

SOUTH AFRICA / JUDGMENT

FFS Refiners (Pty) Ltd v OTGC Terminal (Pty) Ltd (LM010Apr21) [2021] ZACT 45 (23 June 2021)

[2021] ZACT 45**COURT**

Competition Tribunal

BEFORE

Y Carrim, AW Wessels, H Cheadle

CASE / FILE NUMBER

LM010Apr21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**COMPETITION TRIBUNAL OF SOUTH AFRICA****Case****No.: LM010Apr21****In the matter between:**FFS Refiners (Pty)
Ltd Primary
Acquiring Firm
And
OTGC Terminals (Pty)
Ltd Primary
Target Firm**Panel:**Y
Carrim (Presiding Member)
AW Wessels (Tribunal Panel Member)
H Cheadle (Tribunal Panel Member)
Heard**on:**23 June 2021
Decided

on:	23 June 2021 ORDER Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 (“the Act”) the Competition Tribunal orders that- 1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto; and 2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a). Presiding Member
Date:	23 June 2021 Ms Yasmin Carrim
Concurring:	Mr Andreas Wessels and Prof. Halton Cheadle CASE NUMBER: LM010APR21 FFS REFINERS (PTY) LTD AND OTGC TERMINALS (PTY) LTD ANNEXURE A – MERGER CONDITIONS 1. DEFINITIONS The following expressions shall bear the meaning assigned to them below and cognate expressions
bear corresponding meaning:	1.1. “Acquiring Firm” means FFS Refiners (Pty) Ltd; 1.2. “Approval Date” means the date referred to in the Tribunal’s clearance certificate (Form CT 10); 1.3. “Commission” means the Competition Commission of South Africa; 1.4. “Commission Rules” mean Rules for the Conduct of Proceedings in the Commission; 1.5. “Competition Act” means the Competition Act, No. 89 of 1998, as amended; 1.6. “Conditions” mean the conditions set out herein; 1.7. “Day” means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa; 1.8. "Employee" has the same meaning as in the LRA;

1.9.

“Implementation Date” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.10.

“LRA” means the Labour Relations Act, No. 66 of 1995, as amended;

1.11.

“Merger” means the Acquiring Firm’s proposal to acquire 100% of the shares in the Target Firm;

1.12.

“Merging Parties” means the Acquiring Firm and the Target Firm;

1.13.

“Moratorium” means the period of 2 (two) years from the Approval Date;

1.14.

“Retrenched Employees” means employees retrenched by the Acquiring Firm in November 2020 and April 2021 who indicated, in writing, that they are interested in being called should a work opportunity arise and are on the Acquiring Firm’s database;

1.15.

“Target Firm” means OTGC Terminals (Pty) Ltd;

1.16.

“Tribunal” means the Competition Tribunal of South Africa; and

1.17.

“Tribunal Rules” mean Rules for the Conduct of Proceedings in the Tribunal.

2.

CONDITIONS

2.1. The

Merging Parties shall not retrench any Employees because of the Merger for the duration of the Moratorium.

2.2. For the sake of

clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements;

(ii) voluntary early

retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the

LRA; (iv) resignations or

retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements

unrelated to the

Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or

poor performance; and (vii) any decision not to renew or extend a fixed term contract of a contract worker or

Employee taken in the

ordinary course of business.

2.3. Should

any vacancy arise at either of the Merging Parties, the relevant Merging Party will use its reasonable endeavours to inform such

employees thereof using the contact details provided by the Retrenched Employees. For the duration of the Moratorium, and where a

Retrenched Employee applies for a vacant position and the relevant Merging Party is reasonably satisfied that the Retrenched Employee is

suitable for that position, the relevant Merging Party shall give preference to such Retrenched Employee in the recruitment process

although the Retrenched Employee shall only be appointed if he/she is ultimately the best candidate for the job.

3.

MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1. The Merging

Parties shall circulate a copy of the Conditions to all Employees including their respective employee representatives and registered

trade unions, within 5 (five) Business Days of the Approval Date.

3.2. As

proof of compliance with 3.1, the Merging Parties shall within 5 (five) Business Days of circulating the Conditions, provide the

Commission with an affidavit from a senior official, attesting to the circulation of the Conditions and attach a copy of the notice sent to

the Employees and/or employee representatives and/or registered trade unions.

3.3. The

Merging Parties shall inform the Commission in writing of the Implementation Date, within 7 (seven) Business Days of it becoming effective.

3.4. As

proof of compliance with 2.1 above, on each anniversary of the Approval Date, the Acquiring Firm shall submit an affidavit from a senior official, attesting to compliance with the Conditions.

3.5. To

monitor compliance with these Conditions, the Commission may require the Merging Parties, to provide any additional information.

4.

BREACH

4.1. If

the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines

that there has
been an apparent breach by the Merging Parties of these Conditions,
the breach shall be dealt with in terms of Rule
39 of the Commission
Rules read together with Rule 37 of the Tribunal Rules.

5.

VARIATION

5.1. The

Merging Parties and/or the Commission may at any time, on good cause
shown, apply to the Tribunal for the Conditions
to be waived,
relaxed, modified and/or substituted.

6.

GENERAL

6.1.

All correspondence in relation to the

Conditions must be
submitted to the following
email address:

mergerconditions@compcom.co.za
and
ministry@thedtic.gov.za.

Case No.:

LM010Apr21

FFS

Refiners (Pty)

Ltd (Acquiring

Firm)

and

OTGC Terminals (Pty)

Ltd (Target

Firm)

REASONS FOR DECISION

- [1] On 23 June 2021, the Competition Tribunal conditionally approved a large merger whereby FFS Refiners (Pty) Ltd (“FFS”) would acquire the entire issued share capital in OTGC Terminals (Pty) Ltd (“OTGC”) from OTGC Holdings (Pty) Ltd (“OTGC Holdings”)
- [2] FFS, is ultimately controlled by Calulo Petrochemicals (Pty) Ltd and Bud Chemicals and Minerals (Pty) Ltd. The three companies together are referred to as the “acquiring group”. The acquiring group is a supplier of industrial heating fuels in South Africa. It markets, supplies and stores bulk liquids; and offers ancillary packages related to these activities. Of relevance to this merger assessment are the acquiring group’s bulk liquid storage tanks at Cape Town port and Durban at Prospecton and Teakwood Road (which is not situated within the Durban terminal). The acquiring group’s rationale for the proposed transaction is to diversify the business including making bulk liquid storage space available to third-party customers.

[3] OTGC Holdings wholly controls OTGC (the “target firm”) and is selling its entire interest at the behest of OTGC’s largest shareholder, Oiltanking GmbH.¹ OTGC is active as an independent bulk liquid storage provider for non-hazardous

products. It has liquid bulk terminals within Durban and Cape Town.

[4] Both the acquiring and target firms possess bulk liquid storage facilities in Durban and Cape Town. The acquiring group’s bulk liquid storage facilities predominately store hazardous high flash products, whilst the target firm only stores non-hazardous high flash products; the Tribunal’s prior treatment of these markets was to treat them as non-substitutable.² The Commission’s consultations with the Transnet National Ports Authority (TNPA) and customers confirmed this view. As a result of this and further investigation, the Commission concluded that the merger does not result in any horizontal or vertical overlaps.

[5] Third parties were contacted by the Commission and certain customers raised concerns that OTGC would switch its storage facilities to start storing hazardous high flash products. The Commission investigated these concerns and found, based on

FFS’ internal documentation, the incentives for such a move to be lacking. Furthermore, the role that the TNPA plays in regulating

and licensing the provision of certain types of liquid bulk means that switching from provision of non-hazardous to hazardous bulk

storage (or vice versa) is not simple. These concerns were ameliorated by the merging parties’ undertaking to honour OTGC’s existing contracts with customers.

[6] The Commission also investigated the submission by the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) that two sets of proximally related retrenchments may have been occasioned by the merger; however, the Commission’s

investigation revealed that retrenchments were occasioned by the deleterious economic effects of the Covid-19 pandemic.

[7] The Commission could not definitively discount the fact that duplications may arise because of the merger.³ To mitigate against the prospect of any rationalisation arising from such duplications post-merger, the Commission recommended that the merger be approved subject to a 2-year moratorium on merger-specific job losses.

[8] In considering the merit of the proposed conditions, the Tribunal sought submission from both the merging parties and the Commission on the imposition of an additional employment-related condition that preference will be given when vacancies arise in the merged entity to any employees that may have been retrenched for operational reasons. The merging parties were amenable to this.

[9] In relation to the spread of ownership the merging parties submitted that:

- a. OTGC's existing Black ownership is 30%. FFS is majority Black owned as to 51.39%. This merger will therefore give rise to an increase in Black ownership of the terminal operators in relation to OTGC Durban and OTGC Cape Town.
- b. The merger will increase Black female ownership from 16.52% in OTGC to 31.7% Black female ownership.

[10] Based on the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market; and as a result of the conditions undertaken by the merging parties attached hereto marked Annexure "A"

ameliorate any potential public interest concerns.

Signed by:Yasmin Tayob Carrim Signed at:2021-06-23 17:19:42 +02:00

Reason:Witnessing Yasmin Tayob Carri

Ms Yasmin Carrim Date:

23 June 2021

Mr Andreas Wessels and Prof Halton Cheadle concurring

Tribunal Case Manager:

Mpumelelo Tshabalala

For the Merging Parties:

Louise Cleland and Jenny Finnigan

For the Commission: Wiri

Gumbie and Tumiso Loate

1 Oiltanking wishes to divest itself of its operations in South Africa because it has identified them as non-core to its global corporate strategy. As a result of Oiltanking decision, the remainder of OTGC Holding's shareholders also wish to divest.

2 Bidvest Group Ltd and Island View Storage Ltd, case no 17LMDec99.

3 As there may be similarities in the functions of employees operating hazardous and non-hazardous bulk storage tanks from the same premises

2

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZACT/2021/45.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ffs-refiners-pty-ltd-v-otgc-unknown-topic-act-2021>

Prepared on 12 October 2026 · Esheria