

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 06/CR/MAR10

In the matter between:

The Competition Commission

Applicant

and

Southern African Bitumen Association

Respondent

In re:

Chevron SA (Pty) Ltd

First Respondent

Engen Limited

Second Respondent

Shell SA (Pty) Ltd

Third Respondent

Total SA (Pty) Ltd

Fourth Respondent

Masana Petroleum Solutions (Pty) Ltd

Fifth Respondent

Southern African Bitumen Association

Sixth Respondent

SASOL Limited

Seventh Respondent

Tosas (Pty) Ltd

Eighth Respondent

Panel : N Manoim (Presiding Member), A Wessels (Tribunal Member) and Y Carrim (Tribunal Member)

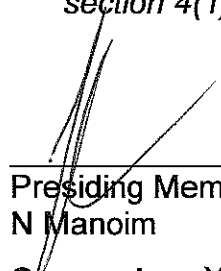
Heard on : 16 August 2011

Decided on : 17 August 2011

ORDER

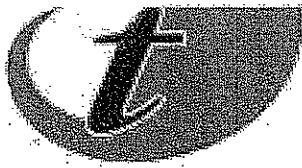
The Tribunal hereby confirms as an order the agreement between the Competition Commission and the respondent (the 'parties'), annexed hereto marked "A", subject to the deletion, as agreed by the parties, of the portion in paragraph 4.1 of the consent agreement, which reads as follows:

"SABITA abides the decision of the Tribunal as to whether the conduct alleged in the complaint referral in fact constitutes a contravention of section 4(1)(b)(i)."



Presiding Member
N Manojm

Concurring: Y Carrim and A Wessels



competitiontribunal south africa

Form CT 6

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

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

Notice of Motion

CT CASE NO. 06/CE/MAR 1
Date: 20/04/2011 File # CC CASE NO. 2009 JAM 42

To: The registrar of the Competition Tribunal

Concerning the matter between:

THE COMPETITION COMMISSION (Applicant)
and
SOUTHERN AFRICAN BETTING ASSOCIATION (Respondent)

Take notice that the APPLICANT intends to apply to the Tribunal for the following order:

CONFIRMATION OF THE SETTLEMENT AGREEMENT IN TERMS OF SECTION 58(1)(a)(iii) OF THE COMPETITION ACT, 1998 ("THE ACT") BETWEEN THE COMPETITION COMMISSION AND THE SOUTHERN AFRICAN BETTING ASSOCIATION, IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE ACT.

Name and Title of person authorised to sign:

Mervin Dorasamy

Authorised Signature:

Date:

[Signature]

20/7/2011

For Office
Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No. 06/CR/Mar10
CC Case No. 2009Jan4223

In the matter between

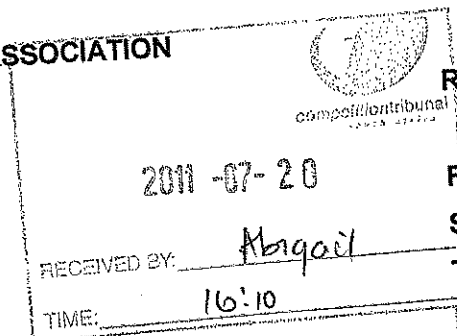
COMPETITION COMMISSION

Applicant

and
SOUTHERN AFRICAN BITUMEN ASSOCIATION

In re

CHEVRON SA (Pty) LTD
ENGEN LIMITED
SHELL SA (PTY) LTD
TOTAL SA (PTY) LTD
MASANA PETROLEUM SOLUTIONS (Pty) LTD
SOUTHERN AFRICAN BITUMEN ASSOCIATION
SASOL LIMITED
TOSAS (PTY) LTD



Respondent

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

SETTLEMENT AGREEMENT

BETWEEN THE COMPETITION COMMISSION AND SOUTHERN AFRICAN BITUMEN
ASSOCIATION IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i)
OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The Commission and SABITA hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 58 (1)(a)(iii) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below.

1. Definitions

For the purposes of this *Settlement Agreement* the following definitions shall apply:

- 1.1 **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 **"Bitumen"** means a residual fraction of crude oil, a mixture of organic components that are highly viscous, black and sticky.
- 1.3 **"Chevron"** means CHEVRON SA (PTY) LTD a company duly incorporated with limited liability in terms of the company laws of the Republic of South Africa, with its principal place of business at 19 DF Malan Street Cape Town
- 1.4 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.5 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.6 **"Complaint"** means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Jan4223
- 1.7 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and SABITA;
- 1.8 **"CLP"** means the Corporate Leniency Policy prepared and issued by the Commission as a guideline, to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Act;
- 1.9 **"Engen"** means ENGEN LIMITED ("Engen"), a company duly incorporated and

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registered in terms of the company laws of the Republic of South Africa with its principal place of business at Engen Court, Thibault Square, corner of Riebeeck and Long Streets, Cape Town.

- 1.10 **"Masana"** means Masana Petroleum Solutions (Pty) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its principal place of business at 10 Junction Avenue, Parktown, Johannesburg.
- 1.11 **"Parties"** means the Commission and SABITA;
- 1.12 **"SABITA"** means SOUTHERN AFRICAN BITUMEN ASSOCIATION ("SABITA") a voluntary non-profit association with its principal place of business at 5 Lonsdale, Lonsdale Way, Pinelands, Cape Town.
- 1.13 **"Sasol"** means SASOL LIMITED ("Sasol"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1 Sturdee Avenue, Rosebank, Johannesburg
- 1.14 **"Shell"** means SHELL SA (PTY) LTD ("Shell") a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Shell House, 9 Riebeeck Street cape Town.
- 1.15 **"Tosas"** means TOSAS (PTY) LTD ("Tosas"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 12 Commercial Road, Wadeville, Johannesburg. The eighth respondent is a wholly owned subsidiary of the seventh respondent. Prior to April 2005, the eighth respondent was a joint venture between Sasol and Total in terms of which Sasol owned 70% of the issued share capital and Total owned 30%.
- 1.16 **"Total"** means TOTAL SA (PTY) LTD ("Total"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Total House, 3 Biermann Avenue, Rosebank,

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Johannesburg.

- 1.17 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Complaint and Complaint Investigation

- 2.1 On 10 September 2008, Sasol together with its subsidiaries, including Tosas, applied for and subsequently obtained conditional immunity in terms of paragraph 12 of the applicant's CLP, in respect of their participation in the development of, and agreement to adopt, a pricing mechanism in respect of the sale of base bitumen and bituminous products.
- 2.2 In its application for leniency Sasol alleged that it, together with *Chevron, Engen, Shell, Total, Masana* and *Tosas* being parties in a horizontal relationship, had contravened section 4(1)(b)(i) of the Act by engaging in price fixing by agreeing to a mechanism to calculate the WLSP (Wholesale List Selling Price), and to the development and implementation of the BPAF (Bitumen Price Adjustment Factor) in relation to the sale of base bitumen and bituminous products.
- 2.3 On 12 January 2009, and pursuant to Sasol's leniency application, the applicant initiated a complaint in terms of section 49(B) (1) of the Act against the respondents. The applicant conducted an investigation into the relevant facts disclosed by Sasol and concluded that *Chevron, Engen, Shell, Total, Masana, Sasol* and *Tosas* had indeed engaged in restrictive horizontal practices, in contravention of section 4(1)(b)(i) of the Act.
- 2.4 The Commission's investigation revealed that:
- 2.4.1 In and during the period commencing from September 2000 to December 2009, and possibly thereafter, *Chevron, Engen, Shell, Total, Masana, Sasol* and *Tosas*, being parties in a horizontal relationship, acting through



their representatives, entered into various agreements, and engaged in conduct that involved concerted practices and/or took decisions that were intended to directly and indirectly fix the purchase or selling price of bitumen and bituminous products in the Republic in contravention of section 4(1)(b)(i) of the Act.

- 2.4.2 Chevron, Engen, Shell, Total, Sasol and Tosas are producers and / or suppliers of bitumen, and compete with one another in the production and / or sale of bitumen and bituminous products in the Republic. Chevron, Engen, Shell, Total, and Sasol are also members of SABITA, a non profit organisation that represents *inter alia* producers of and applicators of bituminous products.
- 2.4.3 The respondents, operating through SABITA, as well as through other forms of communications, including bilateral communications between them, agreed to a proposed contractual formula for determining the fluctuations in the cost of base bitumen..
- 2.4.4 Historically, the petroleum and energy companies calculated the prices for bitumen with reference to an industry-wide retail price list for bitumen and bituminous products. This was calculated collectively by all petroleum companies and was referred to as the Wholesale List Selling Price ("WLSP").
- 2.4.5 The WLSP for bitumen was made up of the In Bond Landed Costs ("IBLC"), which essentially was an import parity based formula where various transport related costs were added to a Free on Board ("FOB") heavy fuel oil price at typical international refining centres. This base price was replaced finally by the Durban Bunker price. Added to the IBLC to arrive at the WLSP were the SABITA levy, the margin and the Road Equalisation Factor ("REF"), which was subsequently replaced by the Crude Oil Pipeline tariff.
- 2.4.6 Chevron, Engen, Shell, Total, Masana, Sasol and Tosas and other role

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players in the industry, in contravention of section 4 of the Act, discussed the establishment of a mechanism to set the WLSP of bitumen in relation to the Bitumen Pricing Index. The respondents adopted the BPAF as a basis for price escalations in their contracts with end consumers.

3. The Complaint Referral

3.1 *The Commission* referred the above complaint to the *Tribunal* on 4 March 2010.

3.2 Prior to the referral, *SABITA*, approached the *Commission* and indicated its willingness to settle the matter.

4. Statement of Conduct

4.1 *SABITA* admits that the discussions referred to above, alleged to be in contravention of section 4(1)(b)(i) occurred through its function as a trade association, which gave rise to the BPAF and to facilitating the publication and updating of the BPAF. *SABITA* abides the decision of the *Tribunal* as to whether the conduct alleged in the complaint referral in fact constitutes a contravention of section 4(1)(b)(i).

4.2 *SABITA* confirms that it ceased engaging in the conduct detailed in paragraph 4.1 above in July 2007 and that, to the best of its knowledge and belief, there have been no further contraventions of section 4 of the Act, which were and /or might have been engaged in or facilitated by *SABITA*.

5. Agreement concerning future conduct

5.1 *SABITA* agrees to:

5.1.1 Desist from any conduct which would allow it to be used as a platform for collusion enabling its members to engage in cartel conduct.

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5.1.2 Refrain from updating or publishing the BPAF.

5.1.3 Develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Competition Act. In particular, such compliance programme will include the following:

5.1.3.1 A competition policy to be drafted and implemented by SABITA;

5.1.3.2 provide specific training on competition law aspects particularly relevant to SABITA, to its 14 council members and 4 SABITA officers;

5.1.3.3 ensure that such training will be made available to all new employees joining SABITA. Furthermore, SABITA will update such training annually to ensure on an on going basis that it will not be used as a platform where its members can engage in any anticompetitive activities

5.1.4 To submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the *Settlement Agreement* as an order by the Competition Tribunal;

5.1.5 To circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed at SABITA within 30 days from the date of confirmation of this Settlement Agreement by the Tribunal;

6. Administrative Penalty

6.1 Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, SABITA accepts that it is liable to pay an

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administrative penalty.

The parties have agreed that SABITA will pay an administrative penalty in the amount of R500 000 (Five hundred thousand rand);

6.2 This amount does not exceed 10% of SABITA's total annual income derived from membership fees and sponsorships.

6.3 SABITA will pay the amount set out in paragraph 6.1 above to the Commission as follows:

6.3.1 R100 000 within 10 days of confirmation of this Settlement Agreement by the Tribunal;

6.3.2 R 200 000 on or before 31 December 2011;

6.3.3 R 200 000 on or before 30 June 2012.

6.4 The penalty must be paid into the Commission's bank account which is as follows:

NAME: THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER: 4050778576

BRANCH CODE: 323 345

6.5 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

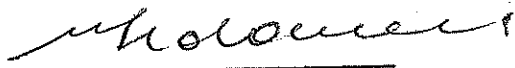
7. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and SABITA relating to any alleged contravention by the respondents of the Act that is the subject of the Commission's investigation referred to the Tribunal under CT Case No. 06/CR/Mar10

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Dated and signed at Cape Town on the 14th day of July 2011

For SABITA



Chief Executive Officer

Dated and signed at Pretoria on the 18 day of July 2011

For the Commission



Competition Commissioner



Tebogo Mputle

From: Tebogo Mputle
Sent: Wednesday, August 17, 2011 11:04 AM
To: 'vani@vanichetty.co.za'; Mervin Dorasamy; Wendy Mkwanazi; 'lam@deneysreitz.co.za'; 'rraath@werksmans.com'; 'chris.charter@dlacdh.com'; 'andrew.cadman@rhp.co.za'; 'Anthony@nortonsinc.com'; 'mgarden@ens.co.za'
Cc: Lerato Motaung; Alicia Hlafane
Subject: The Competition Commission and SA Bitumen Association - 06/CR/Mar10
Attachments: 20110817105033322.tif

Dear All

Please see attached consent order and kindly confirm receipt.

Kind Regards

Tebogo Mputle
Registry Administrator
competition tribunal south africa
Tel No: +27 (12) 394 3354
Fax No: +27 (12) 394 4354
Mobile: +27 (82) 557 6897
Email: tebogom@comptrib.co.za
Website: www.comptrib.co.za