding in CSA from OTS, which is the transaction before us now being the third in the series of the transactions relating to CGEI's shareholding in CSA.

[8] As to which of the three transactions is ultimately implemented will be in the discretion of CGEI. All that we were required to do is to assess whether the present proposed merger should be approved subject to the conditions that have been tendered.

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[2] Tribunal case no. LM050May17.
[3] Tribunal case no. LM232Nov17.

Parties to the proposed transaction

Primary acquiring firm

[9] The primary acquiring firm is Glencore SA, a wholly-owned subsidiary of Glencore SA Oil Investment (Pty) Ltd ("Glencore SA Holdings"), which in turn is a wholly-owned subsidiary of Glencore International Investment Limited ("Glencore International").

[10] Glencore International is ultimately controlled by Glencore plc ("Glencore"), a public company whose shares are listed on the London and Johannesburg Stock Exchanges. Glencore is not controlled by any single shareholder.

[11] Glencore controls a number of subsidiaries worldwide and in South Africa. However, Glencore SA does not control any firm.

[12] Of relevance to the proposed transaction is Glencore's activities in the crude oil and refined oil product markets. In South Africa Glencore is active in:

a. The supply of crude oil to South African customers;
b. The supply of petroleum products (petrol and diesel) to South African customers, being refineries as well as traders which supply petroleum products to local refineries;
c. The consumption, in mining operations, of petroleum products (petrol and diesel) and lubricants; and
d. The purchase of petroleum products (petrol and diesel) from refineries for export only.

Primary target firms

[13] The primary target firm is CSA which is controlled by OTS. Before the OTS Transaction, OTS had a 23% shareholding in CSA. This was increased to 98% as a result of the OTS transaction. CSA is now controlled by OTS. The remainder of the CSA issued share capital is held by the CSA Employee Participation Plan (2% non-controlling interest).

[14] CSA also directly controls Coal Resources (Pty) Ltd ("Coal Resources"), a dormant company which does not directly or indirectly control any firms. Both CSA and Coal Resources are incorporated in accordance with the laws of South Africa.

[15] CSA has the following economic activities in South Africa:

a. It has significant manufacturing capability, storage and distribution infrastructure comprising of depots, pipelines and supply contracts which support its marketing and distribution efforts in South Africa. CSA markets its products in South Africa under the *Caltex* brand, with 797 independent service stations nationwide. The *Caltex* retail outlets sell transportation fuels, all containing Chevron's proprietary *Techron* additive and a range of *Caltex*-branded lubricants;

b. It owns and operates a crude oil refinery in Cape Town, Western Cape. The key refined products produced by the refinery include petrol, diesel, aviation (jet), bunker (marine), kerosene, asphalt, LPG and fuel oil. The refinery has a crude oil input capacity of 100 000 barrels per day;

c. It owns and operates a lubricants manufacturing plant in Durban. This plant manufactures a range of lubricant products such as base oils, engine oils, industrial oils, fuel additives, coolants and greases.

d. CSA is also involved in the marketing and distribution of petroleum products at a wholesale level, and through the network of service stations, at a retail level. CSA is also involved in the manufacture, marketing and distribution of finished lubricants. The CSA retail network is comprised of Direct Investor Territory ("DIT") sites[4] and Branded Marketer sites. CSA has three DIT regions which correspond to the three largest metropolitan areas in South Africa, namely Gauteng, Durban and Cape Town.

[16] CSA further operates a Caltex Branded Marketer Model whereby the Branded Marketers procure petroleum products from CSA. There are ten (10) Branded Marketers in South Africa and one (1) in Botswana. Each Branded Marketer is assigned a territory in South Africa where they can apply their local knowledge of the area and, utilising their own investments, grow their business and meet local customer needs.

[4] The DIT sites are either: CSA owned, and retailer operated ("CORO"); CSA leased, and retailer operated ("CLRO"); retailer owned, and retailer operated ("RORO"); or retailer owned with CSA assets (underground tanks, pumps and signage) ("ROWA").

[17] The Branded Marketers are responsible for ensuring that all the sites within their territories are maintained and that CSA standards are adhered to. The Branded Marketers have thus "stepped into the shoes" of CSA as owners of the retail sites and equipment and have the rights and capabilities to supply the retail stations within their territory with *Caltex*-branded fuels.

[18] The Branded Marketers are completely independent businesses; three (3) of which are at least 51% black-owned, six (6) of which are 100% black-owned and one (1) that is currently in the process of obtaining 51% black-ownership. This model allows CSA to contractually appoint Branded Marketers to act as franchisors in specific geographic markets, instead of having branches. The specific markets include rural and peri-urban locations.[5] The contractual agreements between CSA and the Branded Marketers require that the Branded Marketers buy all of their supply from CSA. The Branded Marketers then operate under the *Caltex* brand and service the areas outside of urban centres that CSA services itself.

Proposed transaction and rationale

[19] Glencore SA intends to acquire 75% of the issued share capital in CSA from OTS ("the Glencore Transaction"). Accordingly, the proposed transaction will result in Glencore exercising sole control over CSA. OTS will revert to the 23% shareholding it had before the OTS Transaction. The remaining 2% of the issued share capital of CSA will continue to be held by the CSA Employee Participation Plan.

[20] In terms of a contractual arrangement between the parties [redacted]

[21] Glencore submitted that the transaction allows it to acquire an integrated downstream oil business with a significant retail, commercial and industrial sales network in addition to a strategically located refinery. It can now enter the retail, commercial and industrial oil markets in South Africa, participate in the growth of those markets and use its international access to oil and petroleum products to meet South African demand.

[5] Branded Marketer sites: Eastern Cape – 99 sites; Western Cape – 76 sites; North-West – 46 sites; Free State – 35 sites; KwaZulu-Natal North – 33 sites; Mpumalanga North – 31 sites; Northern Cape – 31 sites; KwaZulu-Natal South – 28 sites; Limpopo – 27 sites; and Mpumalanga South – 27 sites.

[22] OTS submitted that the fundamental purpose of acquiring the shares in CSA was to facilitate and co-create the establishment of a national champion and the first black majority owned company in the petroleum industry with a view to diversify into other segments of the broader energy sector in South Africa. OTS wished to catalyse transformation in the downstream petroleum sector.

Impact on competition

[23] The Commission found that the proposed transaction resulted in both a horizontal and vertical overlap in the activities of the merging parties.

[24] The horizontal overlap occurred in that both CSA and Glencore supply petroleum products to non-retail customers.[6]

[25] The vertical overlaps occur in that:

a. Glencore is active in the upstream market for the exploration of crude oil while CSA relies on crude oil as a primary input in its manufacturing of its petroleum products;
b. Both Glencore and CSA supply petroleum products to the non-retail customers. At the same time, Glencore (being a trader and an industrial customer) and CSA (being a refiner) also operate as non-retail customers in that they purchase petroleum products from other suppliers of non-retail petroleum products. A two-way vertical overlap therefore arises as CSA supplies petroleum products required by Glencore and at the same time, Glencore supplies petroleum products required by CSA; and
c. Glencore's mines are industrial customers of petroleum products, namely petrol, diesel and lubricants and CSA is a supplier of same.

[26] With the above overlaps in the activities of the parties in mind, the Commission considered the following relevant markets:

a. The upstream international market for the exploration, extraction and supply of crude oil;
b. The national downstream market for the supply of petroleum products to non-retail customers; and

[6] Non-retail customers consist of wholesale sales to three categories of customers: independent retailers (unbranded service stations), other independent resellers, industrial and commercial consumers (hospitals, car rental fleets, and factories).

c. The downstream market for the supply of lubricants.

Horizontal Assessment

[27] In the national downstream market for the supply of petroleum products to non-retail customers, the Commission found that the merged entity would have a post-merger market share of approximately [redacted] with an accretion of approximately [redacted]

[28] The market shares are low and indicate that the merged entity would not have market power post-merger. The Commission also found that the merged entity would continue to face competition from other suppliers of petroleum products to the non-retail market, including Sasol Oil (Pty) Ltd, BP Southern Africa (Pty) Ltd, Engen Limited, Shell South Africa (Pty) Ltd and Total SA (Pty) Ltd. These firms also operate their own refineries.

[29] Given that the post-merger market shares are low and that the merged entity will continue to face competition, the Commission concluded that merged entity will not be able to exercise market power and accordingly the proposed transaction will not lead to any unilateral effects.

Vertical Assessment

[30] In the upstream international market for exploration, extraction and supply of crude oil, the Commission found that Glencore is a small player in the upstream market for the exploration of crude oil with approximately 3.38% of the market. Further, in South Africa, Glencore's crude oil sales only accounted for [redacted] of the total South African crude oil consumption, while Glencore's crude oil sales volumes accounted for only 3.3% of the worldwide market for crude oil production.

[31] As a result of the above findings, the Commission was of the view that no input foreclosure would occur because:

a. Glencore does not have market power in the upstream market and/or the downstream;
b. The downstream competitors have other suppliers of crude oil (which includes suppliers within their group of companies) and do not depend on Glencore as a supplier of crude oil; and
c. The downstream competitors of the merged entity all raised no concerns about procuring oil from Glencore post-merger.

[32] The Commission was further of the view that customer foreclosure concerns are unlikely to arise as a result of the merger as CSA is a small customer that already purchases the majority [redacted] of its crude oil supplies from within its group. Further, CSA confirmed it purchases from numerous other suppliers such as [redacted]

[33] In the downstream national market for the supply of petroleum products to non-retail customers, the Commission found there to be no input foreclosure concerns as the merged entity's post-merger market shares are low [redacted] and submissions from customers indicate there are alternative suppliers in the market, such as Trafigura, BPSA, Shell and Total. The proposed transaction is also unlikely to result in customer foreclosure concerns as there are alternative customers to sell to and suppliers have the option of exporting their products.

[34] In the downstream national market for the supply of lubricants, the Commission found that the merged entity has low post-merger market shares as a supplier of lubricants [redacted] and their customers have alternative suppliers such as Shell, Sasol Oil, Total, Engen and BPSA, and as such input foreclosure is unlikely. The Commission further concluded that because Glencore is not a significant customer of lubricant in the South African market (Glencore consumes [redacted] of the lubricant in the market) and that the firm that supplied Glencore's requirements has alternative customers, there is no likelihood of customer foreclosure occurring in this market.

Public interest

Background

[35] The Economic Development Department ("EDD"), Branded Marketers, CSA's committee of retired employees ("the retirees") and the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union ("CEPPWAWU") all raised several public interest concerns directly with the merging parties which culminated in the conclusion of a *Framework Agreement* between the merging parties and certain Government departments. ("agreed set of conditions").

[36] The concerns raised range from employment, refinery capacity, local procurement and broad-based black economic empowerment.

[37] The Commission concluded that the merging parties' tendered conditions, including those agreed with the Government departments, address all potential public interest concerns - particularly in relation to the effect of the proposed transaction on employment, small business (BEE) and certain concerns related to CSA's retired employees.

[38] The merging parties have agreed that the proposed transaction should be approved subject to the agreed set of conditions. Apart from providing a brief summary of the set of conditions below, we find it unnecessary to deal with them in great detail.

[39] We do however discuss some public interest -related concerns and proposed remedies in this regard.

Employment

[40] After the merging parties engaged with CEPPWAWU, the union indicated that it no longer wished to raise any public interest concerns. Nevertheless the merging parties agreed to a condition that no retrenchments will take place as a result of the proposed transaction. In addition, Glencore has undertaken to maintain at least the number of employees as are employed in aggregate by CSA for a period of no less than five (5) years from the implementation date of the proposed transaction.

[41] Furthermore, we note that Glencore has also undertaken, as part of the remedy package offered, to ensure that CSA encourages any third parties involved in the value chain for the production and sale of CSA's products to expand their levels of employment wherever reasonably possible.

[42] Glencore has also undertaken to ensure that CSA uses all reasonable efforts to increase indirect employment through the investment in production and the establishment of a Development Fund, as provided for in the conditions.

[43] The Commission was of the view that the above undertakings adequately address any employment concerns relating to retrenchment arising from the proposed transaction.

Impact on retiree medical aid subsidy

[44] Concerns were received from CSA's retired employees in relation to their medical aid subsidy. These retired employees submitted that they have a right to a 75% medical aid subsidy from CSA, which is to run from retirement until the death of the retiree and his / her spouse.

[45] The retirees were concerned that Glencore might terminate the obligations that CSA has towards its retired employees. This they submit would violate their rights and legitimate expectations of employment benefits since their expectation was that this benefit would endure until the death of the retiree and his / her spouse.

[46] To address the above concern, Glencore has undertaken to continue to meet any ongoing contractual obligations which it has towards retired employees of CSA post-merger. In this regard, the merging parties have acknowledged that the medical aid subsidy is included as one of the ongoing legal and contractual obligations of CSA, the duration of which is for the remainder of the lifetime of the beneficiaries. Further, CSA will meet with the retirees and their respective representatives from time to time, at their request, on matters relating to post-retirement medical aid benefits.

[47] The Commission was of the view that this condition addresses the concerns of the retired employees as it guarantees the continued provision of the subsidy by CSA in accordance with the understanding of the retirees.

Branded Marketers' concerns

[48] The Branded Marketer Model is described above in paragraphs 16-18. As we learnt from the OTS Transaction, CSA contractually appoints the Branded Marketers; the agreement runs for a period of fifteen (15) years and automatically terminates fifteen (15) years after the conclusion of the agreement. CSA has the discretion to renew the Branded Marketer agreements for an additional fifteen (15) years.

[49] The Branded Marketers raised several public interest concerns, as they did in the OTS Transaction. These concerns largely pertain to the following issues: (i) future relationships; (ii) supply stability; (iii) the brand and how it will be managed; (iv) ensuring that CSA bears the costs of rebranding service stations; and (v) some sort of

indication whether the Branded Marketer Model will continue post 2027 (in particular whether the Branded Marketer Model will continue).

[50] The Commission was of the view that Glencore should honor the existing contracts and obligations of CSA. In this respect, Glencore has undertaken to ensure that CSA will not change any of the existing Branded Marketer contracts that would be to the detriment of the Branded Marketers. This includes amongst others that CSA will let the current Branded Marketer contracts run its course for a period no less than 8 (eight) years and will not seek to change the terms and conditions of the contracts for the remainder of the contract period.

[51] Further, the merging parties have undertaken to meet regularly with the Branded Marketers to engage with them regarding the evolution of CSA's long-term strategy.

[52] Finally, the Branded Marketers raised concerns with regards to post-merger rebranding. To ensure that the Branded Marketers would not be materially worse off financially than they would be absent the proposed transaction, the merging parties submitted that CSA's service stations will be fully rebranded in line with Glencore's branding requirements by approximately 2024.

[53] To allay the Branded Marketers fears, Glencore has given an undertaking to ensure that CSA will bear the cost of rebranding to the Glencore brand all service stations falling under CSA's Branded Marketer footprint that have already been upgraded to the latest Caltex standards (227 service stations).

[54] CSA will also cover rebranding costs to the Glencore brand for approximately 353 sites in the large metropolitan areas (outside the Branded Marketer territories). The cost of the abovementioned rebranding is presently estimated at R290 million.

[55] For the 254 service stations falling under the Branded Marketer Programme in respect of which branding has not yet been upgraded to the latest *Caltex* standards, Glencore has undertaken to ensure that CSA will cover 20% of the rebranding costs into a Glencore brand, as an incentive to rebranding. CSA's contribution in this regard is an estimated R25 million.

Impact on BEE Shareholding

[56] The Commission sought to assess whether the proposed transaction results in the dilution of shares for a BEE entity. Secondly, the Commission considered what the [redacted] shareholding that OTS will retain in CSA implies in terms of rights that would be afforded to OTS.

[57] As OTS is a 100% black owned business, the OTS Transaction was seen to have a positive effect on the ability of small businesses, or firms controlled or owned by previously disadvantaged persons to be competitive. Before the OTS transaction, OTS held 23% of the shares in CSA. The question the Commission sought to answer was whether the proposed transaction can be viewed as an outright dilution of BEE shareholding from 98% to 23%.

[58] Glencore submitted that it was always the intention that there would be an on-sale of the 75% shareholding by OTS to Glencore as per contractual arrangements between the two In other words, the current transaction was not proceeded with pending the acquisition by OTS of the 57% shareholding in CSA which was the OTS Transaction. It can therefore be gathered from the agreement that the plan for OTS was to sell the 75% shareholding in CSA to Glencore and not operate the business on its own. In essence, the 98% shareholding by OTS in CSA has always been temporary as it was the intention of OTS to on-sell to Glencore.

[59] The Commission noted the reduction of the BEE shareholding in CSA. However, the undertaking made by Glencore to ensure that the BEE shareholding in CSA will be at least [redacted] and that the BEE shareholders will be able to appoint approximately [redacted] of the directors to serve on the board of CSA addresses the BEE concern. We note here, that OTS submitted that it had previously agreed with Glencore that it will, at any time between 27 September 2018 and prior to the conclusion of this transaction, acquire a greater (controlling stake) in CSA by buying shares from Glencore. Glencore submitted that there was never such agreement. In our view this is a dispute that needs to be resolved between the parties.

Other Conditions

[60] The merging parties have committed to a wide range of other public interest conditions, which include the following:

a. Glencore will maintain its head office in South Africa;

b. Glencore must within a period of 5 years invest R6 billion, over and above CSA's current investment plans, to develop the Western Cape refinery;

c. Glencore will procure the inputs locally within South Africa, wherever practically possible and feasible;

d. Glencore shall ensure that CSA maintains a baseline number of independently owned service stations;

e. Where independently owned service stations are to be established CSA shall give preference to Small Businesses, especially black-owned businesses;

f. Glencore will ensure that the Economic Return Ratio[7] earned by the retailer owned stations shall be maintained or increased in favor of the retailer owned stations and especially smaller and black-owned retailers when compared to the Economic Return Ratio earned by CSA service stations;

g. Glencore must, through the Development Fund, increase its level of supplies of LPG to Black-owned Businesses in an amount in excess of 15%, following the expiration of current contractual arrangements. CSA will also increase, where feasible, LPG supply into South Africa through purchase on international markets;

h. Glencore undertakes that should it or CSA make further investments to CSA's terminals and logistics infrastructure in South Africa, Glencore will ensure that such investments have no negative impact on the production of the CSA refinery.

[7] This is the rate of economic return between CSA owned and independently owned petrol stations in the DIT, where the ratio will be determined between CSA and the EDD with reference, *inter alia*, to the throughput and profitability of the petrol stations.

i. Glencore will procure that CSA shall maintain or increase the current level (as a proportion) of expenditure on local procurement of goods and services;

j. Glencore will ensure that CSA will not substitute current, local, South African owned suppliers with off-shore suppliers of goods or services;

k. Glencore must establish a development fund of approximately R220 million over a period of 5 years to support Small Business and Black-owned Businesses which are involved in CSA's value chain; and

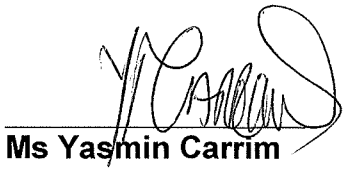
l. Glencore shall use all reasonable endeavours to increase its current Broad Based Black Economic Empowerment scorecard rating by two levels, from level 4 to level 2 within 2 years;

Conclusion

[61] As already indicated above, the merging parties agreed to the approval of the proposed transaction subject to the full set of tendered conditions, which we have imposed with certain enhancements thereto.

[62] The Commission concluded that the set of remedies tendered by the merging parties sufficiently addresses any legitimate merger-specific concerns raised by the Branded Marketers.

[63] We concluded that the imposed conditions collectively adequately address any public interest concerns arising from the proposed transaction and approved the proposed transaction subject to a detailed set of public interest conditions, attached hereto marked as **"Annexure A"**.



Ms Yasmin Carrim

25 April 2019
DATE

Ms Andiswa Ndoni and Prof. Imraan Valodia concurring

Case Managers:	Kameel Pancham and Helena Graham
For the acquiring firm:	Adv. Frank Snyckers SC instructed by Werksmans
For the target firm:	Mmadika Moloi of Webber Wentzel
For the Commission:	Themba Mahlangu and Portia Bele