



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM232Nov17

In the matter between:

Off the Shelf Investments 56 (RF) (Pty) Ltd

Primary Acquiring Firm

And

Chevron South Africa (Pty) Ltd

Primary Target Firm

Panel	:	Norman Manoim (Presiding Member)
	:	Andiswa Ndoni (Tribunal Member)
	:	Medi Mokuena (Tribunal Member)
Heard on	:	12 September 2018
Last submission received	:	13 September 2018
Order Issued on	:	13 September 2018
Reasons Issued on	:	11 October 2018

Reasons for Decision

Conditional approval

- [1] On 13 September 2018, the Competition Tribunal ("Tribunal") conditionally approved the transaction involving Off the Shelf Investments 56 (RF) (Pty) Ltd ("OTS") and Chevron South Africa (Pty) Ltd ("CSA").
- [2] The reasons for conditionally approving the proposed transaction follow.

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").
- [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 (which includes OTS and CGEI), OTS has a pre-emptive right to acquire the 75% of the issued share capital held by CGEI in CSA, in the event that CGEI intends to sell its shares in CSA to a third party, on the same terms and conditions as CGEI intends to sell its shares to that third party ("the pre-emptive right").
- [6] The Sinopec transaction triggered the mechanisms of the pre-emptive right contained in the *Shareholders Agreement*, resulting in CGEI extending an offer to sell the CSA shares to OTS on the same terms and conditions as CGEI had agreed with Sinopec. OTS had accepted the CGEI offer subject to regulatory approvals. Thus, we have the proposed transaction before us.
- [7] The Tribunal does not need to decide which of these two transactions is ultimately implemented. Ultimately this will be the decision of CGEI. What we do need to decide is whether the present proposed merger should be approved subject to the conditions that have been tendered.

Potential future transactions

- [8] The merging parties submitted that OTS had engaged Glencore Energy UK Limited ("Glencore") as its technical and financial advisor in respect of the proposed transaction. Glencore, independently and separate from the proposed transaction, had made its intention clear to purchase the majority shareholding in CSA from OTS in the future.
- [9] We merely wish to note the ambit of Glencore's role in the proposed transaction, any future transaction relating to Glencore and the shareholding of CSA will be assessed independently and on its own merits at that particular stage. It was made clear to us at

the hearing that the future role of Glencore is not something we need consider for the purpose of determining the present transaction with OTS.

Parties to the proposed transaction

Primary acquiring firm

- [10] The primary acquiring firm is OTS, a private company incorporated in accordance with the laws of the Republic of South Africa. OTS is a Broad-Based Black Economic Empowerment ("B-BBEE") consortium. OTS is ultimately controlled by Mr Mashudu Elias Ramano, who controls multiple firms along with OTS, none of which are active in the petroleum market.
- [11] OTS does not directly or indirectly control any firms. However, OTS has an existing, non-controlling 23% shareholding in CSA. OTS is 99.6% owned by members of historically disadvantaged groups.

Primary target firms

- [12] The primary target firms are CSA and Coal Resources (Pty) Ltd ("Coal Resources"). Both CSA and Coal Resources are incorporated in accordance with the laws of South Africa. CSA directly controls Coal Resources, a dormant company which does not directly or indirectly control any firms.
- [13] CSA is 75% directly owned and controlled by CGEI, a company incorporated in Delaware. The remainder of the CSA issued share capital is held by the CSA Employee Participation Plan (2% non-controlling interest) and OTS (23% non-controlling interest).
- [14] CGEI is ultimately controlled by Chevron Corporation ("Chevron"), a company incorporated in accordance with the laws of Delaware. Chevron is listed on the New York Stock Exchange. In South Africa, Chevron controls Chevron Africa Pakistan Services (Pty) Ltd.
- [15] CSA has the following economic activities in South Africa:
 - a. 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;

- b. 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. These products are marketed under the *Caltex* master brand with a variety of product brands.
- c. 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.
- 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") sites¹ 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 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. Within these territories, at the beginning of this model in 2005, CSA sold all of its retail service station assets including land, buildings, and equipment to the Branded Marketers; and has assigned all of them supply and franchise agreements that CSA had with the retailers to the Branded Marketers.

[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

¹ 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").

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.² 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] In terms of the *Sale and Purchase of Shares and Related Interests Agreement*, OTS intends to acquire 75% of the issued share capital in CSA from CGEI. Accordingly, the proposed transaction will result in OTS increasing its current 23% interest in CSA to 98%. Upon implementation of the proposed transaction, OTS will acquire control of CSA. The remaining 2% of the issued share capital of CSA will continue to be held by CSA Employee Participation Plan.
- [20] Further, OTS will acquire control of the dormant Coal Resources, a subsidiary of CSA as well as the entire issued share capital of Chevron Botswana (Pty) Ltd. This transaction was unconditionally approved by the Botswana Competition Authority on 01 December 2017.
- [21] OTS submitted that it has the vision and objective to create South Africa's first majority black-owned and managed downstream oil company of a meaningful scale. It was this objective that drove it to engage with technical and financial advisors so that it may realise its objective.

² 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] Chevron submitted that it has in recent years divested several assets in Africa to dispose of non-strategic assets. It is anticipated that CSA would be more strategic in the hands of the new shareholder.

Impact on competition

- [23] The Commission found that there is no overlap in the activities of the merging parties. This is because the primary acquiring firm is an investment holding company and it does not control any firm that operates in the petroleum industry. The only interest of the acquiring firm in activities similar to that of the target firm is the 23% non-controlling interest held by OTS in CSA.
- [24] The Commission did assess the value chain of the petroleum market in South Africa and found that at the wholesale level OTS was not active, only CSA was active at this level as a wholesale supplier of fuel to the retail licensed holders and commercial customers.
- [25] At the retail level of the value chain, the Commission found that there are different brands owned by the oil majors under which fuel is supplied to the customers. The oil majors themselves (as wholesalers) are precluded to operate retail stations.³ As such, the oil majors enter into agreements with licensed retail operators who are involved in the direct sale of fuel to customers. At this level, the Branded Marketers also contract directly with the licensed retail operators of the petrol stations within their territory who operate under the CSA brand (*Caltex*). The various retail stations of the oil majors (including those operated by the Branded Marketers) compete against each other. OTS does not have any operations at this level either.
- [26] The Commission concluded that OTS and its controlling entities do not compete with CSA at any level of the petroleum value chain. Therefore, there is no overlap in the activities of the merging parties.

³ In terms of the Petroleum and Products Act and Regulations, petrol may only be sold to the end-consumer by licensed retailers from licensed sites. Manufacture and wholesalers are prohibited from holding a retail license except for training purposes. Vertical integration in the industry is thus restricted because licensed wholesalers cannot hold retail licenses.

Public interest

Background

- [27] The Economic Development Department ("EDD"), Department of Energy ("DOE"), 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.
- [28] The concerns raised range from employment, refinery capacity, local procurement and broad-based black economic empowerment. We also note that the DOE highlighted certain positive outcomes that it, in light of the abovementioned *Framework Agreement*, expects from the proposed transaction. These outcomes relate to issues such as the post-merger preservation of jobs, the upliftment of small businesses (particularly those owned by previously disadvantaged individuals), preservation of CSA's refinery capacity and the introduction of clean fuels.
- [29] Since agreement was reached between the merging parties and the Government departments, and since the merging parties have agreed that the proposed transaction should be approved subject to the agreed set of conditions between these parties, we do not deal with this any further in these reasons, apart from a brief summary of the set of public interest conditions (see paragraph 56 below).
- [30] 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.
- [31] Next, we briefly discuss the employment-related concerns and proposed remedies in that regard.

Employment

- [32] After the merging parties engaged with CEPPWAWU, the union indicated that it no longer wished to raise any public interest concerns. Irrespective of this, in relation to the effects of the proposed transaction on employment, the merging parties agreed to a condition that no retrenchments will take place as a result of the proposed transaction. In addition, OTS 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.

- [33] Furthermore, we note that OTS 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.
- [34] OTS 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.
- [35] The Commission was of the view that the above undertakings adequately address any employment concerns relating to retrenchment arising from the proposed transaction.
- [36] We next briefly deal with the CSA retiree concerns.

Impact on retiree medical aid subsidy

- [37] 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.
- [38] The retirees were concerned that OTS may terminate the obligations that CSA has towards its retired employees. This they submit goes against their rights and benefits of employment since their expectation was that this benefit would endure until the death of the retiree and his / her spouse.
- [39] To address the above concern, CSA has undertaken to continue to meet any ongoing contractual obligations which it has towards retired employees of CSA. 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.

- [40] The Commission was of the view that this condition is sufficient to address 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.
- [41] We next, from a public interest perspective, deal with the concerns raised by the Branded Marketers.

Branded Marketers' concerns

- [42] The Branded Marketer Model is described above in paragraphs 18-20. 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. The agreements, on average, have 15 years remaining.
- [43] The Branded Marketers raised a number of public interest concerns, but had opted to engage directly with the merging parties on these issues. These concerns largely center on the following issues: (i) future relationships; (ii) supply stability; (iii) the brand and how it will be managed; (iv) future sale of assets including inland storage; and (v) some sort of indication whether the Branded Marketer Model will continue post 2027 (when their contracts with CSA are at an end).
- [44] The Commission found that the Branded Marketers were seeking commitments from the merging parties, in light of the investments that the Branded Marketers have made in their areas of operation. The Branded Marketers sought an indication of a continuation of the Branded Marketer Model beyond 2027.
- [45] The Commission was of the view that it would be overreaching were it to prescribe terms of renewal for contracts only ending in nine (9) years' time and was of the view that the undertaking that OTS will ensure that CSA will not change any of the existing contracts with the Branded Marketers that would be detrimental, was sufficient to address this concern.
- [46] Other issues pertain to the Branded Marketers requesting to be consulted on the decision making relating to CSA operations. The Branded Marketers seek to build trust with CSA through these engagements. On this basis 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.

- [47] The Commission was of the view that this process will allow the Branded Marketers and the merging parties to manage any other issues that are not merger specific.
- [48] Finally, we note the merging parties' intention to phase out the *Caltex* brand in South Africa post-merger and replace it with an OTS brand. 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 the OTS branding requirements by approximately 2024.
- [49] To allay the Branded Marketers fears, OTS has given an undertaking to ensure that CSA will bear the cost of rebranding to an OTS brand all service stations falling under CSA's Branded Marketer footprint that have already been upgraded to the latest Caltex standards (227 service stations).
- [50] CSA will also cover rebranding costs to the OTS brand for approximately 353 sites in the large metropolitan areas (outside the Branded Marketer territories). The costs of the abovementioned rebranding is presently estimated at R290 million.
- [51] 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, OTS has undertaken to ensure that CSA will cover 20% of the rebranding costs into an OTS brand, as an incentive to rebranding.
- [52] Ultimately 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. The Commission noted that the Branded Marketers expressly stated that they are satisfied with the tendered remedies by the merging parties.
- [53] We are satisfied that the merging parties' tendered conditions adequately address and are proportional to the Branded Marketers' legitimate merger-specific (public interest) concerns.

[54] We further note that the merging parties have committed to a wide range of (other) public interest conditions, subject to which the proposed transaction has been approved, including the following:

- a. OTS will maintain its head office in South Africa;
- b. OTS 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. OTS will procure the inputs locally within South Africa, wherever practically possible and feasible;
- d. OTS 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. OTS will ensure that the Economic Return Ratio⁴ earned by the retailer owned stations shall be maintained or increased in favor of the retailer owned stations and, in particular, towards smaller and black-owned retailers when compared to the Economic Return Ratio earned by CSA service stations;
 - i. With regard to this condition we intervened and requested that the parties redraft this clause to cover the two possibilities of dispute that could arise: (i) the parties can't reach agreement on the formula; and (ii) even if the parties reach agreement on the formula they may disagree on its proper implementation.⁵ The parties had since submitted a redrafted version of the condition, to our satisfaction.
- g. OTS 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;

⁴ 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.

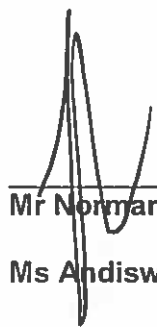
⁵ Transcript *inter alia* page 22.

- h. OTS undertakes that should it or CSA make further investments to CSA's terminals and logistics infrastructure in South Africa, OTS will ensure that such investments have no negative impact on the production of the CSA refinery. This directly addresses the issues raised by the DOE and impacts positively on the industry;
- i. OTS will procure that CSA shall maintain or increase the current level (as a proportion) of expenditure on local procurement of goods and services;
 - i. Further, OTS procures that CSA will not substitute current, local, South African owned suppliers with off-shore suppliers of goods or services.
- j. OTS must establish a development fund of approximately R215 million over a period of 5 years to support Small Businesses and Black-owned Businesses which are involved in CSA's value chain;
- k. CSA 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;

[55] 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. We conclude that the imposed conditions collectively adequately address any public interest concerns arising from the proposed transaction.

Conclusion

[56] We approve the proposed transaction subject to a detailed set of public interest conditions, attached hereto marked as "**Annexure A**". The imposed set of conditions adequately addresses any public interest concerns arising from the proposed transaction.



Mr Norman Manoim

Ms Andiswa Ndoni and Mrs Medi Mokuena

11 October 2018
DATE

Case Manager:

Kameel Pancham

For the acquiring firm:

Adv. Terry Motau instructed by Webber Wentzel

For the target firm:

Judd Lurie and Sarah Jackson of Bowmans

For the Commission:

Maya Swart and Thabelo Masithulela