

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: 016279**

**In the matter between:**

The Competition Commission

Applicant

and

Air Products South Africa (Pty) Ltd

Respondent

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Panel : T Madima (Presiding Member), A Ndoni (Tribunal Member) and A Roskam (Tribunal Member)

Heard on : 20 March 2013

Decided on : 20 March 2013

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**Order**

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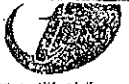
The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent annexed hereto marked "A".



Presiding Member  
T Madima

**Concurring:** A Ndoni and A Roskam

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

	
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CT Case No. 016279

CC Case No. 2009Mar4329

In the matter between

COMPETITION COMMISSION

Applicant

and

AIR PRODUCTS SOUTH AFRICA (PTY) LTD

Respondent

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CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND AIR  
PRODUCTS SOUTH AFRICA (PTY) LTD IN RESPECT OF CONTRAVENTION OF  
SECTION 4(1)(b)(i) and 4(1)(b)(ii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF  
1998), AS AMENDED

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The Competition Commission and Air Products South Africa (Pty) Ltd hereby agree that application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order in terms of section 49D read with sections 58(1)(a)(iii) and 58(1)(b), as well as sections 59(1)(a), 59(2) and 59(3) of the Competition Act, 1998 (Act No. 89 of 1998), in respect of contravention of sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act, 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. **"Air Products"** means Air Products South Africa (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business situated at 4 Spencer Road, Kempton Park, South Africa. Air Products' primary business is to manufacture, supply and distribute a wide variety of industrial and specialty gas products and chemicals to the Southern African region servicing the steel, stainless steel, chemical, petrochemical and engineering industries.
- 1.3. **"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.
- 1.4. **"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 1<sup>st</sup> 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 in terms of section 49B of the Act against Sasol Chemical Industries Limited ("Sasol"), Air Products, African Oxygen Limited ("Afrox"), Fedgas (Pty) Ltd ("Fedgas") and Air Liquide (Pty) Ltd ("Air Liquide") under case number 2009Mar4329;
- 1.7. **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Air Products;
- 1.8. **"GAN"** means gaseous nitrogen;
- 1.9. **"GOX"** means gaseous oxygen;
- 1.10. **"LAR"** means liquid argon;
- 1.11. **"LIN"** means liquid nitrogen;

1.12. "**LOX**" means liquid oxygen;

1.13. "**Sasol**" means Sasol Chemical Industrial Limited;

1.14. "**Suite of Agreements**" means a set of agreements, namely; the Co-operation Agreement, the Supply Agreement, the Management Agreement and the Utilities and Services Agreement, entered into between Sasol and Air Products, in relation to the supply and marketing of GAN, GOX, LAR, LIN, and LOX;

1.15. "**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 3<sup>rd</sup> Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

## 2. Background to the Complaint Investigation

2.1 The Commission received a marker application in terms of its CLP from Sasol on 6 March 2009, which was granted by the Commission on 6 March 2009. Subsequently Sasol, on behalf of its Sasol Nitro division, submitted a formal CLP application on 31 March 2009 which indicated that Air Products reached agreement with Sasol (its competitor) regarding prices and markets through the various terms, conditions and obligations stipulated in the suite of Agreements in contravention of section 4(1)(b) and section 5(1) of the Competition Act, 1998 ("the Act"). These agreements allegedly limited the extent to which the two firms could compete in the supply and marketing of GAN, GOX, LAR, LIN and LOX. It was also alleged that these agreements facilitated discussions on customers and prices between the two firms, thus potentially contravening the Act.

2.2 Pursuant to this, the Commission on 1 September 2009 initiated an investigation into the industrial and specialty gases industry against Sasol Chemical Industries Limited ("Sasol"), Air Products South Africa (Pty) Ltd ("Air Products"), African Oxygen Limited ("Afrox"), Fedgas (Pty) Ltd ("Fedgas") and Air Liquide (Pty) Ltd ("Air Liquide"), for alleged contraventions of section 4(1)(b) and section 5(1) of the Act.

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2.3 The relevant products that were the subject of the Commission's investigation are:

2.3.1 *Liquid Argon*

Liquid argon is used in industrial processes such as the manufacturing of high quality stainless steel and production of impurity-free silicon crystals for semi-conductor manufacture, as an inert filler gas for light bulbs and as dry, heavier-than-air-or-nitrogen filler for the space between glass panels in high-efficiency multi-pane windows, in healthcare and food and beverage applications.

2.3.2 *Liquid Nitrogen*

Liquid nitrogen is produced industrially in large volumes in liquid form and is the ideal coolant for certain applications such as food freezing and cooling materials which are heat sensitive, and used in tyres, plastics, certain metals and pharmaceuticals.

2.3.3 *Gaseous Nitrogen*

Gaseous nitrogen is one of the most frequently used industrial gases because it has such a wide range of applications. It is used in the chemical and petroleum industries for storage tank blanketing and vessel inerting applications. It is also used extensively by the electronics and metals industries for its inert properties.

2.3.4 *Gaseous Oxygen*

The principal uses of oxygen stem from its strong oxidizing and life-sustaining properties. It is used in medicine for therapeutic purposes and in the metals industry for steelmaking and metal-cutting applications. In the chemical and petroleum industries, oxygen is used in the production of a wide variety of fuels and chemicals. Oxygen is used in the pulp and paper industry for a variety of applications, including pulp bleaching, black liquor oxidation, and lime kiln enrichment. In the glass industry, oxygen/fuel combustion is used in melting operations. Oxygen

is also used for gasification applications for producing synthesis gas to make chemicals, fuels, electricity, hydrogen or steam.

2.4 There are three major suppliers of the above industrial gases in South Africa and these are Air Products, Air Liquide, and Afrox. While Sasol produces industrial (atmospheric) gases, these are mainly for its own internal consumption and to supply Air Products consequent to obligations arising from the suite of agreements between the two firms, with very limited quantities supplied to third parties.

### **3. The Commission's Findings**

3.1. The Commission conducted its investigation and found that during 1998, Air Products and Sasol entered into the suite of Agreements in relation to the supply and marketing of GAN, GOX, LAR, LIN, and LOX, which entailed:

- The Co-operation Agreement which regulated the co-cooperation between Air Products and Sasol in the marketing of surplus GAN, GOX, LAR, and LIN from the Sasol One Oxygen plant;
- the Supply Agreement which regulated the supply of GAN, GOX, back-up LIN and LOX from Air Products' Vanderbijlpark plant to the Sasol One Oxygen plant using pipelines owned by Sasol;
- the Management Agreement which regulated the management, operation and maintenance of the Sasol One Oxygen plant by Air Products; and
- the Utilities and Services Agreement which regulated the supply of certain utilities and services such as power, water, hydrogen and steam by Sasol to Air Products at the Sasol One Oxygen plant.

3.2. The suite of Agreements came into effect on 4 April 1998, and were in terms of the agreements, set to expire in April 2013, unless terminated by mutual consent or by giving notice of 12 months.

3.3. The Commission found that Air Products and Sasol are competitors in the supply of LAR, LOX, LIN, GOX and GAN as they were, and continue to be,

independent producers of these products and both have plants that have the capacity to produce these specialty gas products.

3.4. The Commission found that the suite of Agreements effectively gave rise to price fixing and market allocation, in contravention of section 4(1)(b)(i) and 4(1)(b)(ii) of the Act. In relation to price fixing, the Commission found that Sasol and Air Products fixed prices for the sale of LIN and LAR to third parties. Furthermore, that Sasol had to obtain prior consent from Air Products to sell to third parties and the prices at which to make such sales.

3.5. In relation to market allocation, the Commission found that the suite of Agreements enabled Sasol and Air Products to allocate the wholesale supply of the industrial gases to Air Products, thus removing Sasol from being a competitor to Air Products.

3.6. As a result of the suite of Agreements, Sasol did not supply new customers even though it was able to, and to date it continues to supply only those customers which it supplied prior to the conclusion of the suite of Agreements.

3.7. The products, GAN, GOX and LOX were mainly for Sasol's internal consumption. In addition there was no evidence of any contravention of section 5(1) of the Act.

#### **4. Statement of Conduct**

Air Products admits that it entered into the suite of Agreements with Sasol, giving rise to price fixing and market allocation of industrial specialty gases namely, LIN and LAR, in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act as set out in paragraphs 3.1 to 3.6 above.

#### **5. Agreement concerning future conduct**

Air Products agrees to:

5.1. amend the suite of Agreements within 10 days of this Consent Agreement

being made an order of the Tribunal;

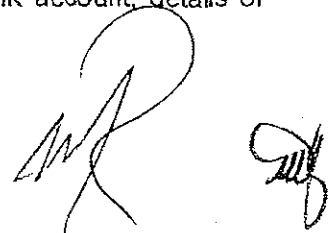
- 5.2. circulate a statement summarising the content of this Consent Agreement to all Air Products' employees who are middle managers and above within 30 days of the date of confirmation of this Consent Agreement as an order of the Tribunal;
- 5.3. develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the monitoring and detection of any contravention of the Act;
- 5.4. submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Competition Tribunal; and
- 5.5. desist from all anti-competitive conduct.

#### **6. Administrative Penalty**

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, Air Products is liable for and has agreed to pay an administrative penalty in the sum of R2 762 978.70 (Two million seven hundred and sixty two thousand, nine hundred and seventy eight rand and seventy cents), which represents 1.5% of Air Products' 2011 annual turnover in respect to LIN and LAR products.

#### **7. Terms of Payment**

- 7.1. Air Products shall pay the amount set out above [in paragraph 6] to the Commission within 30 days from the date of confirmation of this Consent agreement by the Tribunal.
- 7.2. This payment shall be made into the Commission's bank account, details of

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which are as follows:

Bank name: Absa Bank  
Branch name: Pretoria  
Account holder: Competition Commission Fees Account  
Account number: 4050778576  
Account type: Current Account  
Branch Code: 323 345

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

#### 8. Full and Final Settlement

This Consent Agreement is entered into in full and final settlement and upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Air Products, relating to alleged contraventions of sections 4(1)(b) and 5(1) of the Act, that are the subject of the Commission's investigations under Commission Case No. 2009Mar4329.

For Air Products



Authorized signatory for Air Products South Africa (Pty) Ltd

Dated and signed at KEMPTON PARK on the 18 day of FEBRUARY 2013

For the Commission

Dated and signed at Pretoria on the 21 day of February 2013



**Shan Ramburuth**  
**Competition Commissioner**



