COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 06/CR/Mar10

In the matter between:

The Competition Commission — Applicant

and

Masana Petroleum Solutions (Pty) Ltd — Respondent

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

Heard on : 23 June 2010

Decided on : 23 June 2010

Order

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

N Manoim

Y Carrim and A Wessels concurring

"A"

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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

Date: 8-Jun-2010 **File #** Case No: 06/CR/Mar10

To: The registrar of the Competition Tribunal

Concerning the matter between:

THE COMPETITION COMMISSION (Applicant)

and MASANA PETROLEUM SOLUTIONS (PTY) LTD (Respondent)

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

Confirmation of the Consent Agreement entered into between the Competition Commission and the Respondent as a Consent Order in terms of Section 49D of the Competition Act, 1998 (as amended), read with Commission Rule 18 and Tribunal Rule 24

competitiontribunal
2010 -06- 08
RECEIVED BY: Abrgail
TIME: 10:15

Name and Title of person authorised to sign:

Wendy Mkwananzi: Chief Legal Counsel

Authorised Signature: **Date:**

08 June 2010

For Office Use Only: Tribunal file number: Date filed:

This form is prescribed by the Minister of Trade and Industry in terms of section 27 (2) of the Competition Act 1998 (Act No. 89 of 1998).

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south africa

Form CT1(1)

About this Form

This form is issued in terms of section 50 of the Competition Act and Rules.

This form is to be used only for a referral by the Competition Commission.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served with this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any other answer must be in affidavit form, setting out in numbered paragraphs:

(a) a concise statement of the grounds on which the complaint is opposed;

(b) the material facts or points on which the respondent relies;

(c) an admission or denial of each ground, and of each material fact relevant to each ground, set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Form continues on Page 2

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

Referral of Complaint by Commission

Date: 04 March 2010

To: the Registrar of the Competition Tribunal, and:

(Name of respondent and [if applicable] other participants :)
Chevron SA (Pty) Ltd, Engen Ltd, Shell SA (Pty) Ltd, Total SA (Pty) Ltd, Masana Petroleum Solution (Pty) Ltd, Southern African bitumen Association, Sasol Limited and Tosas (Pty) Ltd

Concerning:

(Complaint name and Commission file number:)
Competition Commission v Chevron & Others
CC 2009 jan 4223

From: the Competition Commission

The Competition Commission alleges that the Respondent contravened the provisions of the Competition Act, section 4(1)(b)(i) by engaging in the following prohibited conduct:

(Concise statement of the alleged prohibited practice:)
Price Fixing in contravention of section 4(1)(b)(i) of the Act as detailed in the affidavit of Khamisi William Kganare hereto annexed.

competitiontribunal
south africa
2010 -03- 04
RECEIVED BY: M Lotter
TIME: 14h00

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south africa

Form CT1(1)
Page 2

About this Form

This form is issued in terms of section 27(2) of the Competition Act.

This form is to be used only for a referral by the Competition Commission.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served with this referral.

If the answer raises only a point of law it must set out the question of law to be resolved. Any other answer must be in affidavit form, setting out in numbered paragraphs –
(a) a concise statement of the grounds on which the complaint is opposed;
(b) the material facts or points on which the respondent relies;
(c) an admission or denial of each ground, and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rule 14 through 19.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 012 3943300
fax: 27 012 3942166
e-mail: dsa@comptrib.co.za

Referral of Complaint by Commission

The Competition Commission seeks an order granting the following relief:

(Concise statement of the order or relief sought:)

See the attached Notice of Motion.

COMPETITION TRIBUNAL
2010 -06- 08
RECEIVED BY: Abigail
TIME: 10:15

☐ This referral is to proceed as a consent proceeding.

☑ This referral is to proceed as a contested proceeding. Attached is an affidavit setting out the grounds of this complaint, and a statement of the material facts and the points of law relevant to it, as required by Competition Tribunal Rule 15(2).

Name and Title of person authorised to sign on behalf of the Competition Commission:

Wendy Mkwananzi: Chief Legal Counsel

Authorised Signature:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

CT Case No: 06/CR/MAR10

CC Case No: 2009Jan4223

In the matter between:

COMPETITION COMMISSION	APPLICANT
And	
CHEVRON SA (PTY) LTD	FIRST RESPONDENT
ENGEN LIMITED	SECOND RESPONDENT
SHELL SA (PTY) LTD	THIRD RESPONDENT
TOTAL SA (PTY) LTD	FOURTH RESPONDENT
MASANA PETROLEUM SOLUTION (PTY LTD	FIFTH RESPONDENT
SOUTHERN AFRICAN BITUMEN ASSOCIATION	SIXTH RESPONDENT
SASOL LIMITED	SEVENTH RESPONDENT
TOSAS (PTY) LTD	EIGHTH RESPONDENT

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the applicant refers a complaint to the Competition Tribunal for an order in the following terms:

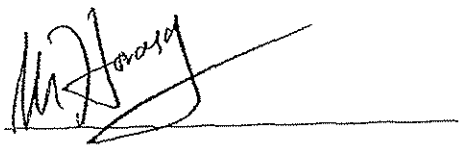
1. An order declaring that the First to Sixth Respondents have contravened section 4(1)(b)(i) of the Act;

2. An order directing the First to Sixth Respondents to desist from such conduct;

3. An order directing First, Second, Third, Fourth, Fifth and Sixth Respondents to pay an administrative penalty equivalent to 10% of each of the Respondents' annual turnover in the Republic and its exports from the Republic during the preceding financial year.

4. Such further and /or alternative relief as the Tribunal may consider appropriate.

Dated at Pretoria on this 4th day of March 2010



COMPETITION COMMISSION

Applicant

Block C, dti Campus

77 Meintjies Street

Sunnyside

Pretoria

Ref: M Dorasamy /W Mkwananzi

mervind@compcom.co.za

wendym@compcom.co.za

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

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

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
MASANA PETROLEUM SOLUTIONS (PTY) LTD	Respondent

In re:

COMPETITION COMMISSION	Applicant
and	
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

SETTLEMENT AGREEMENT

BETWEEN THE COMPETITION COMMISSION AND MASANA PETROLEUM SOLUTIONS (PROPRIETARY) LIMITED IN REGARD TO ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The *Commission* and *Masana* hereby agree that application be made to the Competition Tribunal for the confirmation of a Settlement Agreement 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 Masana;

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 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 Masana;

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, 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, 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 a formula for determining the pricing of base bitumen and bituminous products.

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 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, *Masana,* approached the *Commission* indicated its willingness to settle the matter and in addition provided the Commission with information pertaining to its role in the cartel. The *Settlement Agreement* was concluded as a result of *Masana's* engagement with the *Commission.*

4. **Statement of Conduct**

4.1 *Masana* admits that it has contravened section 4(1)(b)(i) of the Act, in that:

4.2 *Masana* and its competitors

4.2.1 met and shared competitively sensitive information relating to the pricing of bitumen and associated products;

4.2.2 made use of a common platform to transparently share and exchange pricing information;

4.2.3 used, made use of and implemented the agreed pricing formulae.

4.3 The Corporate Senior Management of *Masana* confirm that, to the best of their knowledge and belief, there are no further contraventions of section 4 of the *Act,* which were and /or might have been engaged in by *Masana.*

5. **Agreement Concerning Future Conduct**

5.1 *Masana* agrees to cooperate with the *Commission* in relation to the prosecution of any other parties under the *Complaint Referral*. This cooperation includes and is not limited to the provision of evidence (documentary and oral), pertaining to the contraventions detailed in this Settlement Agreement and the provision of witnesses to testify to this conduct in proceedings before the *Tribunal*.

5.2 *Masana* agrees to:

5.2.1 circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed in its business within 30 days from the date of confirmation of this Settlement Agreement by the Tribunal;

5.2.2 develop and implement a compliance programme incorporating corporate governance designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a prohibited practice in terms of the Act, a copy of which programme shall be submitted to the Commission within 60 days of 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, *Masana* accepts that it is liable to pay an administrative penalty.

The parties have agreed that Masana will pay an administrative penalty in the amount of R13 000 000, 00 (thirteen million rand)

6.2 This amount does not exceed 10% of *Masana's* annual turnover in the Republic and its exports from the Republic during the preceeding financial year.

6.3 *Masana* will pay the amount set out in paragraph 6.1 above to the Commission within six months from the date of confirmation of this Settlement agreement by the Tribunal. This amount will be paid over by the Commission to the National Revenue Fund, referred to in 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 *Masana* 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

Dated and signed at PRETORIA **on the** 20th **day of** MAY **2010**

For Masana

Chief Executive Officer

For the Commission

1 June 2010

Competition Commissioner