



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:
LM195Mar23/FFR045Jun23

In the matter between:

CFAO Motors Proprietary Limited

Applicant

and

The Competition Commission

Respondent

Panel : S Goga (Presiding Member)
: M Mazwai (Tribunal Member)
: L Mncube (Tribunal Member)

Heard on : 11 October 2023
Order issued on : 13 December 2023
Reasons issued on : 13 December 2023

REASONS FOR DECISION

INTRODUCTION

[1] In this matter, the applicant, CFAO Motors Proprietary Limited (“CFAO”) seeks an order for a full refund of merger filing fees paid to the Competition Commission (“Commission”) in the amount of R550 000.00 in respect of an abandoned large merger between the CFAO and William Simpson Cars Proprietary Limited (“WSC”) (collectively referred to as the “merger parties”).

This application is brought in terms of Rule 34(2) (b) of the Rules for the Conduct of Proceedings in the Competition Commission (“Commission Rules”) and in accordance with Rule 31(1) (f) of the Rules for the Conduct of Proceedings in the Competition Tribunal (“Tribunal Rules”).

- [2] The Commission opposes this application on the basis that it has completed its investigation and recommended to the Competition Tribunal (“Tribunal”) that the merger should be conditionally approved. The Commission further submitted that the Tribunal had already been approved the merger at the time that CFAO notified the Commission that it had abandoned the merger.
- [3] After hearing the parties and considering the documents in the record, we have decided not to grant the application on the basis that CFAO has not demonstrated that there is good cause to grant a refund of merger filing fees paid to the Commission.

Background

- [4] On 3 March 2023, the merger parties notified a large merger with the Commission in terms of which CFAO intended to acquire the Stellantis branded motor vehicle dealership business conducted by WSC in Tokai, Cape Town.
- [5] During the Commission’s investigations CFAO had submitted that all employees under the employ of WSC would be taken over by the CFAO in terms of section 197 of the Labour Relations Act No. 66 of 1995 (“LRA”). Furthermore in the merger filing the parties state that “*The proposed transaction will not have a negative impact on employment. Particularly, no job losses or retrenchments will occur because of the proposed transaction.*”¹

[6] According to the Commission it received submissions from the National Union of Metalworkers in South Africa (“NUMSA”) who raised concerns about job security post-merger. NUMSA requested that the merger be approved subject to a five-year moratorium on merger related retrenchments. The Commission approached the merging parties requesting a response to the concerns raised by NUMSA. In doing so, the Commission also explained the difference between merger specific and operational retrenchments. The merger parties indicated that they were prepared to commit that there would be no retrenchments (merger related or otherwise) for 12-months post-merger.¹

[7] However, the Commission’s investigation found that the proposed merger would result in certain employment duplications and the Commission was therefore concerned about the potential for merger related retrenchments. At the conclusion of its investigation the Commission recommended a 24-month moratorium on merger related retrenchments to the Tribunal.

Tribunal Merger Hearing

[8] On 2 June 2023, the Tribunal convened a hearing into the proposed merger. One of the issues considered was the duration of the moratorium on merger related retrenchments. CFAO argued for a 12-month moratorium on merger related retrenchments as opposed to a 24-month moratorium as recommended by the Commission. It argued that there had been no retrenchments in any of the dealerships it acquired over the last four years and expressed its commitment to employment going forward.

¹ email correspondence received from the merging parties dated 18 April 2023.

- [9] However, CFAO argued that it could only commit to a 12-month moratorium on merger related retrenchments and raised concerns of “uncertainty in terms of the market”², citing a poor and/or slow-growing economy, with high inflation rates coupled by high interest rates and ongoing loadshedding.³
- [10] The Commission, on the other hand, continued to be concerned that the proposed merger was likely to result in duplications of staff roles and result in retrenchments.⁴ This duplication of certain administrative staff was confirmed by CFAO.⁵
- [11] On 22 May 2026, the Tribunal issued an order approving the proposed merger subject to a 24-month moratorium on merger related retrenchments. The Tribunal Reasons followed on 26 June 2023.
- [12] In terms of the Tribunal’s Reasons, we noted that the above condition related to merger-specific retrenchments and would not impact retrenchments that occur as a result of unforeseen and unrelated commercial and operational circumstances, including changes in business viability as a result of an evolving economic climate.⁶ We pause to mention that this difference between merger specific and operational retrenchments, was also explained to merger parties during the Commission's investigations.⁷
- [13] Two days after Tribunal’s reasons were issued, on 28 June 2023, the CFAO filed this application with the Tribunal indicating that it is not able to implement

² Transcript page 34.

³ Transcript page 35.

⁴ Transcript page 32.

⁵ Transcript page 35.

⁶ See paragraph 39 of the Tribunal Reasons.

the transaction due to the 24-month moratorium on retrenchments imposed by the Tribunal.⁸

The Applicant's case.

[14] CFAO seeks a remittance of the merger filing fees because it has abandoned the proposed merger.⁹ It argues that it has abandoned the proposed merger owing to economic decline, high interest rates and the effects of loadshedding on its business, and believes that the merger filing fee could be utilised in its business and possibly for future acquisitions.¹⁰

The Commission's case.

[15] The Commission opposes this application on the basis that it has deployed substantial resources to the investigation of the merger. The Commission had completed its investigation and recommended a conditional approval to the Tribunal, which had already conditionally approved the merger at the time CFAO notified the Commission that it has abandoned the merger.¹¹ They further note that the Applicant did not communicate any intent to abandon the merger due to the moratorium on retrenchments during the process. Lastly, the Commission submits that CFAO has not shown any good cause for the remission of the merger filing fees.

⁸ CT6 - Notice of Motion.

⁹ Founding affidavit, at paragraph 1.

¹⁰ Transcript, page 3, lines 11 to 25, page 4 lines 1 to 8.

¹¹ Commission's heads of argument, page 2, at paragraph 2.

Our analysis

[16] The enabling provision of the statute for the refunding of a merger filing by the Commission is Rule 34 of the Commission Rules which states the following:

34. Abandonment of merger

- (1) *The primary acquiring firm may notify the Commission in Form CC 6 that it has abandoned the intended merger transaction and has no intention to implement it.*
- (2) *Upon the filing of Form CC 6*
 - (a) *The parties to the merger are in the same position as if the merger had never been notified; and*
 - (b) *The filing fee paid in respect of that merger is forfeited to the Commission, unless the party that paid the fee applies within 10 business days to the Tribunal, on good cause shown, order the Commission to refund all or part of the fee.* (our emphasis).

[17] In terms of Rule 34(2)(b) of the Commission's Rules the onus of establishing good cause for a refund of all or part of a filing fee is on the merger parties. The Tribunal has discretion to determine what constitutes good cause in the interests of justice based on the facts of each case.¹² In this context, we must determine whether there is good cause to grant the application for the remittance of merger filing fees.

¹² *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14, para 54.

- [18] On the facts placed before us, we find that the Applicant has not provided us with sufficient facts and evidence that will allow us to conclude that good cause has been shown.
- [19] In its founding affidavit CFAO did not allege or provide evidence for good cause for the remission. It simply stated that they were operating in challenging economic and trading conditions and could use the filing fee within the company.
- [20] A filing fee refund is not there for the mere asking simply because the merger parties do not wish to comply with the conditions attached to the merger. If this were the case it would open floodgates, when a decision has been made by the Commission or the Tribunal and the parties do not wish to proceed with that the transaction (or in fact, in the case of a prohibition, cannot proceed). This proposition was not denied by the merger parties when put to them by the Tribunal during the hearing.¹³
- [21] When evaluating whether good cause has been established on proper evidence before the Tribunal, it is necessary to be circumspect. That is so because of the considerable effect that such relief can have on the respondent. CFAO does not dispute that the Commission expended resources during the investigation of the proposed merger. In fact, it commended the work done by the Commission.¹⁴

¹³ See transcript of the hearing on page 8.

¹⁴ See page 7 of the application for a refund of a filing fee hearing transcript.

[22] In our view, CFAO has failed to establish good cause for the remittance of its merger filing fees.

Conclusion

[23] Having considered the above, we find that the CFAO has not shown good cause for the remittal of its merger filing fees.

[24] For these reasons, the CFAO's application for refund of the merger filing fee is dismissed.

Order

1. The application for the remittance of the merger filing fees is dismissed.
2. Each party to bear its own costs.

Ms Shaista Goga

13 December 2023

Date

Concurring: Ms Mondo Mazwai and Professor Liberty Mncube

Tribunal case managers : Sinethemba Mbeki and Baneng Naape

For the Applicant : Quinton Marais

For the Commission : Mfundo Ngobese and Nolitha Moss