competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR152Dec14/SA156Dec23

In the matter between:

The Competition Commission	Applicant
And	
Leo Constantin Pistorius N.O.	First Respondent
Hermine Pistorius N.O.	Second Respondent
Arnoldus Kurt Pistorius N.O.	Third Respondent
Sanette Fourie N.O.	Fourth Respondent
Daniel Hendrik Du Plessis N.O.	Fifth Respondent

Panel	:	L Mncube (Presiding Member) : T Vilakazi (Tribunal Member) : A Ndoni (Tribunal Member)
Heard on	:	13 February 2024
Decided on	:	13 February 2024

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Leo Constantin Pistorius; Hermine Pistorius N.O; Arnoldus Kurt Pistorius; Sanette Fourie N.O; Daniel Hendrik Du Plessis N.O annexed hereto.

Signed by:Liberty Mncube
Signed at:2024-02-13 14:47:19 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

Presiding Member
Professor Liberty Mncube

13 February 2024
Date

Concurring: Professor Thando Vilakazi and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC Case No: 2009DEC4847

CT Case No: .....

In the matter between

THE COMPETITION COMMISSION	Applicant
and	
LEO CONSTANTIN PISTORIUS N.O.	First Respondent
HERMINE PISTORIUS N.O.	Second Respondent
ARNOLDUS KURT PISTORIUS N.O.	Third Respondent
SANETTE FOURIE N.O.	Fourth Respondent
DANIEL HENDRIK DU PLESSIS N.O.	Fifth Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE FIRST TO FIFTH RESPONDENTS IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED.

1. PREAMBLE

The Competition Commission and the first to fifth Respondents hereby agree that an 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 27(1)(d) read with section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended ("the Act"), in respect of a contravention of section 4(1)(b)(i) of the Act.

2. DEFINITIONS

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

2.1. **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2. **"Aglime"** means a soil additive produced from pulverised limestone or chalk, and includes calcitic agricultural lime ("CAL") and dolomitic agricultural lime ("DAL");

2.3. **"Arnoldus Kurt Pistorius N.O."** means Arnoldus Kurt Pistorius in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.4. **"Amended Referral"** means the notice of motion and supplementary referral affidavit, together with annexures, filed by the Commission on 26 March 2018 under CT case number: 020230/CR152Dec14;

2.5. **"CAL"** means calcitic agricultural lime which is one of the two types of aglime;

2.6. **"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 Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.7. **"Commissioner"** means the Commissioner of the Commission, as appointed by the Minister of Trade, Industry and Competition in terms of section 22(1) of the Act;

2.8. **"Complaint"** means the complaint initiated by the Commissioner in terms of section 49B(1) of the Act on 21 December 2009 under CC case number: 2009Dec4847;

2.9. **"Daniel Hendrik Du Plessis N.O."** means Daniel Hendrik Du Plessis in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.10. **"Days"** means business days, being any day, which is not a Saturday, Sunday or public holiday gazetted in the Republic of South Africa from time to time;

2.11. **"FSSA"** means the Fertilizer Society of South Africa;

2.12. **"H Pistorius & Co."** means the trade name used by the Hendrik Pistorius Trust to conduct its business as a supplier of CAL at the time of the alleged contravention;

2.13. **"Hendrik Pistorius Trust"** refers to the trust duly registered in terms of the laws of the Republic of South Africa under trust deed number IT11463 and is represented by the trustees as reflected in the Letter of Authority. The Hendrik Pistorius Trust trades as "H Pistorius & Co." at 50 Frances Street, Colbyn, Pretoria, Gauteng;

2.14. **"Hermine Pistorius N.O."** means Hermine Pistorius in her capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.15. **"Leo Constantin Pistorius N.O."** means Leo Constantin Pistorius in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.16. **"Parties"** means the Commission and the first to fifth respondents;

2.17. **"Respondents"** means the following firms as cited in the Commission's Referral Affidavit of 4 December 2014 and Supplementary Referral Affidavit of 26 March 2018, namely, the trustees of the Hendrik Pistorius Trust (Leo Constantin Pistorius N.O., Hermine Pistorius N.O., Arnoldus Kurt Pistorius N.O., Daniel Hendrik Du Plessis N.O., Sanette Fourie N.O.), Kalkor (Pty) Ltd, CML Taljaard & Son (Pty) Ltd, PBD Boeredienste (Pty) Ltd, Grasland Ondernemings (Pty) Ltd and FSSA;

2.18. **"Sanette Fourie N.O."** means Sanette Fourie in her capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.19. **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and the trustees of the Hendrik Pistorius Trust;

2.20. **"Settlement Amount"** means the amount agreed upon in full and final settlement of the abovementioned matter between the parties;

2.21. **"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 the 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street,

Sunnyside, Pretoria, Gauteng; and

2.22. **"Trustees"** are the most recent trustees of the Hendrik Pistorius Trust as reflected in the recent Letter of Authority attached hereto as **Annexure "A"**.

3. COMPLAINT INITIATION AND INVESTIGATION

3.1. In 2008, the Commission received a complaint from Enviro Lime (Pty) Ltd ("Enviro Lime") wherein it alleged that H Pistorius & Co., a supplier of CAL, was engaged in restrictive vertical practices and abuse of dominance.

3.3 The Commission investigated Enviro Lime's complaint. During the investigation, the Commission found information that suggested that the conduct by certain members of the FSSA lime committee could be in contravention of section 4(1)(a) and (b)(i) and (ii) of the Act. On this basis, the Commission decided to initiate the complaint as set out below.

3.4 On 21 December 2009, the Commissioner initiated a complaint against certain members of the FSSA lime committee, including H Pistorius & Co., ("the 2009 Complaint"). The 2009 Complaint alleged, *inter alia*, that:

3.4.1 Certain members of the lime committee of the FSSA met quarterly at the offices of the FSSA to discuss matters that include quarterly sales of aglime, total provincial sales of aglime, net prices of the lime and transport components and gypsum sales for agricultural uses;

3.4.2 The members of the FSSA lime committee met to discuss the average

prices and transport costs of calcitic lime, dolomitic lime, aglime and gypsum, in contravention of sections 4(1)(a), 4(1)(b)(i) and 4(1)(b)(ii) of the Act;

3.4.3 The members of the FSSA lime committee exchanged/submitted sales and pricing information by region, through the FSSA. This served to increase transparency and allowed for the monitoring of price fixing or market allocation agreements or concerted practices between the members of the FSSA; and

3.4.4 The above sales and pricing information distributed by the FSSA to the members of the FSSA lime committee was in contravention of section 4(1)(a) of the Act.

3.5 On 10 August 2010, the Commissioner amended its 2009 Complaint to add Rozie Agencies CC, as a respondent in the Complaint.

3.6 On 18 November 2010, the Commission conducted a search and seizure operation ("dawn raid") at the premises of Kalkor (Pty) Ltd ("Kalkor"), Grasland Ondernemings (Pty) Ltd ("Grasland"), PBD Boeredienste (Pty) Ltd ("PBD"), H Pistorius & Co. and the FSSA. After the dawn raid, on 20 December 2010, Grasland applied for leniency in terms of the Commission's Corporate Leniency Policy and was granted conditional immunity.

3.7 On 27 January 2012, following further investigation, the Commission

amended its 2009 Complaint to include an allegation about the fixing of commission rates payable to fertilizer companies ("The 2012 Complaint"). The Commission amended the 2009 Complaint to expressly include the allegation that the Respondents, being members of the FSSA, agreed on the amount of or trading condition in respect of commissions that each would pay to fertilizer companies that employ agents who distribute aglime, in contravention of section 4(1)(b)(i) of the Act.

4 THE COMPLAINT REFERRAL

4.1 On 4 December 2014, the Commission referred the Complaint to the Tribunal against the Hendrik Pistorius Trust (as then represented by Hendrik Wilhelm Carl Pistorius, Leo Constantin Pistorius, Hermine Pistorius and Arnoldus Kurt Pistorius), Kalkor, CML Taljaard & Son (Pty) Ltd, PBD, Grasland and FSSA. The Referral was based on the Commission's findings during its Complaint investigation. The Commission's referral alleged that:

4.1.1 during the period between January 1995 and May 2008, the Respondents met annually and agreed to fix the rates of the agents' commission;

4.1.2 the meetings of the Respondents to agree on the rates of agents' commission were generally held before, during an adjournment of, or after the Annual General Meeting of the FSSA;

4.1.3 the meetings took place at the offices of the FSSA and other restaurants outside the premises of the FSSA;

4.1.4 the Respondents used FSSA as a platform for the above conduct; and

4.1.5 the agreements reached by the Respondents in respect of agents' commissions were effective for a period of one year and were revised on an annual basis during the Annual General Meeting of the FSSA.

4.2 Accordingly, the allegations in the Commission's Referral were confined to the allegations in the Commission's amended initiation of 27 January 2012, namely, an alleged contravention of section 4(1)(b)(i) of the Act.

Commission's supplementary referral

4.3 In May 2016, the Commission applied for leave to supplement or amend its referral affidavit of 2014. The Commission's Supplementary Referral Affidavit served two purposes:

4.3.1 To clarify in the Commission's complaint referral that the respondents' contravention of the Act endured until at least April 2009; and

4.3.2 To provide a formal citation of two additional trustees of the Hendrik Pistorius Trust namely, Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O. as the Tenth and Eleventh respondents.

4.4 In August 2016, the Tribunal granted the Commission leave to file a supplementary Referral Affidavit. The Commission filed its Supplementary Referral Affidavit on 26 March 2018.

4.5 Mr Hendrik Wilhelm Carl Pistorius and Mr Ian McIntyre, who was cited in the Commission's referral as the first and fifth respondents, respectively, have since passed away; hence they are not cited as respondents in this Settlement Agreement. Mr. Hendrik Wilhelm Carl Pistorius has not been replaced and Mr Ian McIntyre has been replaced by Ms. Sanette Fourie, who is cited in this Settlement Agreement as the fourth respondent in her capacity as one of the current trustees of the Hendrik Pistorius Trust.

5. THE RESPONDENTS' POSITION

5.1. The Respondents deny the allegations of colluding with other respondents to fix agent commissions for the following reasons:

5.1.1. The agents working with fertilizer companies (suppliers of fertilizer such as Yara SA (Pty) Ltd, Sasol Nitro, a division of Sasol Chemical Industries Ltd and Omnia Fertilizer (Pty) Ltd) were not the respondents' employees. The fertilizer companies unilaterally demanded a commission increase for the agents, which the Respondents learned of through Grasland's CEO.

5.1.2. The Respondents never accepted or implemented the proposed commission rates demanded by the fertilizer companies. They had independent arrangements with the agents and adhered to them.

5.1.3. The Respondents had no incentive to manipulate agents' commissions, as the proposed increase would have raised the Respondents' own costs.

6. NO ADMISSION OF LIABILITY

6.1. The Respondents do not admit that they have acted in contravention of section 4(1)(b)(i) or any other provision of the Act, as described in paragraph 4 above. However, the Parties have agreed to enter into the Settlement Agreement without admission to a contravention of the Act.

6.2. The Respondents have decided to settle the legal dispute for pragmatic reasons, including management time, legal costs, and the general drain on resources.

6.3. The Respondents acknowledge that:

6.3.1. legal proceedings can be protracted, expensive, and disruptive, hence the desire to focus on serving their customers and expanding their business.

6.3.2. settling the matter is likely to be less expensive than continuing with legal proceedings. They also recognize that the dispute creates uncertainty and negative publicity that could harm their reputation and business prospects.

6.3.3. settling this case would enable them to put this matter behind them and will enable them to move forward with a renewed commitment to fairness,

honesty, and transparency in all their business dealings. They are confident that their customers and stakeholders will acknowledge their dedication to these values and continue to support them.

7. SETTLEMENT AMOUNT

7.1. The Respondents agree to make payment of a settlement amount in the amount of R275 000.00 (Two hundred and seventy-five thousand Rand). This amount does not exceed 10% of the Respondents' annual turnover in its most recent financial year.

7.2. The Respondents will pay the settlement amount over a period of 6 (six) months in six equal instalments of R45 833.00 (Forty-five thousand, eight hundred and thirty-three Rand).

7.3. The first instalment shall be paid within 30 (thirty) days from the date of confirmation of this Settlement Agreement by the Tribunal. The balance shall be paid in 5 (five) equal instalments, over a period of 5 months from the date of the first instalment. The balance of the instalments shall be due on the last date of each month.

7.4. The payment shall be made into the Commission's bank account, details of which are as follows:

NAME	**: THE COMPETITION COMMISSION**
BANK	**: ABSA BANK BUSINESS BANK**
ACCOUNT NUMBER	**: 40-8764-1778**
BRANCH CODE	**: 632005**

PAYMENT REF : 2009Dec4847HWC Pistorius

7.5. The Commission shall pay the settlement amount over to the National Revenue Fund in accordance with section 59(4) of the Act.

8. AGREEMENT REGARDING FUTURE CONDUCT AND MONITORING

8.1. The Respondents undertakes to refrain from engaging in any anti-competitive conduct in contravention of the Act in future.

8.2. The Respondents will develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that all employees, management and other functionaries do not engage in contravention of the Act. In particular, such a compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contraventions of the Act.

8.3. The Respondents shall submit a copy of the compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order of the Tribunal.

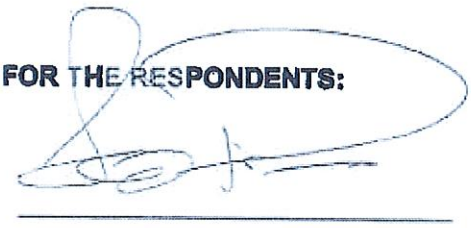
8.4. The Respondents shall circulate a statement summarising the contents of this Settlement Agreement to all employees, management and functionaries within 60 (sixty) days from the date of confirmation of the Settlement Agreement as an order of the Tribunal, and report to the Commission once this obligation has been complied with.

8.5. All reports concerning the conditions set out in this Settlement Agreement, including but not limited to the provision of the compliance programme and proof of payment of the settlement amount contemplated in clause 7 shall be submitted to the Commission at Collections@compcom.co.za.

9. FULL AND FINAL SETTLEMENT

This Settlement Agreement is entered into in full and final settlement of the Complaint, and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and the Respondents in respect of conduct contemplated under the Commission's Investigation and Referral under case number: 2009Dec4847.

FOR THE RESPONDENTS:



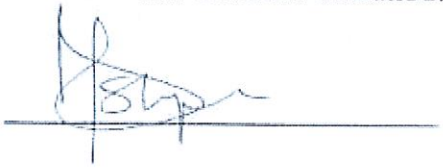
Duly authorised signatory

LEO C PETERSEN.

.....*(Full names)*

DATED AND SIGNED AT PRETORIA **ON THE** 07 **DAY OF** DECEMBER **2023.**

FOR THE COMPETITION COMMISSION OF SOUTH AFRICA:



DORIS TSHEPE The

Commissioner

DATED AND SIGNED AT Pretoria **ON THE** 14th **DAY OF** December **2023.**