

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 015891

In the matter between:

The Competition Commission

Applicant

and

Astral Operations Limited

Respondent

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

Heard on : 01 October 2013

Final draft submitted on : 05 November 2013

Decided on : 12 November 2013

Order

The Tribunal hereby confirms as an order in terms of section 58(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998) the settlement agreement reached between the Competition Commission and the Respondent, annexed hereto marked "A".



Presiding Member
N Manoim

Concurring: Y Carrim and A Wessels

^a ANNEXURE A⁴

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT CASE NO.: 74/CR/JUN08

In the matter between:

THE COMPETITION COMMISSION

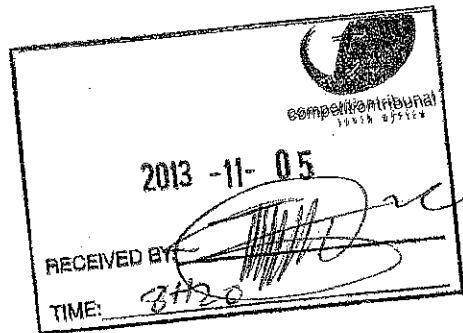
Applicant

and

ASTRAL OPERATIONS LIMITED

First Respondent

IN RE: CC CASE NUMBERS



2009APR4389

2009APR4390

2009APR4391

2011Jan5575

In re: CT CASE NO.:

74/CR/JUN08

THE COMPETITION COMMISSION

Applicant

And

ASTRAL OPERATIONS LIMITED

First Respondent

ELITE BREEDING FARMS

Second Respondent

CONSENT AND SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
ASTRAL OPERATIONS LIMITED IN REGARD TO CONTRAVENTIONS OF SECTIONS 4(1)(b)(i) and
8(c) OF THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED)

9 1/18

The Competition Commission and Astral Operations Limited hereby agree that application be made to the Competition Tribunal for confirmation of this Settlement and Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58(1) (b) and 59(1)(a) of the Competition Act, No. 89 of 1998, as amended, on the terms set out below:

1. Definitions

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

- 1.1. **"the Act"** means the Competition Act, No. 89 of 1998 (as amended);
- 1.2. **"AFMA"** means the Animal Feed Manufacturing Association;
- 1.3. **"Agreement"** means this settlement and consent agreement duly signed and concluded between the *Commission* and *Astral*;
- 1.4. **"Astral"** means Astral Operations Limited, a public company duly incorporated in accordance with the company laws of the Republic of South Africa, with its registered office at 92 Koranna Avenue, Doringkloof, Centurion, 0157, together with its subsidiaries and associated companies;
- 1.5. **"Breeding Stock and Broiler Complaint"** means the complaint initiated by the *Commissioner* on 14 April 2009 against SAPA and all past and present members of SAPA involved in the breeding stock market and the broiler production market under case number 2009Apr4389 for alleged contravention of sections 4(1)(a); 4(1)(b)(ii); 8(d)(i) and (iii) alternatively 8(c) and/or 5(1) of the Act;
- 1.6. **"CLP"** means the Commission's Corporate Leniency Policy, as published in Government Notice 628 of 2008;
- 1.7. **"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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;
- 1.8. **"Country Bird"** means Country Bird (Proprietary) Limited;
- 1.9. **"County Fair"** means County Fair, a division of Astral;
- 1.10. **"Commissioner"** means the Commissioner of the Competition Commission appointed in terms of section of 22 of the Act;

- 1.11. "Days" unless otherwise stated, means business days;
- 1.12. "Elite" means Elite Breeding Farms, which was, at the time of the *Elite Referral*, a joint venture arrangement between *Astral* and *Country Bird* with its registered address or place of business at Mount West Farm, Nottingham Road, KwaZulu Natal;
- 1.13. "Elite Complaint" means the complaint lodged on 20 February 2007 by *Country Bird* and Supreme against *Astral* and *Elite* under case number 2007Feb2788 and referred to the *Tribunal* on 30 June 2008 under case number 74/CR/JUN08 for alleged contravention of section 4(1)(b)(i) and (ii), and section 8(c), alternatively 8(d)(i) of the Act;
- 1.14. "Poultry Products Complaint" means the complaint initiated by the *Commissioner* on 14 April 2009, pursuant to the *Commission's* study on the South African Poultry Sector, under case number 2009Apr4391, against SAPA and all past and present members of SAPA for alleged contravention of section 4(1)(a), 4(1)(b)(i) and 4(1)(b)(ii) of the Act;
- 1.15. "Infringing Conduct" means conduct admitted by *Astral* to be in contravention of section 8(c) of the Act as described in clause 3.2 hereof, as well as conduct admitted by *Astral* to be in contravention of section 4(1)(b)(i) of the Act as described hereunder in clause 4.2 hereof (and the sub-clauses thereof) of this Agreement;
- 1.16. "Parties" means the *Commission* and *Astral*;
- 1.17. "SAPA" means the South African Poultry Association;
- 1.18. "Suite of Complaints" means, collectively, the *Elite Complaint*, the *Poultry Products Complaint* and the *Breeding Stock and Broiler Complaint*;
- 1.19. "Supreme" means Supreme Poultry (Proprietary) Limited;
- 1.20. "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.

2. Background to the Settlement and Consent Agreement

This Agreement fully and finally settles and concludes each of the complaints comprising the *Suite of Complaints* against *Astral*. The basis upon which each such complaint has been settled is detailed below.

3. The Elite Complaint (Case No.74/CR/JUN08)

3.1. Background

- 3.1.1. The *Elite Complaint* was initiated on 20 February 2007 against *Astral* and *Elite*. *Astral* and *Elite* were alleged to have contravened –

- 3.1.1.1. section 4(1)(b)(i) and (ii) in that the Elite joint venture agreement and the restrictions that flow from it as well as enforcement thereof had the effect of fixing trading conditions; and
- 3.1.1.2. section 8(c), alternatively section 8(d)(i) of the Act, in that the Elite joint venture agreement imposed a restriction that *Country Bird* should source 90% of its parent stock from *Elite* which effectively meant that *Country Bird* could not deal with other suppliers of parent stock that compete with *Elite*.
- 3.1.2. At the time of the *Elite Complaint*, *Elite* was a joint venture between *Astral* and *Country Bird*. It was created for the purpose of and involved in the supply of parent breeding stock to the joint venture partners (i.e. *Astral* and *Country Bird*).
- 3.1.3. Upon completion of its investigation, the Commission referred the following findings to the *Tribunal* for determination –
 - 3.1.3.1. *Astral*, being a dominant firm within the meaning of section 7 of the Act, engaged in exclusionary conduct in contravention of section 8(c) and/or 8(d)(i) of the Act by engaging in, *inter alia*, the following conduct –
 - 3.1.3.1.1. *Country Bird* was restricted to source 90% of its parent stock requirements from *Elite*, which prevented *Country Bird* from dealing with other suppliers of parent stock;
 - 3.1.3.1.2. the joint venture arrangements prevented *Country Bird* from entering the upstream breeder level; and
 - 3.1.3.1.3. *Elite* was forced to procure its feed requirements from Meadow Feeds, which foreclosed other competing suppliers of feed from supplying feed to *Elite*.
 - 3.1.3.2. *Astral* required one of its customers, MPC Chickens (Proprietary) Limited, to not supply day old chicks to *Supreme*;
 - 3.1.3.3. *Astral* and *Country Bird* are in a horizontal relationship and the real purpose of *Elite* was to avoid competition between *Astral* and *Country Bird*.



3.2. *Admission*

Astral admits that it entered into an agreement with *Country Bird* in relation to the purchase of parent stock which was in contravention of section 8(c) of the *Act* in that, for so long as *Country Bird* was a party to the *Elite* joint venture, it was impeded and/or prevented from expanding within the broiler market through the introduction of an alternative parent stock breed.

3.3. *Agreement Concerning Future Conduct*

3.3.1. *Astral* confirms that with effect from 28 November 2008, *Elite* became a wholly owned subsidiary of *Astral*, pursuant to the acquisition by *Astral* of the entire interest in *Elite* then held by *Country Bird* and/or *Supreme* and *Country Bird*, which is no longer a participant in *Elite*, is no longer bound by the terms of the *Elite* joint venture agreement.

3.3.2. Pursuant to the said acquisition of *Country Bird*'s interest in *Elite*, all arrangements between *Elite* on the one hand and *Astral* and *Country Bird* on the other hand *qua* joint venture partners in *Elite* came to an end.

3.3.3. *Astral*, in any event, undertakes that it shall not engage in conduct which amounts to an abuse of dominance in contravention of section 8(c) of the *Act*.

3.4. *Finalisation of the Elite Complaint*

3.4.1. Save as aforesaid, in the context of the basket settlement arrangement reached between *Astral* and the *Commission*, the *Commission* does not persist in prosecuting *Astral* in regard to the matters set out in clause 3.1.3 hereof and the *Elite Complaint* is fully and finally settled as between the *Parties* on the basis of the admission in clause 3.2 hereof and the undertaking in clause 3.3 hereof.

3.4.2. No penalty is payable by *Astral* in regard to the *Elite Complaint*.

4. **The Poultry Products Complaint (Case No.2009Apr4391)**

4.1. *Background*

4.1.1. *The Poultry Products Complaint* comprises a complaint initiated by the *Commission* against SAPA and all past and present members of SAPA for alleged contravention of section 4(1)(a), 4(1)(b)(i) and/or 4(1)(b)(ii) of the *Act*.

- 4.1.2. During April 2010, as part of its investigation of the *Poultry Products Complaint*, the *Commission* received a leniency application from Pioneer on behalf of its Agri division, Tydstroom Poultry ("**Tydstroom**") in respect of fresh poultry products. The alleged conduct is said to have taken place in the Western Cape (the "**Western Cape Fresh Poultry conduct**").
- 4.1.3. Following the receipt of a letter from the *Commission* regarding the Western Cape Fresh Poultry conduct (dated 16 August 2011), *Astral* immediately embarked upon its own independent internal investigation into the alleged conduct. According to *Astral*, the internal investigation revealed that representatives of *County Fair* attended a meeting at *Tydstroom* (the exact date of which could not be established, but was likely to have been between 2003 and 2007), which resulted in an agreement between *Tydstroom* and *County Fair* to co-operate with each other in attempting to raise pricing levels for fresh poultry in the Western Cape. The agreement included notifying each other of upcoming price increases and the timing of such increases. In addition, following this meeting, representatives of *County Fair* and *Tydstroom* telephoned one another in an endeavour to monitor compliance with the agreement.
- 4.1.4. *Astral* submitted its findings to the *Commission* on 26 January 2012 and immediately commenced with settlement negotiations with the *Commission*.
- 4.1.5. Following the *Commission's* investigation, the leniency application and the receipt of *Astral's* submissions from its internal investigation, the *Commission* concluded that *County Fair* had contravened section 4(1)(b)(i) of the *Act*.

4.2. *Admission*

Astral admits that it entered into an agreement with a competitor to fix prices of fresh poultry in the Western Cape for the period between 2003 to up 2007 in contravention of section 4(1)(b)(i) of the *Act* in that –

- 4.2.1. representatives of *County Fair* attended a meeting at *Tydstroom's* premises (the date of which is unknown), which resulted in an agreement between *Tydstroom* and *County Fair* to co-operate with each other in attempting to raise pricing levels for fresh poultry in the Western Cape. The agreement included notifying each other of upcoming price increases and the timing of such increases; and

- 4.2.2. following this meeting, representatives of *County Fair* and *Tydstroom* telephoned one another in an endeavour to monitor compliance with the agreement.
- 4.3. *Agreement Concerning Future Conduct*
- 4.3.1. *Astral* confirms that the conduct referred in clause 4.2 ceased in or around 2007 (although the exact date on which such conduct ceased could not be determined).
- 4.3.2. *Astral* undertakes not to engage in conduct which amounts to directly or indirectly fixing a purchase or selling price or trading condition in contravention of section 4(1)(b)(i) of the *Act*.
- 4.4. *Administrative Penalty*
- 4.4.1. *Astral* accepts that it is liable to pay an administrative penalty in terms of section 58(1)(a)(iii) and section 59(1)(a) of the *Act* for its contravention of section 4(1)(b)(i) of the *Act* in relation to the Poultry Products Complaint. In this regard, in the context of the basket settlement reached between *Astral* and the *Commission* in terms of this *Agreement Astral* -
- 4.4.1.1. will pay an administrative penalty in the sum of **R16 732 894.47** (sixteen million seven hundred and thirty two thousand eighty hundred and ninety-four rands forty-seven cents), being 3% of *County Fair's* fresh poultry turnover in the Western Cape for the 2008 financial year;
- 4.4.1.2. will pay the penalty amount to the *Commission* in two equal payments, the first such payment of R8 366 447.23 (eight million three hundred and sixty-six thousand four hundred and forty-seven rands and twenty-three cents) to be made within seven (7) days of confirmation of this *Agreement* as an Order of the *Tribunal*;
- 4.4.1.3. will make the second and final payment of R8 366 447.23 (eight million three hundred and sixty-six thousand four hundred and forty-seven rands and twenty-three cents) within six (6) months after the confirmation of the *Agreement* as an Order of the *Tribunal*.

4.4.1.4. will pay the administrative penalty into the following bank account of the Commission:

NAME:	THE COMPETITION COMMISSION FEE ACCOUNT
BANK:	ABSA BANK, PRETORIA
ACCOUNT NUMBER:	4050778576
BRANCH CODE:	323 345

4.4.2. The *Commission* will pay these sums to the National Revenue Fund in terms of section 59 (4) of the *Act*.

4.5. *Finalisation of the Poultry Products Complaint*

Save as aforesaid, in the context of the basket settlement arrangement reached between *Astral* and the *Commission*, the *Commission* does not persist in prosecuting *Astral* in regard to the matters investigated in terms of the *Poultry Products Complaint* and the *Poultry Products Complaint* is fully and finally settled as between the *Parties* on the basis of the admission in clause 4.2 hereof, the undertaking in clause 4.3 hereof and the administrative penalty in clause 4.4 hereof.

5. **The Breeding Stock and Broiler Complaint (Case No. 2009Apr4389)**

5.1. *Background*

- 5.1.1. The *Breeding Stock and Broiler Complaint*, was a complaint against *SAPA* and all past and present members of *SAPA* (which includes *Astral*) in terms of which the members of *SAPA* were alleged to have allocated markets; and/or to have entered into exclusive supply agreements; tying and sharing information through their membership in *SAPA* in contravention of section 4(1)(b)(ii), 5(1) and section 8((d)(iii) alternatively 8(c) of the *Act*.
- 5.1.2. The *Commission* focused its investigation on the largest players which are all vertically integrated up to the feed level, namely; Rainbow Chickens Limited ("*Rainbow*"); *Astral*, Pioneer Foods (Proprietary) Limited ("*Pioneer*") and *Country Bird*.
- 5.1.3. The *Commission's* investigation encompassed market allocation specifically against *Pioneer* and *Rainbow*; exclusive supply agreements against all broiler producers (including *Astral*); tying allegations against certain breeding stock suppliers and information exchange against all of the respondents through their membership in *SAPA*.

5.1.4. Subsequent to the investigation, the *Commission* took a decision not to refer the tying and the exclusive supply agreement allegations. Thus, the *Commission's* investigation focused on the market/customer allocation and information exchange allegations.

5.1.5. At the conclusion of the aforementioned investigation, the *Commission* also took a decision not to refer the information exchange allegations for adjudication, subject to undertakings by the respondents (including *Astral*) regarding future information exchanges through *SAPA*.

5.2. *Agreement Concerning Future Conduct*

On this basis, *Astral* agrees and undertakes, when submitting data (pricing, volumes including breeding stock levels, broiler placements, numbers of chickens slaughtered and costs) to *SAPA*, that the data submitted will be in the following format:

5.2.1. in the current broad categories (i.e. total number of chicks sold for a calendar month, total broiler chick placements, Historical monthly broiler price statistics etc.);

5.2.2. the broiler price data should be aggregated nationally across all product categories and pack sizes;

5.2.3. on a monthly basis to the third party statisticians.

5.3. *Finalisation of the Breeding Stock and Broiler Complaint*

In the context of the basket settlement and the undertaking by *Astral*, the *Commission* does not persist in prosecuting *Astral* in regard to the matters investigated in terms of the *Breeding Stock and Broiler Complaint* and the *Breeding Stock and Broiler Complaint* is fully and finally settled as between the *Parties* on the basis of the undertaking in clause 5.2 hereof.

6. **General agreement concerning future conduct**

6.1. *Astral* undertakes to co-operate with the *Commission* in any ongoing investigations in respect of each of the matters constituting the *Suite of Complaints* and in respect of any subsequent prosecution of the other respondents to any such investigations.

6.2. Such co-operation includes, without limitation –

6.2.1. the provision of all and any documents (or categories of documents) which are in possession of or under the control of *Astral* and which the *Commission* considers to be relevant to the *Commission's* ongoing

investigation and/or prosecution of any one or more of the matters comprising the *Suite of Complaints*;

6.2.2. the making available to the *Commission* of all and any witnesses as the *Commission* may identify to testify to conduct forming part of the conduct under the investigation in any one or more of the matters comprising the *Suite of Complaints* in proceedings before the *Tribunal* (to the extent that such witnesses are in *Astral's* employ). Where witnesses are no longer in *Astral's* employ, but previously were in its employ, *Astral* undertakes to use its best endeavours to procure the co-operation of such witnesses with the *Commission* in the manner aforesaid.

6.3. *Astral* confirms that it implemented a competition law training programme in 2008, which has been ongoing since then. It does, however, undertake to develop and implement a further competition law group compliance programme, with corporate governance so as to supplement its existing competition law compliance regime, designed to ensure that all its relevant employees are aware of the provisions of the *Act* and do not contravene them; and to submit a copy of the aforesaid compliance programme to the *Commission* within 60 days of the date of confirmation of this *Settlement and Consent Agreement* as an order of the *Tribunal*.

7. Full and final settlement

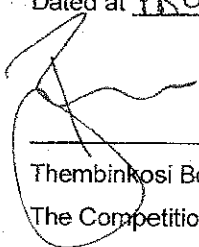
7.1. This *Settlement and Consent Agreement*, upon confirmation as an order by the *Tribunal*, is entered into in full and final settlement and concludes all proceedings and investigations between the *Commission* and *Astral* relating to the conduct that is the subject of the *Commission's* investigations under each of the matters comprising the *Suite of Complaints*.

7.2. Save for where it has been specifically expressed above, *Astral* makes no admissions in relation to the balance of the issues referred to in this *Settlement and Consent Agreement*.

Dated at CENTURION on this the 29th day of OCTOBER, 2013


Mr. Chris Schutte
Chief Executive Officer, Astral Operations Ltd

Dated at PRETORIA on this the 1st day of NOVEMBER 2013



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The Competition Commissioner: The Competition Commission