

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 019778

In the matter between:

The Competition Commission

Applicant

and

Saldanha Foods (Pty) Ltd

Respondent

Panel : N Manoim (Presiding Member)
A Ndoni (Tribunal Member)
I Valodia (Tribunal Member)

Heard on : 05 November 2014

Decided on : 05 November 2014

Order

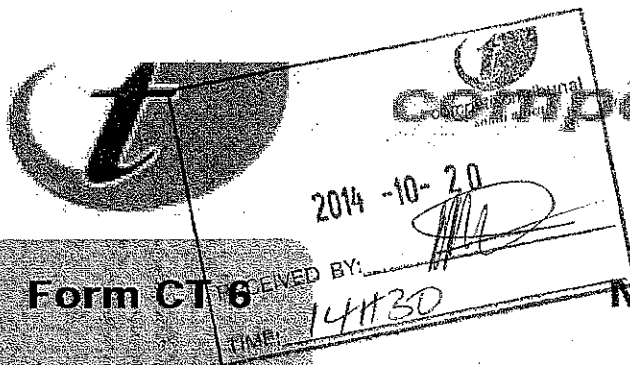
The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
Mr N Manoim

Concurring: Ms A Ndoni and Prof I Valodia

019778 "A"



competitiontribunal south africa

Form CT 6

Notice of Motion

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

Date: 20-Oct-2014

File # CC:2008JUL3827; CT

To: The registrar of the Competition Tribunal

Concerning the matter between:

The Competition Commission (Applicant)

and Saldanha Foods (Pty) Ltd (Respondent)

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

Confirmation of the attached settlement agreement concluded between the Applicant and the Respondent as an Order of the Competition Tribunal in terms of Section 27(1)(d) as read with Section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended.

Name and Title of person authorised to sign:

Bukhosibakhe Majenge - Acting Chief Legal Counsel

Authorised Signature:

Date:

20/10/2014

For Office
Use Only:

Tribunal file number:

Date filed:

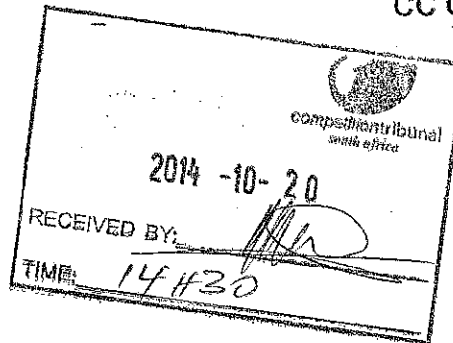
IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: 018697

CC Case No.: 2008JUL3827

In the matter between:

COMPETITION COMMISSION



Applicant

and

SALDANHA FOODS (PROPRIETARY) LTD

Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION
SALDANHA FOODS (PROPRIETARY) LTD IN RESPECT OF AN ALLEGED
CONTRAVENTION OF SECTIONS 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT
NO. 89 OF 1998), AS AMENDED

The Competition Commission ("**Commission**") and Saldanha Foods (Proprietary) Limited ("**Saldanha Foods**") hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for confirmation of this Agreement as an order of the Tribunal in terms of section 27(1)(d) as read with 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 Consent Agreement the following definitions shall apply:

- 1.1 **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 **"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;
- 1.3 **"Commissioner"** means the Commissioner of the Commission, appointed in terms of section 22 of the Act;
- 1.4 **"Complaint"** means the complaint initiated by the Commissioner in terms of section 49B of the Act under case number 2008Jul3827 (as extended);
- 1.5 **"Oceana"** means Oceana Group Limited and its wholly owned subsidiary, Oceana Brands;
- 1.6 **"Oceana Brands"** means Oceana Brands Limited, a wholly owned subsidiary of Oceana, a company duly incorporated and registered in terms of the company laws of South Africa, with its principal place of business at 7th Floor, Oceana House, 25 Jan Smuts Street Foreshore, Cape Town 8001;
- 1.7 **"Parties"** means the Commission and Saldanha Foods;
- 1.8 **"Respondents"** means the firms against whom an investigation was initiated, being Oceana, Foodcorp (Pty) Ltd (**"Foodcorp"**), Premier Fishing SA (Pty) Ltd (**"Premier Fishing"**), Gansbaai Marine (Pty) Ltd (**"Gansbaai Marine"**), the South African Pelagic Fish Processors Association (**"SAPFPA"**) and the South African Pelagic Fishing Industry Association (**"SAPFIA"**), Pioneer Fishing (Pty) Ltd (**"Pioneer Fishing"**), Saldanha Bay Canning Co (Pty) Ltd (**"SBCC"**), Saldanha Foods, West Point Processors (Pty) Ltd (**"West Point Processors"**), West Point Fishing Corporation (Pty) Ltd (**"WPFC"**), SA Vismeelbemarkings Maatskappy (Pty) Ltd (**"SAVM"**), South African Deep Sea Trawling Association and Sea Harvest Corporation (Pty) Ltd (**"Sea Harvest"**);
- 1.9 **"Saldanha Foods"** means Saldanha Foods (Proprietary) Limited, a company duly registered in accordance with the laws of the Republic of South Africa, with its principal place of business at Block B Granger Bay Court, Victoria Alfred

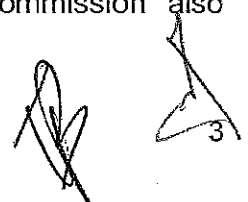


Waterfront, Cape Town. Saldanha Foods is the holding company of SBCC and WPFC, being the entities which hold the pelagic fishing interests of the Saldanha Group;

- 1.10 **"SAPFPA"** means the South African Pelagic Fish Processors Association, an industry association for pelagic fish processors formed in the mid-1990's.
- 1.11 **"SAPFIA"** means the South African Palegic Fishing Industry Association.
- 1.12 **"SBCC"** means Saldanha Bay Canning Company (Proprietary) Limited, a private company incorporated in accordance with the laws of the Republic of South Africa, and is a wholly owned subsidiary of Saldanha Foods.
- 1.13 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and Saldanha Foods;
- 1.14 **"WPFC"** means West Point Fishing Corporation (Proprietary) Limited, a private company incorporated in accordance with the laws of the Republic of South Africa, and is a wholly owned subsidiary of Saldanha Foods;
- 1.15 **"West Point Processors"** means West Point Processors (Proprietary) Limited, a private company incorporated in accordance with the laws of the Republic of South Africa, and is 78% owned by Saldanha Foods and 22% owned by Paternoster Visserye.

2. The Complaint

- 2.1 On 08 July 2008 the Commissioner initiated an investigation against Oceana, Foodcorp, Premier Fishing, Gansbaai Marine, SAPFPA and SAPFIA in respect of allegations that the above mentioned entities engaged in price fixing and/or the fixing of trading conditions and/or market allocation in contravention of section 4(1)(b) of the Act in respect of pelagic fish. Pelagic fish comprises three species of fish namely anchovy, pilchards and red eye.
- 2.2 On 19 January 2010, the Commission extended the Complaint to include additional respondents, namely Pioneer Fishing, SBCC / WPFC, SAVM, SA Deep Sea Trawling Association and Sea Harvest. The Commission also



supplemented its complaint with allegations that the respondents had entered into exclusive supply agreements with trawlers for the supply of pelagic fish, in contravention of sections 5(1), 8(c) and 8(d)(i) of the Act as well as with an allegation of market allocation involving Oceana Group and Sea Harvest.

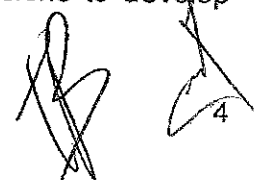
- 2.3 On 23 March 2012 the Commission further extended the Complaint to include additional respondents, namely Saldanha Foods, West Point Processors and WPFC.

3. The Commission's findings

At the conclusion of its investigation of the Complaint, the Commission found that:

3.1 Raw fish price formula

- 3.1.1 There has been a longstanding and open practice within the small pelagic fish industry for factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) to agree to an industry wide formula, linking the payment of boat owners, skippers and crew to an average annual fishmeal price achieved within the industry ("**the raw fish price formula**").
- 3.1.2 Oceana Brands, Foodcorp, Premier Fishing SA, Gansbaai Marine, Pioneer Fishing and West Point Processors were at the relevant times all active in the market for processing pelagic fish into canned fish and/or fish meal and are therefore in a horizontal relationship in terms of the Act.
- 3.1.3 Oceana Brands, Foodcorp, Premier Fishing, Pioneer Fishing and West Point Processors were at the relevant times vertically integrated and they also competed in the upstream market for catching pelagic fish.
- 3.1.4 The above firms are members of SAPFPA. During the mid 1990's to 2010 they, in meetings of SAPFPA and through correspondence distributed by SAPFPA to its members, took decisions to develop



and implement the historical raw fish price formula (as had been agreed with vessel owners / operators, skippers and crew) as payment for the service of catching raw pelagic fish as follows:

3.1.4.1 SAVM calculates the average fish meal price achieved during the preceding calendar year and circulates it annually to SAPFPA and its members.

3.1.4.2 The raw fish price is calculated by SAVM and comprises an amount equal to 11% of the average fish meal price achieved during a calendar year and the result of the calculation is provided to SAPFPA and communicated to its members and to the representative bodies for vessel owners, skippers and crew.

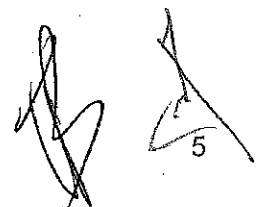
3.1.4.3 This 11% formula comprises the following basic elements:

3.1.4.3.1 4.8825% for basic payment to the skipper and crew of a vessel and;

3.1.4.3.2 6.1175% for payment to boat owners;

3.1.5 A premium was paid based on a sliding scale according to yield, known as the canning premium, based on the quality of pilchards to be canned. All the market participants used the 11% raw fish price formula in respect of payment for the service of catching pelagic fish during the period of 1999 to 2010 whether they attended the SAPFPA meetings or not.

3.1.6 In addition to the fixing of the raw fish price formula, the factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) also agreed to associated trading conditions, namely the so-called "voorskot" and "agterskot" payments. In effect these were agreements in respect of advance and catch up payments, which were also published by SAPFPA and that a canned fish bonus would be payable. This, however, differed from processor to processor.



3.1.7 In the course of the SAPFPA meetings and negotiations with the representative bodies of vessel owners, skippers and crew, competitively sensitive information was exchanged. This facilitated agreement in respect of the raw fish price formula and its implementation.

3.1.8 The above conduct amounts to a contravention of section 4(1)(b)(i) in that the Respondents agreed to fix the prices payable to vessel owners/ operators, skippers and crew for the services provided by each in the catching of pelagic fish. This was accomplished by continuing to implement the raw fish price formula as a basis for determining the amounts payable for the services rendered by the vessel owners/operators, skippers and crew.

4. Admissions by Saldanha Foods

4.1 Saldanha Foods admits it was party to the conduct described in 3 above and that its involvement therein contravened section 4(1)(b)(i) of the Act.

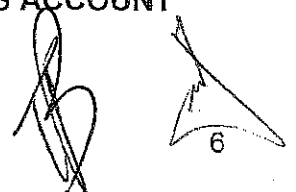
5. Administrative penalty

5.1 Saldanha Foods is liable for and has agreed to pay an administrative penalty in accordance with sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, in the amount of R4 063 750.00 which amounts to 2.5% of its 2013 group turnover with regards to pelagic fishing operations which include the catching, processing and marketing operations ("**the Administrative Penalty**").

5.2 Saldanha Foods will pay the Administrative Penalty in 6 equal monthly instalments. The first payment must be paid within 5 business days from the date of the confirmation of this Settlement Order as an order of the Tribunal.

5.3 This payment shall be made to the Commission's bank account, details of which are as follows:

BANK NAME: ABSA BANK
BRANCH NAME: PRETORIA
ACCOUNT HOLDER: COMPETITION COMMISSION FEES ACCOUNT
ACCOUNT NUMBER: 4050778576



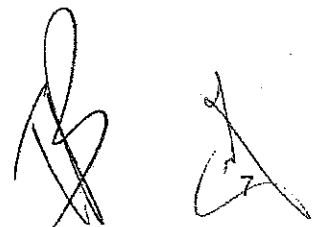
6

ACCOUNT TYPE: CURRENT ACCOUNT
BRANCH CODE: 323 345
REF: Saldanha2008Jul3827

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

6. Agreement concerning future conduct

- 6.1 Saldanha Foods agrees to fully cooperate with the Commission in relation to the prosecution of the Complaint as it has already been referred to the Tribunal under CT Case Number 018697. Without limiting the generality of the foregoing, Saldanha Foods specifically agrees, subject to the availability of evidence and witnesses, to:
- 6.1.1 testify in the complaint referral in respect of alleged contraventions covered by this Settlement Agreement; and
 - 6.1.2 provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Settlement Agreement; and
 - 6.1.3 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Settlement Agreement.
- 6.2 Saldanha Foods records that it has ceased its participation in the conduct as described herein and agrees that it will in future refrain from conduct that may give rise to a contravention of section 4(1)(b) of the Act.
- 6.3 For this purpose, Saldanha Foods shall develop and implement a comprehensive competition law compliance and training programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act.

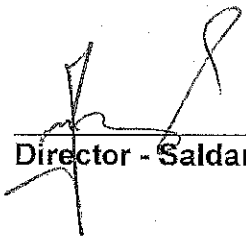
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- 6.4 Saldanha Foods will submit a copy of its compliance programme to the Commission within 30 (thirty) days of the date of confirmation of the Consent Agreement by the Tribunal.

7. Full and Final Settlement

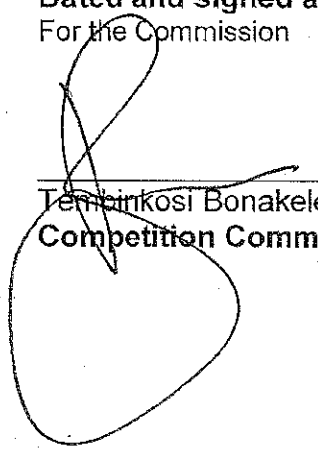
This Settlement Agreement, upon confirmation as an order by the Tribunal, is in full and final settlement, between the Commission and Saldanha Foods, of all proceedings investigated by the Commission under Commission case number 2008JUL3827 (as amended or extended), and being prosecuted under Tribunal Case Number 018697.

Dated and signed at CAPE TOWN on the 26th day of September 2014.
For Saldanha Foods



Director - Saldanha Foods (Proprietary) Limited

Dated and signed at PRETORIA on the 15 day of October 2014.
For the Commission



Tembinkosi Bonakele
Competition Commissioner