

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 48/CR/Aug10

In the matter between:

The Competition Commission

Applicant

and

Safripol (Pty) Ltd

Respondent


Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member) and T Orleyn (Tribunal Member)

Heard on : 25 August 2010

Decided on : 25 August 2010

Order

The Competition Tribunal hereby confirms the consent agreement entered into between the above-mentioned parties, which is "Annexure A" hereto, as amended by the parties at the hearing of 25 August 2010 by "Annexure B" hereto.


A Wessels
Presiding Member

Concurring: M Mokuena and T Orleyn

" Annexure A "

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

CT CASE NO: 40 /CR/JUN2010

CC CASE NO: 2007NOV3338

In the matter between:

COMPETITION COMMISSION

and

SAFRIPOL (PROPRIETARY) LIMITED

2010-08-12

RECEIVED BY: Tebogo

TIME: 10h45

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south africa

Applicant

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SAFRIPOL (PTY) LTD REGARDING ALLEGED CONTRAVENTIONS OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT NO 89 OF 1998, AS AMENDED

The Competition Commission and Sfripol (Pty) Ltd hereby agree that application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Tribunal in terms of sections 58(1)(a)(iii), 58(b) as read with sections 59(1)(a), 59(2) and 59(3) of the Competition Act No.89 of 1998, as amended, on the terms set out below.

1 Definitions and interpretation

In this Consent Agreement, unless the context indicates otherwise, the following definitions shall apply:

1.1.1 "the Act" means the Competition Act No. 89 of 1998, as amended;

1.1.2 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act as a juristic person, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;

1.1.3 "Commissioner" means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;

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- 1.1.4 "**Competition Board**" means the Competition Board, a statutory body established in terms of Section 3(1) of the Maintenance and Promotion of Competition Act, 1979;
- 1.1.5 "**Complaint**" means the complaint initiated by the Commissioner in terms of section 49 B of the Act against Safripol, Sasol, SANS Fibres (Pty) Ltd ("SANS") and HOSAF Fibres (Pty) Ltd ("HOSAF") under case number 2007Nov3338;
- 1.1.6 "**DTI**" means the Department of Trade and Industry;
- 1.1.7 "**Pricing Formula**" means the propylene price formula as set out in the Supply Agreement;
- 1.1.8 "**Safripol**" means Safripol (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with registration number: 2006/007270/07, with its principal place of business situated at The Campus, Eden Gardens Building, Corner Sloan and Main Roads, Bryanston;
- 1.1.9 "**Sasol**" means Sasol Chemical Industries Ltd, a company duly incorporated and registered in accordance with the laws of the Republic of South Africa, with its registered office situated at 22 Kent Avenue, Ferndale, Johannesburg, South Africa;
- 1.1.10 "**the Supply Agreement**" means the agreement between Sasol and Safripol for the supply of propylene to Safripol by Sasol signed on 8 December 1994, as amended.
- 1.1.11 "**Consent Agreement**" means this Consent Agreement duly signed and concluded between the Commission and Safripol;
- 1.1.12 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria

2 Background to the Commission's investigation

The Commission records the background to its investigation as follows:

- 2.1 In October 2007 the DTI requested the Commission to consider opening an investigation against various firms operating in the polymers industry. The DTI's request in this regard was based on its observations in relation to polymer pricing, that an import parity benchmark seemed to be the standard practice used for pricing polymers in South Africa, including polypropylene.
- 2.2 The DTI alleged that, as a result, consumers were being charged relatively high prices, as if South Africa were a high cost net importing country of these products.
- 2.3 The Commission consequently conducted a preliminary analysis into pricing practises within the chemicals sector with specific reference to polymers; and subsequently initiated a complaint investigation in terms of section 49B (1) of the Act on 12 November 2007.
- 2.4 The complaint was initiated against Sasol, Safripol, SANS and HOSAF in respect of alleged contraventions of Sections 4(1)(b)(i) and 4(1)(b)(ii); Section 5(1) and Sections 8(a) and 9(1) of the Act, through *inter alia* the following conduct:
- 2.4.1 excessive pricing through import-parity pricing of polypropylene and polyvinylchloride by Sasol;
- 2.4.2 excessive pricing through import-parity pricing in polyethylene terephthalate by SANS and Hosaf
- 2.4.3 horizontal and vertical restrictive practices in the pricing of polypropylene by Sasol and Safripol;
- 2.4.4 horizontal restrictive practices in polyethylene terephthalate by SANS and Hosaf; and
- 2.4.5 price discrimination in polypropylene and polyvinylchloride by Sasol.

3 The Commission's conclusions in respect of price fixing between Sasol and Safripol

At the conclusion of its investigation the Commission made the following findings:

3.1 Historic background

3.1.1 On 08 December 1994, Sasol and Safripol entered into the Supply Agreement in terms of which Sasol agreed to supply Safripol with certain quantities of propylene. The Supply Agreement was concluded pursuant to the Competition Board's concerns with regards to the AECI/Sasol merger investigation, where AECI and Sasol sought to merge certain portions of their chemical businesses in Polfin Limited (the predecessor of Sasol Chemical Industries Limited). The Competition Board, on the basis of the undertakings made by the merged entity to supply Safripol/ Sentrachem with monomer feedstocks (including propylene) on a non-discriminatory basis, concluded that it was not necessary to launch a formal investigation into the proposed merger.

3.1.2 In terms of the Supply Agreement, Sasol and Safripol agreed to a pricing formula which entails, among other things, that the price Safripol pays to Sasol for propylene is based on the domestic polypropylene prices of Sasol and Safripol, which prices the parties share quarterly. The price of propylene is derived by applying to the polypropylene prices a ratio of the average propylene prices to polypropylene prices in North West Europe and the USA over the previous three years. To this price is added a percentage of the standard freight charge for polypropylene from Rotterdam to Durban.

3.2 The alleged contravention of the Act

3.2.1 At the conclusion of its investigation into both Sasol and Safripol's pricing practices, the Commission found *inter alia* that Safripol has acted in contravention of section 4(1) (b)(i), due to the following conduct:

3.2.1.1 The Pricing Formula and related provisions of the Supply Agreement and its operation, has resulted in Sasol and Safripol sharing competitively sensitive information relating to the pricing of polypropylene.

3.2.1.2 The Pricing Formula and related provisions of the Supply Agreement and its operation, amounts to the direct or indirect fixing of the selling price of polypropylene, with respect to which Sasol and Safripol are in a horizontal relationship.

3.2.2 With regard to the Pricing Formula and the related provisions of the Supply Agreement, the Commission found that Safripol has acted in

contravention of section 4(1)(b)(i) in that Safripol's pricing of polypropylene is characterised by the following:

- 3.2.2.1 Pricing negotiations with polypropylene customers are made with reference to Sasol's local pricing and the prices of imported product that could be landed in South Africa. This is despite the fact that South Africa is a large net exporter of polypropylene.
- 3.2.2.2 As a result of the Supply Agreement, Safripol is constrained in sourcing its propylene inputs and hence in increasing its production of polypropylene. This is due to the higher prices it has to pay for propylene beyond 55 000 tonnes per annum, and that it cannot increase its supply of propylene from Sasol beyond 100 000 tonnes per annum. Safripol is constrained in not being able to offer more competitive polypropylene prices to achieve increased local sales.
- 3.2.2.3 The Pricing Formula incentivises Sasol and Safripol to closely follow each other's price increases, since the increase of the price of polypropylene by one of them raises the price of propylene to the other, thereby reducing the margins of the firm that does not follow the price increase. Ultimately, the Pricing Formula incentivises both Sasol and Safripol to charge the highest possible prices for polypropylene which, as a result of the lack of effective competition between Sasol and Safripol, are at levels set by competition from imports.
- 3.2.2.4 The Supply Agreement also removes any incentive Safripol might have unilaterally to lower its prices for polypropylene. If it were to do so, then it would simply reduce its own margins, as the propylene price is determined as a percentage of the average polypropylene selling prices of both Sasol and Safripol.
- 3.2.3 Safripol and Sasol exchange information retrospectively on average quarterly prices of polypropylene sales to the local market.
- 3.2.4 The arrangements have resulted in Safripol's average prices for polypropylene (packed and delivered, exchanged quarterly) closely tracking Sasol's average prices for polypropylene.

4 Settlement discussions

Shortly before the referral of the Complaint to the Tribunal, Safripol met with the Commission and the parties engaged in discussions with a view to settling the matter. This Consent Agreement is the outcome of those discussions.

5 Admissions

Safripol admits that the Supply Agreement, which contains restrictive terms regarding pricing and volumes, and the implementation of the Supply Agreement, including the Pricing Formula, constrain the ability of Safripol to compete effectively with Sasol in the polypropylene market. Safripol accordingly admits that the implementation of the Supply Agreement amounts to the indirect fixing of a price or trading condition in contravention of section 4(1)(b)(i) of the Act.

6 Agreement concerning future conduct

6.1 Safripol agrees and undertakes:

6.1.1 to prepare and circulate a statement summarising the content of this Consent Agreement to its employees who are managers and to its directors and relevant corporate governance structures within 30 days of the date of confirmation of this Consent Agreement as an Order of the Tribunal;

6.1.2 to develop and implement a compliance programme incorporating corporate governance designed to ensure that, subject to clause 6.2, 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 set out the parameters within which the Supply Agreement shall continue to be applied, and shall be submitted to the Commission within ninety (90) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;

6.1.3 save for the implementation of the Supply Agreement strictly in accordance with its terms and as contemplated in clause 6.2, to refrain from sharing with Sasol competitively sensitive information relating to the pricing of polypropylene; and

6.1.4 to use its best endeavours to renegotiate, within 6 months from the date upon which this Consent Agreement is made an order of the Tribunal, or within such longer period as the Commission may agree

(provided that the Commission shall not withhold its agreement on good cause shown) the terms of the Supply Agreement, and in particular the Pricing Formula and volume restrictions, in a manner which will promote competition and ensure that the implementation thereof will not result in a contravention of the Act.

6.2 The Commission and Safripol recognise that the re-negotiation of the terms of the Supply Agreement, and in particular, the Pricing Formula and volume restrictions, cannot be unilaterally undertaken or enforced by Safripol. Safripol shall:

6.2.1 accordingly have the right to continue to implement the terms of the Supply Agreement and the Pricing Formula until conclusion of the renegotiations referred to in clause 6.1.3; and

6.2.2 notify the Commission of any failure or refusal on the part of Sasol to engage constructively with Safripol in the process of re-negotiation of the terms of the Supply Agreement.

7 Co-operation

7.1 Safripol undertakes to co-operate fully with the Commission in its prosecution of the remaining Respondent in the complaint referral.

7.2 This co-operation includes, but is not limited to:

7.2.1 providing the Commission with all relevant evidence available to it that might assist the Commission in its prosecution of the remaining respondents in the Complaint referral;

7.2.2 ensuring that all current Safripol employees, and where necessary, using its best endeavours to procure that former employees, who have knowledge of the pricing practices between Sasol and Safripol referred to above, are available to and co-operate with the Commission, both for purposes of consultation and to give evidence in proceedings before the Tribunal.

8 Administrative penalty

8.1 Safripol is liable for an administrative penalty in terms of sections 58(1)(a)(iii), 59(2) and (3) of the Act in the amount of R16 474 573,11 (sixteen million four

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hundred and seventy four thousand five hundred and seventy three rand and eleven cents)). The administrative penalty represents 1,5% of Safripol's total annual turnover for its financial year ending 2009 for turnover derived from polypropylene products.

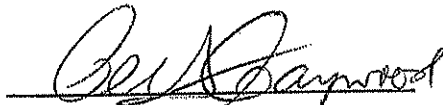
8.2 The administrative penalty will be paid by Safripol to the Commission within ninety (90) days after the date of confirmation of this Consent Agreement as an Order of the Tribunal.

8.3 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.

9 Full and final settlement

This Settlement Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and Safripol in relation to the contravention of section 4(1)(b)(i) and Section 5(1) of the Act, investigated under the Commission's case number: 2007Nov3338.

DATED at JOHANNESBURG on this the 27th day of JULY 2010.



Geoff Gaywood

Chief Operating Officer

Duly authorised signatory of Safripol

DATED at Johannesburg on this the 30 day of July 2010.



Shan Ramburuth

Commissioner, Competition Commission

"Annexure B" to the Consent Agreement entered into between the Competition Commission and Safripol (Pty) Ltd

Annexure A is amended as follows:

1. In Clause 6.1.3 of Annexure A the words "the pricing of polypropylene" are deleted and replaced by the words "polypropylene, including polypropylene prices and volumes".
2. In Clause 6.2.1 of Annexure A reference to clause "6.1.3" is deleted and replaced by "6.1.4".