

## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM152Dec22

In the matter between:

Cape Town Biogas (Pty) Ltd

Primary Acquiring Firm

And

New Horizons Waste to Energy (RF) (Pty) Ltd

Primary Target Firms

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Panel : J Wilson (Presiding Member)  
: I Valodia (Tribunal Panel Member)  
: F Tregenna (Tribunal Panel Member)  
Heard on : 28 February 2023  
Decided on : 02 March 2023

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### Order

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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 as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Signed by Jerome Wilson  
Signed at 2023-03-02 12:04:43 +02:00  
Reason Witnessing Jerome Wilson  
Jerome Wilson

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**Presiding Member**  
**Adv. Jerome Wilson**

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**02 March 2023**

**Date**

**Concurring: Prof. Imraan Valodia and Prof. Fiona Tregenna**

# Merger Clearance Certificate

**Date** : 02 March 2023

**To** : Cliffe Dekker Attorneys

Case Number: LM152Dec22

Cape Town Biogas (Pty) Ltd And New Horizons Waste to Energy (RF) (Pty) Ltd

## Notice CT 10

### About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

You applied to the Competition Commission on **23 November 2022** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- no conditions.
- the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

### Contacting the Tribunal

The Competition Tribunal  
Private Bag X24  
Sunnyside  
Pretoria 0132  
Republic of South Africa  
tel: 27 12 394 3300  
fax: 27 12 394 0169  
e-mail: [ctsa@comptrib.co.za](mailto:ctsa@comptrib.co.za)

### The Registrar, Competition Tribunal

*Tebogo Mpirira*

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**Annexure A**  
**Cape Town Biogas (Pty) Ltd**  
**and**  
**New Horizons Waste to Energy (RF) (Pty) Ltd**  
**CC Case Number: 2022Nov0044**

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**CONDITIONS**

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**1 DEFINITIONS**

In this document, the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings –

- 1.1 **"Acquiring Firm"** means Cape Town Biogas (Pty) Ltd;
- 1.2 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.3 **"Commission Rules"** means the Rules of the Conduct of Proceedings in the Commission;
- 1.4 **"Competition Act"** means the Competition Act 89 of 1998 (as amended);
- 1.5 **"HDPs"** means historically disadvantaged persons as understood under the Competition Act;
- 1.6 **"Implementation Date"** means the date on which the Merger is implemented in accordance with the commercial arrangements between the Merging Parties;
- 1.7 **"M&O Incentive Scheme"** means an incentive scheme intended to incentivise key management and operations and maintenance workers of the Acquiring Firm;
- 1.8 **"Merger"** means the acquisition of control by the Acquiring Firm over the Target Firm;

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- 1.9 **"Merged Entity"** means New Horizons Waste to Energy (RF) (Pty) Ltd post implementation of the Merger;
- 1.10 **"Merging Parties"** means the Acquiring Firm and the Target Firm collectively;
- 1.11 **"Performance Criteria"** means the criteria for which Qualifying Workers can participate in the M&O Incentive Scheme as well as the performance metrics to qualify for participation in the scheme. These criteria will be established within 1 year of the Implementation Date.
- 1.12 **"Proposed Transaction"** means the transaction that facilitates the merger;
- 1.13 **"Qualifying Workers"** means key management as well as operations and maintenance Workers who qualify to participate in the M&O Incentive Scheme. For the avoidance of doubt it is clarified that all employees of the Target Firm will participate in the M&O Incentive Scheme with appropriate Performance Criteria taking into account the role and responsibilities of employees. For the purposes of the M&O Incentive Scheme, this also includes workers who are contracted to provide, or who are employed by firms that are contracted to provide, management and operational services to the Merged Entity for longer than a calendar year. For the avoidance of doubt, contract workers who, and the employees of *ad hoc* service providers that, are contracted to provide services to the Merged Entity for less than a calendar year are excluded for this purpose;
- 1.14 **"Target Firm"** means New Horizons Waste to Energy (RF) (Pty) Ltd;
- 1.15 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and
- 1.16 **"Workers"** means "workers" as understood under the Competition Act read with clause 1.13 above.

## 2 SPREAD OF HDP OWNERSHIP CONDITION

- 2.1 The Merging Parties undertake to, by no later than the first anniversary of the Implementation Date, ensure that no less than ■% of the Acquiring Firm's shareholding is held by HDPs. The Merging Parties also undertake to give such prospective HDP shareholders the option to increase their shareholding in the Acquiring Firm up to ■%.
- 2.2 This option will be available to prospective HDP shareholders on a fair market value basis, determined as at the time that such option will be exercised, on the same pricing and general terms and conditions that would be applicable to all other existing and future shareholders in the Acquiring Firm. This option will be available for a period of 24 months from Implementation Date of the Merger.
- 2.3 For the avoidance of doubt, the HDP shareholder(s) described above will be able to appoint a

director to the Acquiring Firm's board.

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**3 WORKER PARTICIPATION INCENTIVE SCHEME**

- 3.1 The Merging Parties intend to create the M&O Incentive Scheme to allow all Workers to participate in the Merged Entity so that it may perform and create value and, once operational, to be sustainable in the long run.
- 3.2 The Merging Parties undertake, by the first anniversary of the Implementation Date, to implement such M&O Incentive Scheme in terms of which scheme benefits will be made available to Qualifying Workers based on the Merged Entity's performance in line with the Performance Criteria. The Performance Criteria and the M&O Incentive Scheme will operate on the following principles:
- 3.2.1 The performance incentives in the Performance Criteria will operate on a non-discriminatory basis to the benefit of all Qualifying Workers which, for the sake of clarity, includes Workers occupying non-managerial positions.
- 3.2.2 Qualifying Workers will receive benefits under the scheme calculated on the basis of their duration of service at the Merged Entity. The Merged Entity will ensure that this principle is included in the relevant contracts in terms of which service providers provide management and operational services to the Merged Entity.
- 3.2.3 The benefits flowing from the M&O incentive scheme will be equity-like in nature and will be linked to the Merged Entity's financial performance. Such benefits will take the form of shares, share options or another structure that would provide equivalent financial benefits.
- 3.2.4 The Qualifying Workers will receive such benefits on an annual basis.
- 3.2.5 There will be no costs attributable to Qualifying Workers to in order to benefit from the M&O Incentive Scheme.
- 3.2.6 Insofar as the benefits take the form of vested shares, provision will be made for the repurchase of any shares at fair market value when the Qualifying Workers cease providing services to the Merged Entity.

**4 MONITORING COMPLIANCE WITH THE CONDITIONS**

- 4.1 The Acquiring Firm will notify the Commission of the Implementation Date of the Merger within 5 (five) business days of its occurrence.
- 4.2 The Acquiring Firm will, within 30 days of the first anniversary of the Implementation Date, provide

the Commission with a compliance report. The compliance report will include the following details

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4.2.1 Indication of the total percentage of shares in the Acquiring Firm held by HDPs and the identity of the shareholder(s);

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4.2.2 Of the option afforded to prospective HDP shareholders as contemplated in 2.1 above;

4.2.3 A description of the M&O Incentive Scheme Performance Criteria;

4.2.4 Particulars of the Qualifying Workers who have benefitted, or who are anticipated to benefit, from the M&O Incentive Scheme; and

4.2.5 Indication of the total value of the benefits in the Merged Entity made available to Qualifying Workers in terms of the M&O Incentive Scheme.

4.3 At the expiry of the 24-month option period, the Acquiring Firm will inform the Commission of the outcome of the option and the additional shareholding, if any, that the HDP(s) took up in consequence of the option.

## 5 **APPARENT BREACH**

5.1 Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determine that there has been an apparent breach by the Parties of these Conditions, the breach shall be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

## 6 **GENERAL**

6.1 All correspondence in relation to these conditions must be submitted to the following email addresses: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).

## 7 **VARIATION OF THE CONDITION**

7.1 The Merged Entity may at any time, on good cause shown, including changes in economic conditions, apply to the Tribunal for the Conditions to be lifted, revised or amended.