



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM169Dec20

In the *large merger* between:

DSV SOUTH AFRICA (PTY) LTD

Acquiring Firm

and

**GLOBEFLIGHT WORLDWIDE EXPRESS SA
(PTY) LTD**

Target Firm

Panel:	M Mazwai (Presiding Member) E Daniels (Tribunal Panel Member) A Ndoni (Tribunal Panel Member)
Heard on:	21 April 2021
Date of last submission:	23 April 2021
Order issued on:	26 April 2021
Reasons issued on:	24 August 2021

REASONS FOR DECISION

Conditional Approval

[1] On 26 April 2021, the Competition Tribunal approved a large merger between DSV South Africa (Pty) Ltd (“DSV”) and Globeflight Worldwide Express SA (Pty) Ltd (“Globeflight”), subject to conditions.

[2] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. However, it raises some public interest issues. Following submissions by the Commission, the merging parties

and the Department of Trade Industry and Competition (“dtic”), we approved the transaction subject to conditions that address these public interest concerns.

[3] Our reasons for the conditional approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[4] DSV, is a South African company ultimately controlled by DSV Panalpina A/S Group (“DSV Panalpina”), a public company listed on the Nasdaq Copenhagen Stock Exchange headquartered in Hedehusene, Denmark. In South Africa, DSV is held by DSV Africa Holdings (Pty) Ltd (“DSV Africa”), as to 75%, and DSV Empowerment Trust, as to 25%. DSV Africa is indirectly, wholly owned by DSV Panalpina.

[5] DSV’s wholly owned subsidiaries are DSV Solutions (Pty) Ltd; DSV Mounties (Pty) Ltd (“DSV Mounties”); DSV Road (Pty) Ltd (“DSV Road”), the entity housing the DSV Distribution business. In its capacity of partner in The Sisonke Partnership,¹ DSV also holds 100% equity in DSV Healthcare (Pty) Ltd.

[6] DSV’s activities include (i) land, air and sea freight-forwarding services; (ii) contract logistics services; (iii) courier services; and (iv) special projects. DSV also advises on national customs and clearance, security, license requirements and regulation related to air and sea freight.

Primary target firm

[7] The primary target firm, Globeflight, is held by four individuals (the “**sellers**”), two of whom are classified as historically disadvantaged persons (“HDPs”) jointly holding 21% of the shares in Globeflight. Globeflight wholly owns and controls

¹ DSV Healthcare’s holding company is DSV in the capacity of partner of The Sisonke Partnership which holds 100% of Healthcare’s equity.

two active entities: Mercury Couriers Proprietary Limited (“Mercury”) and Global Options Worldwide Express Investments Proprietary Limited (“GWE Swaziland”). Globeflight also controls five dormant entities registered in Namibia, the United Kingdom, Hong Kong, Israel and Malawi.² It also controls Regional Wholesale Services (Pty) Ltd (“RWS”), as to 48% – a subsidiary providing wholesale courier services which is not being sold as part of the proposed transaction.

[8] Globeflight, is a South African company providing local and international courier services through different modes of transport, including road and air. Its general courier services include the delivery of envelopes and parcels between individuals, homes and businesses. It has a particular focus on providing courier services to optometrists and their suppliers as well as courier services for blood and blood-related products. Globeflight also provides basic warehousing services to a single customer, a US based logistics firm, [REDACTED].

Proposed transaction and rationale

[9] In terms of the proposed transaction, DSV intends acquiring 100% of the issued share capital in Globeflight from SA Express Wine Delivery Service (Pty) Ltd (“WDS”).³

[10] The rationale for the transaction, according to DSV, is to improve its service offering, visibility, response times and efficiencies for the benefit of its customers. To this end, DSV continually invests in systems and facilities in order to deliver on this goal. With this in mind, DSV has sought to expand and improve its service offering in respect of its courier services. [REDACTED]

² As to 100%: GWE Namibia, GOWE UK and GWE Hong Kong. As to 90%, GWE Israel; and as to 50%, GWE Malawi.

³ Immediately prior to closing, Globeflight will undergo an internal restructuring such that the WDS entity will be interposed into the structure between the sellers and Globeflight such that the sellers’ percentage interests will stay the same. As earlier stated, RWS, which provides wholesale courier services, will be transferred to WDS and is not part of the proposed transaction.

[REDACTED]

[REDACTED]

[REDACTED] The proposed transaction therefore presents an opportunity for DSV to expand and improve its product offering [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[11] For the sellers, [REDACTED]

[REDACTED]

Relevant market and impact on competition

[12] The Commission identified a horizontal overlap in courier services. Courier services can be distinguished from logistics services. In this regard, courier services generally entail the collection of goods from point A and delivery to point B, while logistics services may include warehousing, as found in previous decisions.⁴

[13] Globeflight holds stock for one customer, [REDACTED] in its branches and delivers or collects parcels on behalf of [REDACTED]. Globeflight does not offer this service to customers in general. For that reason, the Commission concluded that Globeflight cannot be said to offer warehousing services in that the [REDACTED]-service is more appropriately categorised as an extra service for one customer ancillary to Globeflight's standard courier services. The Commission therefore focussed its competitive assessment on courier services rather than logistics services (which may include warehousing). We find no reason to disagree with the Commission's approach in this regard.

[14] The Commission did not identify any vertical overlaps.

⁴ See *inter alia* RTT Group (Pty) Ltd / CourierIt SA (Pty) Ltd and WarehouseIT (Pty) Ltd (CT Case No LM105Aug15) at para 11.

Horizontal assessment

- [15] DSV provides local and international courier services. It specialises in the last mile delivery of small parcels to and from business or home addresses in Southern Africa as well as delivery of commercial customers' products to their branch or dealer networks and / or end customers. Customers can choose from a variety of options: economy service, which is DSV's most cost-effective option (1–3-day transit time), to same day (delivery within 24 hours) or express service for time sensitive parcels. Customers may also request dedicated vehicles for the delivery of their parcels.
- [16] Globeflight's general courier services include the delivery of envelopes and parcels between individuals, homes, and businesses; with a particular focus on providing courier services to optometrists and their suppliers as well as courier services for blood and blood-related products.
- [17] The courier services for optometrists are predominantly carried out by Globeflight's subsidiary, Mercury, on a 'milk run' basis where customers do not need to book a collection. Globeflight simply collects and delivers from pre-specified locations twice a day. Importantly, the requirements for delivering packages for both of these types of customers (dealing in blood and optometry products) are not materially different to delivering any other type of parcel; in fact, Globeflight frequently carries packages from all of these types of customers in a single vehicle.
- [18] The Commission did not definitively conclude on the relevant product or geographic markets but for the purposes of assessment considered the effect of the proposed transaction on the national market for the provision of courier services. The Commission assessed the closeness of competition between DSV and Globeflight.

Closeness of Competition

[19] As indicated, Globeflight's courier services are primarily focussed on smaller customers whereas DSV focuses on larger corporate customers.

[20] The Commission found that through DSV's Pharma business offering, DSV is active in the warehousing, distribution, and courier of pharmaceutical products, while Globeflight offers courier services to optometrists and the [REDACTED]

[21] DSV is one of the main suppliers in pharmaceutical distribution. It services mostly big pharmaceutical companies that require economy service, as opposed to Globeflight's predominantly express service. Express is usually more expensive than economy as it is same day or overnight delivery while economy usually involves large volumes delivered over a day or two. The difference lies in the speed of delivery and costs involved and some ancillary services such as tracking and tracing of the parcel.

[22] Globeflight does not own specialised transportation vehicles or cold storage warehousing typically required for the transportation of pharmaceutical products. For [REDACTED] Globeflight utilises a dedicated fleet for the purposes of fulfilling that project. Globeflight is but one of [REDACTED] more than 10 courier service providers. The only warehousing facility owned by Globeflight, as indicated earlier, is dedicated to [REDACTED]

[23] The Commission noted the fact that [REDACTED]
[REDACTED]
[REDACTED] indicating that courier services for pharmaceutical products may be different to general or other courier services as previously found by the Tribunal in Imperial/RTT.⁵ For completeness, we note the market share estimations by the Commission in regard to the broad market for pharmaceutical

⁵ Imperial Holdings Limited and Imperial Group (Pty) Ltd / RTT Group (Pty) Ltd (case no: 89/LM/Oct12) at paras 12 and 13.

wholesale and distribution include competitors such as UPD, DHL and Imperial where each of these firm have held 15% to 25% market share over the past five years.⁶ Globeflight does not operate in this market.

[24] In the broad market for courier services, based on information gathered from the merger parties and the South African Express Parcel Association (“SAEPA”),⁷ the Commission concluded the following in respect of market shares:

Competitor	Market Shares
DSV	█
Globeflight	█
Merged entity	█
RTT	█
RAM	█
Dawn Wing	█
Courier Guy	█
Others (Including FedEx/TNT, DHL and Aramex)	79%

[25] It was established from the hearing that the remaining 79% market share was also fragmented, and includes other competitors such as Business Express (Bex Couriers) (at █% market share); Response Couriers (at █% market share); and Value Logistics (at █% market share) with the residual 62% market shares also being fragmented.⁸

[26] Given the low market accretion, the Commission concluded that the merger does not result in any significant increase in concentration.

⁶ The Commission’s Merger Report (the “Commission’s Report”) p17-18 at para 39.

⁷ The Commission states in this regard “There was a less than 5% differential between the merging parties and SAEPA’s estimates. The Commission therefore accepts the merging parties’ market share estimates on the basis that there is insignificant difference between the estimates and third-party estimates.” (The Commission’s Report p16 at footnote 8.)

⁸ Including FedEx, Aramex, TNT Express, Fastaway Couriers, DHL, Internet Express, Skynet and DPD Laser Express.

Third Party Submissions

- [27] The Commission engaged with four third parties to obtain their views regarding the state of competition in the market.
- [28] SAEPA's view was that DSV and Globeflight are not close competitors mainly because DSV is a large global firm with warehousing, distribution and courier capabilities whereas Globeflight is mainly active in the courier market.
- [29] The other views were from two of Globeflight's largest customers and one was from a former employee of a large courier company. None of them raised concerns with the merger.

The Hearing

- [30] During the hearing we probed the extent of the overlap in respect of the business-to-customer portion of the market (a segment of the market in which Globeflight focusses), as opposed to a business-to-business segment (where DSV focusses) that the merger report focused on.
- [31] The Commission submitted that its investigation revealed that there seemed to be differences in focus in the provision of the courier services by different firms and had the Commission segmented the market further to include these differences it is likely that the conclusion it would have arrived at is that there is no overlap between the activities. Thus making sense for the Commission's approach in assessing the broader courier services market where the overlap arises.⁹ We found no basis to disagree with the Commission.
- [32] We probed whether the Commission had obtained any views from smaller courier services firms regarding the merger.¹⁰ The Commission indicated it had

⁹ Transcript p15.

¹⁰ Transcript p25.

not done so, however it established from its investigation that barriers to entry in this market are insignificant as entry may be achieved through a single delivery vehicle or a bakkie. Smaller firms however may not have access to information technology (IT) infrastructure which the larger firms have, and thus some of them operate models in which they partner with the larger firms.¹¹ We concluded, given the small accretion in market share, that the merger was unlikely to substantially prevent or lessen competition in the broad courier services market.

[33] We proceeded to consider the public interest.

Public interest

[34] Section 12A(1A) enjoins us, when assessing a merger, to consider the effect of a merger on any of the public interest grounds listed in section 12A(3), of which the following were raised in this merger:

“the effect that the merger will have on —

(b) employment; ... and

...

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”

[35] Section 12A(1A) reads as follows: *“Despite its determination in subsection 1,¹² the Competition Commission or Competition Tribunal must also determine whether or not the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”*

¹¹ Transcript p12.

¹² Subsection 1 enjoins the Competition Commission and Competition Tribunal to initially assess whether the merger is likely to substantially prevent or lessen competition, and if it appears that the merger is likely to substantially prevent or lessen competition, then determine whether the merger is likely to result in technological, efficiency or procompetitive gains that offset the effects of the lessening or prevention of competition; and whether the merger can or cannot be justified on substantial public interest grounds.

Effect on employment

[36] The Commission received submissions from the South African Transport and Allied Workers Union (“SATAWU”); the National Transport Movement (“NTM”); and the Minister of the dtic regarding employment related public interest issues.

[37] Initially, the merger parties indicated that 522 employees were likely to be negatively affected by the proposed merger because it would result in a number of duplications. Following engagements by the Commission with the above mentioned parties during its investigation, the number of potential retrenchments was reduced to 205 employees. Consequently, the number of jobs saved was 317.

[38] During our proceedings we received an indication from SATAWU and the dtic that they intended to participate in the hearing. SATAWU did not ultimately attend the hearing, however, we took into account their submissions made to the Commission during its investigation.

[39] The dtic’s initial concern was that the number of retrenchments represented approximately 10% of the merged entity’s workforce; and queried the need for these job losses given the profitability of Globeflight. The dtic submitted that since Globeflight was not in financial distress and was viable as a stand-alone business, the merger cannot be justified on public interest grounds as it would have a negative effect on employment, and should be prohibited on that basis.

[40] In response, the merger parties provided details of the number of employees at both DSV Road and Globeflight. It appears that the number of retrenchments as estimated by the dtic was based on the total workforce of both entities which was at the time [REDACTED] (with [REDACTED] employees at DSV Road¹³ and [REDACTED] at

¹³ This figure represents the consolidated DSV Road workforce as well as [REDACTED]. Were this number to reflect the DSV Road division workforce [REDACTED] the figure becomes [REDACTED] (Letter from the merger parties to the Commission dated 16 March 2021 at para 8.1.2 and footnote 5, Record p2111).

Globeflight). Following investigation, the Commission concluded that, as provided by the merger parties, the retrenchments amounted to approximately 2.5% of the combined total headcount of the two organisations.¹⁴ This is because [REDACTED]

[REDACTED] On this count the retrenchments amounted to 2.5% of the combined workforce of both organisations. This appears to have been accepted by the dtic.

[41] However, what remained an issue was, given Globeflight’s financial position based on its financial statements, the dtic submitted that it was unclear why Globeflight should not operate as a standalone business. It submitted that the merger should be prohibited, unless the [REDACTED] jobs are absorbed by DSV.

[42] In light of this, we considered the relevant counterfactual if the merger were to be prohibited and tested this with the parties during the hearing.

The Counterfactual

[43] In response to the dtic’s submissions, the merger parties pointed out that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[44] The Commission tested these claims and found that [REDACTED]
[REDACTED]

[45] [REDACTED]
[REDACTED]

¹⁴ The Commission’s Report p7 at para 13; and Letter from the merger parties to the Commission dated 3 March 2021 at para 6.1.2, Record p2091).

[REDACTED]

[46] To turn this around, DSV's management was faced with a decision to either invest in the business [REDACTED]

[47] DSV's management opted to invest in the business. Having now made the investment, it must increase the volume of parcels that move through the distribution centre (in which it has invested) to ensure that the business is operated in an efficient and sustainable manner.¹⁵

[48] Given the significant investment undertaken by DSV we tested the reason for [REDACTED] and the claim [REDACTED]. The merger parties submitted that since the investment was [REDACTED] [REDACTED] the investments made had not been realised and were only anticipated in the future.¹⁶

[49] At the hearing, the merger parties elaborated on different scenarios considered by DSV absent the merger. [REDACTED]

¹⁵ Letter from the merger parties to the dtic at paras 4.3, 4.4 (Record p2088-9).
¹⁶ Transcript p41.
¹⁷ Transcript p33-34, 55-56.

[REDACTED].¹⁸ [REDACTED]
[REDACTED]

[50] The merger parties further submitted [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], which would have resulted in retrenchments.¹⁹

[51] By its nature, the assessment of the counterfactual is not a scientific exercise that can be measured with precision. There is no dispute between the Commission and merging parties that [REDACTED]
[REDACTED] The likely counterfactual – and there is no evidence to the contrary – is that [REDACTED]
[REDACTED]. In light of the potential job losses, we proceeded to assess whether the job losses were substantial; and whether the process followed in identifying the number of job losses was rational.

[52] While in terms of section 12A(1A) a merger that does not raise competition concerns may be prohibited if it raises substantial public interest concerns, sections 12A(1)-(3) read as a whole involve a balancing exercise of the impact on both competition and the public interest.

[53] We also noted that following engagements by the Commission with the trade unions and the dtic, and the reduction in the initial number of job losses, the parties ultimately concluded that the impact on employment was not substantial.

¹⁸ Letter from merger parties to Commission of 2 March 2021 at para 5.8 (Record p2023).

¹⁹ *Ibid* Record p2024.

The Rationality of the Retrenchments

[54] The Commission investigated the process followed in identifying the affected employees and the extent to which this process can be deemed rational.

[55] The merger parties submitted (and provided the Commission with the relevant information) that they undertook a comparison of specific functions within each of their workforce and compared those to the expected requirements of the combined entity going forward,²⁰ having regard to the need to ensure that the combined business would be able to operate on a competitive and sustainable basis.

[56] Having done this analysis, DSV also attempted to limit the impact on unskilled employees and staff such as drivers and warehouse staff (although, where it makes commercial sense to do so, routes would need to be combined and this will impact some jobs) and instead focus on reducing the level of duplication in respect of skilled and managerial employees. In the final analysis, DSV undertook not to retrench any unskilled employees; and to limit the retrenchment of skilled and professional employees, as elaborated on below.

[57] We were satisfied that a rational process to identify potential job losses was followed. The upshot of the engagement between the Commission and the merger parties was that the number of proposed retrenchments was reduced from 522 to 205.

[58] Taking into account the combined workforce of DSV's Road division (in which the Globeflight business would be integrated) and Globeflight (of [REDACTED])

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(Letter from the merger parties dated 22 January 2021, Record p835-6)

employees), we considered that taken as a whole the impact on employment was insubstantial. Furthermore, we were satisfied that the conditions tendered sufficiently addressed the employment concerns identified.

Effect on spread of ownership

[59] During the hearing, the parties were asked about the effect of the merger on the spread of ownership. Section 12A(3)(e) provides:

“the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”

[60] As indicated, DSV is ultimately listed in Denmark. In South Africa, it is held as to 25% by the DSV Empowerment Trust. The parties submitted that the beneficiaries of the DSV Empowerment Trust are all Black South Africans, and mostly youth. The proposed transaction, the merger parties submitted, will increase the HDP ownership of Globeflight from to 21% (previously held by the two HDP shareholders who wish to realise their investment) to 25%; since DSV’s 25% shareholding is held by its HDP Empowerment Trust with a wider spread of beneficiaries. Globeflight’s HDP employees stand to benefit from DSV’s Empowerment Trust. The Commission was of the view that it is unlikely that the proposed merger will have a negative effect on small business or businesses owned and controlled by the HDPs.²¹ We concluded that the merger has no negative effect on the spread of ownership since DSV is owned as to 25% by the DSV Empowerment Trust. This remains the case post-merger.

[61] We concluded that the merger, taken as a whole with the tendered conditions, balances various objectives in the Act including recognising the role of foreign direct investment, at the same time as promoting the competition and public interest issues discussed above.

²¹ The Commission’s Report p34 at para 88.

[62] Accordingly, we approved the merger subject to the conditions summarised below.

The Conditions

[63] The main elements of the conditions are:

63.1. The number of retrenchments has been reduced from 522 to 205, resulting in 317 saved jobs. A moratorium has been placed limiting the number of retrenchments and will take effect three years from the implementation date of the merger. This moratorium on retrenchments has been increased from two years as initially tendered by the merger parties, to three years.

63.2. No semi-skilled employees will be retrenched. The number of retrenchments for skilled employees will be limited to 140 employees; and to 59 employees in respect of professionally qualified employees.

63.3. For a period of three years following the implementation of the merger DSV will inform the retrenched employees of relevant vacancies that arise post-merger. Retrenched employees who meet the employment criteria will be given preference in the appointment process. Where a particular employee does not possess the requisite skills or experience, DSV will consider whether, to the extent feasible, such an employee would be able to fulfil the role (within a reasonable period) following training, mentoring or other re-skilling initiatives.

63.4. DSV will establish a fund to re-skill or re-train eligible skilled employees who have been retrenched. The fund shall be on offer to eligible employees for a period of three years from the date of implementation of the merger, or until it is exhausted, whichever occurs first. Each eligible employee will be allocated a maximum of R15 000. The eligible employee may nominate a close family member to receive this benefit which shall be utilized for paying

school fees and/or other expenses related to the education of the nominated close family member (where “close family member” extends to spouse, children, brother, sister, mother, father, sister’s children and brother’s children).

63.5. For a period of six months after the merger has been approved, DSV will continue to recognise NTM in accordance with a current agreement in relation to the Globeflight workplace as it currently applies.

Conclusion

[64] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the public interest concerns identified have been addressed by the Conditions. We concluded that the merger, taken as a whole with the tendered conditions, balances various objectives in the Act including recognising the role of foreign direct investment, at the same time as promoting the competition and public interest issues discussed above.



Ms Mondo Mazwai

Mr Enver Daniels and Ms Andiswa Ndoni concurring.

24 August 2021

Tribunal case manager:

For the merger parties:

For the Commission:

Mpumelelo Tshabalala

Aidan Scallan and Jessica de Kock

Mogau Aphane

POST-SCRIPT

- [1] As indicated in the main reasons, with which I concur, the Tribunal concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market but, nevertheless, approved the merger subject to public interest conditions which were summarised in the reasons.
- [2] Large mergers are generally very complex and expensive and merging parties and other interested parties require certainty regarding merger filings. The Tribunal rules recognise this and specifically provide that the Tribunal must, within 10 business days after the end of the hearing, either approve the merger, approve the merger subject to conditions, or prohibit the merger.¹
- [3] The Long Title of the Competition Act stipulates that the Act provides “*for the establishment of a Competition Commission (“the Commission”) responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position and mergers and also for the establishment of a Competition Tribunal responsible to adjudicate such matters...*” This was noted by the Constitutional Court in *Senwes*² which also observed that some of the objectives of the Act are directed at addressing the inequalities and imbalances which were created by the apartheid order.³ These inequalities and imbalances resulted in black people being excluded from playing a meaningful role in all aspects of society including in the economy. The effects are still evident today. The Constitutional Court also noted that the Act also seeks to promote a greater spread of business ownership to increase access to it by historically disadvantaged people and that the Act sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved.⁴

¹ Rules for the Conduct of Proceedings in the Competition Tribunal, Rule 35(5).

² *Competition Commission of South Africa v Senwes Ltd* (CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (12 April 2012) at para 3.

³ *Id.*

⁴ *Ibid* at para 4. This is also mentioned in the Preamble to the Act.

[4] The Commission enjoys the primary responsibility for investigating mergers and making recommendations while the Tribunal's function, as indicated above, is to adjudicate on mergers and other matters referred to it for consideration. Although the Tribunal may conduct its hearings in an inquisitorial manner,⁵ it may not and must not assume the role of the investigator but must confine itself to a proper and detailed analysis and evaluation of the evidence presented to it by the merging parties, the Commission and other relevant parties. In essence, when considering mergers, the Tribunal is constrained by the merger record, the Commission's investigative report and recommendations and the submissions made and any additional evidence which may be tendered during the hearing. I am mindful of the Constitutional Court's very important observation in *Senwes* that confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry.⁶ That observation was made in a case about anti-competitive conduct proscribed by the Competition Act and related to a finding of margin squeeze which *Senwes* had objected to because it was not covered by the referral and that evidence supporting it was irrelevant and should not have been led before the Tribunal.⁷ It is very important for the Tribunal to be provided with all relevant material and evidence to enable it to fully complete its consideration of mergers within the time frames specified in the Act and the Competition Tribunal Rules. It is in this context that I wish to make a few observations.

[5] When viewed through the prism of inequality and the noble purpose of the Act, this merger appears to raise important public interest related issues in terms of subsections 12A(2)(h) and (3)(c) and (e) which the Tribunal, in the light of its prescribed functions, was unable to interrogate fully, but which the merging parties and the Commission were alive to and attempted to address. The main reasons do deal fully with the public interest employment concerns and those will not be addressed herein.

⁵ Section 52(2)(b).

⁶ *Senwes* at para 50.

⁷ *Ibid* at para 54.

- [6] Mindful of the confidential nature of much of the information provided to the Tribunal, I intend to couch my observations in a way which does not breach those confidentiality claims.
- [7] The primary acquiring firm, DSV South Africa (Pty) Ltd (“DSV”), is a company incorporated in accordance with the laws of the Republic of South Africa. DSV is ultimately controlled by DSV Panalpina A/S Group (DSV Panalpina), which is a public company listed on the Nasdaq Copenhagen Stock Exchange and is headquartered in Hedeusene, Denmark. DSV performs land, air and sea freight forwarding services; contract logistics services; courier services (DSV Distribution); and special “projects”.
- [8] In addition to controlling DSV, DSV Panalpina, controls DSV Africa Holdings (Pty) Ltd which in turn controls various entities in South Africa.
- [9] DSV Panalpina is a foreign company which has invested in South Africa and operates its various businesses through the entities mentioned above.
- [10] South Africa seeks to attract foreign direct investment and offers international entities and individuals exciting investment opportunities. When such entities and individuals invest in South Africa it is a vote of confidence in our country and our future as a nation.
- [11] Many investors seek to invest in existing, well established and profitable South African businesses rather than in greenfield projects. The former types of investments must be considered within the framework of the Act. It is to this end that my observations are directed.
- [12] Globeflight Worldwide Express (Pty) Ltd (Globeflight), the primary target firm, is a company incorporated in accordance with the laws of the Republic of South Africa and provides local and international courier services by road and air and other modes of transport. Globeflight’s general courier service includes the delivery of envelopes and parcels between individuals, homes and businesses. Globeflight also focuses on specialised courier services.

- [13] Globeflight controls several entities within South Africa and internationally and appears to have positioned itself to operate in a number of countries, other than South Africa, but has not done so yet. It is abundantly clear that DSV views the proposed merger as an exciting opportunity to enhance its own courier business.
- [14] DSV is acquiring 100% of the issued share capital in Globeflight and following the implementation of the merger, Globeflight will be a wholly owned entity of DSV.
- [15] The Commission's extensive investigation found that the activities of the merging parties overlap and that the relevant market is the provision of courier services in South Africa.
- [16] In the Report Assessing The Transaction With Respect to Competitive Conditions and Public Interest Considerations⁸ ("the report") the parties provide rational reasons for wanting to enter into the proposed merger. The parties submit that the implementation of the proposed transaction will not result in a substantial prevention or lessening of competition because the market share of the merging parties is small with an even smaller market accretion. Therefore, according to the parties, the merger will not give rise to vertical concerns and no customer or input foreclosure will arise and there will not be a substantial negative impact on the public interest in South Africa. The Commission agrees with this assessment.
- [17] DSV Panalpina operates in South Africa via DSV and has a physical presence in all the major centres in South Africa.
- [18] In respect of its courier services, DSV has a fleet of small trucks and vans which it utilises to deliver packages.
- [19] DSV and Globeflight both provide local and international courier services.

⁸ Record p54.

- [20] The merging parties do have different focuses. DSV services mainly larger customers, while Globeflight services smaller customers and has certain specialised courier services as well.
- [21] According to Mr Aphane, who represented the Commission, the courier market is broad, and the Commission has defined it broadly and did not look at the different segments, because Globeflight focuses on small parcels and DSV focuses on the large customers and big parcels.⁹ According to Mr Aphane because the two parties service different types of customers which they serve, they are not close competitors.¹⁰
- [22] This view was contradicted by Mr Scallan, who represents the merging parties, who said that the parties do compete in the courier business, but DSV's focus is slightly different to that of Gobeflight, as it focuses on some large corporate type customers. DSV delivers a lot of packages for a small number of customers. Globeflight, according to him, has more customers who are smaller businesses or customers.¹¹
- [23] Mr Aphane went on to explain that they had discussed the issue with various third parties who indicated that a lot of small companies operate in South Africa within the courier space and that the barriers to entry at that level are "*quite insignificant*."¹²
- [24] The small companies can and do partner with the large companies to courier on their behalf but as no details were provided, it would be difficult for the Tribunal to assess the nature of those partnerships and the extent to which the small courier companies actually benefit from the arrangements, although he mentioned that the small courier companies are able to expand in the market.¹³

⁹ Transcript p10, lines 9 -16.

¹⁰ Transcript p11, lines 1-3.

¹¹ Transcript p114-15, lines 20-21 and lines 1 -10.

¹² Transcript p11, lines 18 -21 and p12, lines 1-5,

¹³ Transcript p14, lines 5 -10.

- [25] Theoretically the small courier companies compete but cannot develop the infrastructure which DSV has to facilitate the courier service which it offers.¹⁴
- [26] The Commission did not obtain the views of small courier companies¹⁵ which has resulted in the Tribunal having to consider and evaluate the merger in the absence of any views which the smaller companies may have on the merger.
- [27] Regarding the relevant product market, the parties state that the competition authorities have on several occasions considered a market for courier services which can be distinguished from logistics services. Courier services entail the collection of goods from point A and delivery to point B, while logistics services may include warehousing. The courier services market may be national in scope. However, according to them, as no competition concerns arise it is unnecessary to define the market as under any plausible market definition there will not be a substantial prevention or lessening of competition.
- [28] Although we were provided with some competitor details, we were not provided with the nature and extent of the competition which DSV and Globeflight face from smaller courier companies. We are, in my view, therefore unable to determine exactly what impact mergers like this one will actually have on the myriad of small courier companies, especially as some small companies appear to perform courier services on behalf of the larger courier companies.
- [29] Apparently, the parties will continue to face a great deal of competition. The South African Express Parcel Association (SAEPA) has over 110 companies as members which will exert competitive pressure on the merged entity, post-merger.¹⁶
- [30] Providers of courier services for small packages are required to register as unreserved postal operators, but this requirement is not costly or onerous.

¹⁴ Transcript p13, lines 6 -13.

¹⁵ Transcript, p13.

¹⁶ The report, Record p60.

- [31] A feature of the industry is that numerous micro-organisations can operate and compete effectively against larger operators, according to the parties. These businesses can commence with a single employee and a single half ton bakkie and could begin operations with an initial outlay of R100 000 or less.
- [32] A small business could establish a business in less than two months, while a larger operator seeking to invest in hubs and branches would take longer but it could still be achieved in six months.¹⁷ According to the submissions made, the courier industry is expected to grow, particularly during and because of the pandemic. This is understandable as many people are probably reluctant to stand in long queues while waiting to make arrangements for their packages and letters to be delivered. There appears to be potential for lots of growth amongst small courier companies provided the conditions for such growth can be promoted.
- [33] Customers and suppliers have a high level of countervailing power. There are numerous service providers operating in the market and customers typically do not enter into long terms contracts for these services. Clients switch to service providers based on superior pricing or service.¹⁸
- [34] The report notes that there are hundreds of courier companies operating in South Africa and the market is growing. According to that report, while the market is subject to some innovation, particularly in respect of the automation of distribution centres and the parcel tracking, the service fundamentally involves the transport of a package from A to B. Accordingly, there is limited scope for product differentiation other than in terms of price and quality of service (speed and reliability). Customers are therefore extremely price sensitive and face no switching costs. Therefore, the market for courier services is highly competitive particularly in respect of price. The transaction will not, according to the parties have any negative effects on competition.¹⁹

¹⁷ The report, Record p60-1

¹⁸ The report, Record p61.

¹⁹ The report, Record p61.

[35] When questioned on the relevance of section of section 12A(3)(e) in respect of the proposed merger, Mr Aphane responded by saying DSV is an empowered company in South Africa.²⁰

[36] Mr Scallan confirmed Mr Aphane's observation by saying that DSV South Africa (Pty) Ltd has an empowerment component. Globeflight, too, has shareholders who are historically disadvantaged persons. The parties argue that the transaction improves the ownership by historically disadvantaged persons and the members of the trust get ownership of a larger entity.

[37] The observations by both Mr Aphane and Mr Scallan do not address the fundamental principle underlying section 12A(3)(e), which is to promote a greater spread of ownership and to increase the levels of ownership in firms by historically disadvantaged persons and workers in the firms in the market.

[38] The Memorandum on the Objects of the Competition Bill, 2018 states, with reference to the inclusion of subsection 12A(1A),²¹ that the insertion of the subsection means that when the Competition Commission and the Tribunal consider a merger which they conclude will not substantially prevent or lessen competition, they must still consider the public interest issues relating to the merger. The reason for this is that the merger may need to be prevented, or conditions attached to it, where there are negative public interest outcomes from the contemplated merger. The amendment gives better effect to the jurisprudence and to the initial meaning of section 12A(1A).²²

[39] The public interest grounds are set out in a subsection 12A(3)²³ and must be considered in their entirety. The investigation of those public interest grounds

²⁰ Transcript p21, lines 2 -19.

²¹ Subsection 12A(1A) reads: "*Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)*".

²² See Memorandum on the Objects of the Competition Amendment Bill, 2018. Page 25. Para 3.7 Clause 9.

²³ (3) *When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—*

(a) a particular industrial sector or region;

vest in the Commission while the Tribunal must consider them as part of its adjudicative function.

- [40] The aim of the section is not to further entrench the ownership positions of people who have already benefited from empowerment schemes but to bring many more historically disadvantaged persons into the ownership structures of firms within the various markets in South Africa.
- [41] As mentioned earlier, Globeflight appears to have positioned itself to operate internationally and is probably able to do so. In other words, it is probably able to compete internationally, which the Act also envisages.²⁴
- [42] The merger is going to result in a South African company ceasing to be South African owned, although some of its shares will be held by an empowerment trust. The major beneficiaries of the merger will be DSV Panalpina.
- [43] The Tribunal may not assume the Commission's investigative role. The Commission has done a very careful detailed analysis of the merger and has proposed conditions to address the public interest issues which it identified.
- [44] It would seem to me that greater attention should be given to section 12A(3)(e) in future to ensure that shareholders and entities wishing to dispose of their businesses first try, where possible and practical, to obtain local buyers. This is particularly important as many of our largest firms have already taken primary listings abroad and the process of developing firms of the same stature is well underway in South Africa.

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

²⁴ Subsection 12A(3)(d) of the Act.

[45] I do not read section 12A(3)(e) as prescribing a greater spread of ownership only for historically disadvantaged persons. Rather the focus is a on a greater spread of ownership by South Africans, particularly historically disadvantaged persons and workers.

[46] Section 12A(2)(h) imposes an obligation on both the Commission and the Tribunal to consider whether the merger will result in the removal of an effective competitor. In this regard the section provides that:

“(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or the Competition Tribunal must assess the strength of the competition in the relevant market, and the possibility that the firms in the market will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including – ...

(h) whether the merger will result in the removal of an effective competitor.”

[47] This issue of whether Globeflight is an effective competitor of DSV was canvassed pertinently with Mr Aphane. Mr Aphane agreed that a competitor is going to be removed, but the post market shares would not be substantial to warrant any SLC. Therefore, no further “substantial” assessment was necessary as would have been the case if the market shares post-merger were going to be higher.²⁵

[48] Mr Aphane’s response must be considered within the broader evidence presented by DSV itself which has invested heavily in its business and requires greater volumes.

[49] The unanswered question is what impact the removal of an effective competitor will have on competition in the relevant market. Further unanswered questions relate to whether the *firms* in the market after the merger will behave competitively or co-operatively.

²⁵ In this regard see the Transcript p25, lines 10-21 and lines 1 -5.

- [50] Although there are numerous courier companies in the country, we simply do not know what impact the merger will have on competition generally and, more specifically, how the merger will impact on the smaller firms owned mainly by historically disadvantaged persons and on firms wishing to enter or participate or expand within the relevant market.
- [51] The Tribunal is not an investigator. That role is reserved for the Commission. The Tribunal cannot use its inquisitorial powers to investigate a merger through the backdoor. It would be inappropriate for the Tribunal to institute a full investigation of the public interest issues in the absence of a consideration of such matters by the Commission and the merging parties. Where those matters have been considered, the Tribunal may use its inquisitorial powers effectively.
- [52] While sections 12A(2)(h) and (3)(c) and (e) were canvassed with the Commission and the merging parties, the Tribunal was not able to evaluate the merger with reference to those sections carefully, as not sufficient evidence was tendered. I also need to make it clear that I do not doubt the correctness of the information provided or the submissions made to the Tribunal by the Commission and the merging parties and am of the view that the Tribunal properly considered all the evidence tendered.
- [53] The Tribunal cannot speculate on the cases before it. It cannot make assumptions in the absence of additional evidence. In this regard it is constrained.
- [54] On the available facts, it would appear that had Globeflight invited offers for its business that South African individuals and firms may have been interested in buying it, especially as there are many firms operating in the courier services market.
- [55] It is also possible that the merger may have unintended consequences, which the Tribunal cannot determine, on competition.

[56] I would urge the Commission and merging parties to deal more fully with the public interest provisions in the future to enable the Tribunal to consider those more carefully during its adjudication of mergers. The same attention which is given to the employment concerns which often arise in mergers should be given to all the factors mentioned in subsection 12A(2) and the public interest issues mentioned in subsection 12A(3). This will enable the Tribunal to apply its inquisitorial powers more effectively in respect of the public interest issues and to, where appropriate, call for additional evidence in accordance with the principles of natural justice, without delaying the proceedings.

Enver Daniels

Mr Enver Daniels

24 August 2021

Date