

SOUTH AFRICA / JUDGMENT

Competition Commission South Africa v Foskor (Pty) Ltd (43/CR/Aug10) [2011] ZACT 10; [2011] 1 CPLR 99 (CT) (28 February 2011) [2011] ZACT 10

COURT
Competition Tribunal

BEFORE
Y Carrim, A Wessels, M Mokuena

CASE / FILE NUMBER
43/CR/Aug10

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/Aug10

In the matter between:

The Competition Commission South AfricaApplicant
and

Foskor (Pty) LtdRespondent

Panel : Y Carrim (Presiding Member), A Wessels (Tribunal Member) and M Mokuena (Tribunal Member)

Heard on 26 January 2011

Decided on 28 February 2011

ORDER

The Tribunal hereby confirms the settlement agreement annexed hereto, marked annexure A, as well as the amendment to the settlement agreement, marked as annexure B and a further addendum to the consent order marked as annexure C.

Y Carrim

Concurring: A Wessels and M Mokuena

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA CC Case No. 2007Dec3382 THE
COMPETITION COMMISSIONApplicant And
FOSKOR (PTY) LTDRespondent

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CC Case No. 2007Dec3382

THE COMPETITION COMMISSIONApplicant
And

FOSKOR (PTY) LTDRespondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND FOSKOR
(PROPRIETARY) LIMITED IN REGARD TO THE ALLEGED CONTRAVENTION OF SECTION 8

- (a) OF THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED) The Commission and Foscok
hereby enter into a Consent Agreement in terms of section 49D of the Competition Act, No,
89 of 1998, (as amended) (the "Acf") and agree that application be made for an order
confirming the Consent Agreement in terms of section 58(1)(b) of the Act, on the terms set
out more fully below.

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND FOSKOR
(PROPRIETARY) LIMITED IN REGARD TO THE ALLEGED CONTRAVENTION OF SECTION 8

- (a) OF THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED)

The Commission and Foscok hereby enter into a Consent Agreement in terms of section 49D of
the Competition Act, No, 89 of 1998, (as amended) (the "Acf") and agree that application be made
for an order confirming the Consent Agreement in terms of section 58(1)(b) of the Act, on the
terms set out more fully below.

Definitions For the purposes of this Consent Agreement the following definitions shall apply : 1.1.
"Act" means the Competition Act, No. 89 of 1998 (as amended). 1.2. "Animal Feed
Producers" (AFPs) mean the complainants collectively. 1.3. "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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street,
Sunnyside, Pretoria, Gauteng. 1.4. "Commissioner" means the Commissioner of the Competition
Commission, appointed in terms of section 22 of the Act 1.5. "Complaint" means the Complaint
filed by the Complainants against the Respondents under Case No. 2007Dec3382 on 03 December
2007. 1.6. "Complainants" means Bio- Minerale (Pty) Ltd, Kemira Phosphates (Pty) Ltd t/a KK
Animal Nutrition, N-West Fosfaat CC, and SA Feed Phosphates (Pty) Ltd, (collectively "the
Complainants") 1.7. "Consent Agreement" means this agreement duly signed and concluded
between the Commission and Foscok. 1.8. "Foscok" means Foscok (Proprietary) Limited, a private
company with limited liability duly registered in accordance with the company laws of the

Republic of South Africa, with its principal place of business at 18 Thornhill Office Park, 94 Bekker Road, Midrand Gauteng 1.9. "Omnia" means Omnia Fertiliser Limited

Definitions

For the purposes of this Consent Agreement the following definitions shall apply :

1.1. "Act" means the Competition Act, No. 89 of 1998 (as amended).

1.2. "Animal Feed Producers" (AFPs) mean the complainants collectively.

1.3. "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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

1.4. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act

1.5. "Complaint" means the Complaint filed by the Complainants against the Respondents under Case No. 2007Dec3382 on 03 December 2007.

1.6. "Complainants" means Bio- Minerale (Pty) Ltd, Kemira Phosphates (Pty) Ltd t/a KK Animal Nutrition, N-West Fosfaat CC, and SA Feed Phosphates (Pty) Ltd, (collectively "the Complainants")

1.7. "Consent Agreement" means this agreement duly signed and concluded between the Commission and Foskor.

1.8. "Foskor" means Foskor (Proprietary) Limited, a private company with limited liability duly registered in accordance with the company laws of the Republic of South Africa, with its principal place of business at 18 Thornhill Office Park, 94 Bekker Road, Midrand Gauteng

1.9. "Omnia" means Omnia Fertiliser Limited

1.10. "Parties" means, collectively, the Commission and Foskor. 1.11. "Period" means the period from the year 2007 to August 2008. 1.12. "Respondent" means Foskor (Pty) Ltd 1.13. "Sasoi" means Sasol Limited, a public company with limited liability duly incorporated in terms of the laws of South Africa, with its

registered office at 1 Sturdee Avenue, Rosebank, Johannesburg, Gauteng. 1.14. "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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

1.10. "Parties" means, collectively, the Commission and Foskor.

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1.13. "Sasoi" means Sasol Limited, a public company with limited liability duly incorporated in terms of the laws of South Africa, with its

registered office at 1 Sturdee Avenue, Rosebank, Johannesburg, Gauteng.

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The Complaint and Complaint Investigation

1.15. During December 2007, the Commission received a complaint which alleged that Foster's pricing of phosphoric acid in South Africa was excessive and therefore in contravention of section 8(a) of the Act. The complainants advised the Commission that Foskor had engaged in the following conduct -

1.15.1. Entered into a toll manufacturing agreement with Sasol whereby Sasol would produce phosphates on behalf of Foskor and Foskor would market the phosphates.

1.15.2. Charging excessive prices for the sale of phosphoric acid.

1.16. The Commission's investigations established that the complainants, all Animal Feed Producers (AFPs), rely on the supply of raw product from Foskor and Sasol. Phosphoric acid users like the complainants have no other alternative than to use phosphoric acid for their production.

1.17. Phosphoric acid produced by Foskor destined for sales to the local market was priced at the export price plus 75% of the freight rate of shipping the product to India. Foskor is a large net exporter of this product. Of the 650,000t produced at its Richard's Bay plant, around 500,000t are exported to India, 40,000t to Europe and the balance sold into the local and SADC markets, or used in downstream applications

1.18. Sasol and Foster's combined capacities are over 80% of total local production capacity of phosphoric acid. Following the tolling agreement, Foskor essentially became the sole 'owner' of this capacity.

1.19. For the year ending 31 March 2008, 95% of Foster's phosphoric acid sales were exports; the entire domestic market was equivalent to 35,7% of Foster's total sales. However, although Omnia produces phosphoric acid, it does not sell the product to the market in competition with Foskor and Sasol; it uses it internally for the production of fertilisers.

1.20. Foskor produces phosphate rock to supply the fertiliser and the other related industries in South Africa. Foskor determines the cost throughout the whole value chain. Phosphate rock is used the basic source material in the production of all forms phosphorus-containing products, including phosphoric acid, for use as supplements in livestock and poultry feeds.

2.

Commission's Findings

Upon completion of its investigation into the Complaint, the Commission found that Foskor had engaged in the following conduct, namely -

2.1. Foster's Past Pricing Policy

2.1.1. The pricing policy for phosphoric acid adopted by Foster prior 01 August 2008 was based on a formula that included a variable based on the cost of freight charges payable normally by overseas customers.

2.1.2. Foskor possessed the ability to control prices over a sustained period substantially in excess of those it ought or could have charged to customers wholly dependent upon it for the supply of phosphoric acid. The price therefore was excessive and detrimental to customers.

2.1.3. As a result, Foskor was able to price to the very limit of its monopolistic power in the relevant local market.

2.1.4. A significant portion of the animal feed phosphates to AFPs are sold on a tender basis for a three month period in advance. Foskor, therefore, makes an estimate of what the new dollar-based price will be, albeit, an increase or decrease, and the percentage. It is at this point that Foskor backdated invoices until 01 April of that year in order to correct the under- or over-recovery.

2.1.5. Foskor exercised its ability to set these prices well in advance, in terms of its pricing policy.

2.2. The Toiling Agreement

The said tolling arrangement was terminated on 31 March 2008. The Commission contends that the agreement amounted to the division of markets by allocating customers and specific types of goods. Foskor was granted conditional immunity for this cartel conduct and Sasol settled the matter before it reached the referral stage.

3.

3.1 Foskor notes the Commission's Findings as aforementioned, for purposes of settling this matter.

3.2 Foskor, once informed by the Commission of its concerns regarding the pricing policies, very expeditiously changed its conduct and pricing policy.

4.

Elimination of the detrimental effects of Foskor's past pricing policy for local customers.

4.1 In line with its new pricing policy, adopted from August 2008, Foskor removed the freight charge adjustment from its phosphoric acid prices. The removal of the 75 % of export freight costs has significantly brought down Foskor's prices of phosphoric acid charged to local customers.

4.2 Foskor indicates that its phosphate rock pricing was actually competitive, and the issue was actually in the downstream market for phosphoric acid.

4.2 The revised or new pricing policy implemented by Foskor on 01 August 2008, aims to keep the local market provided with phosphate rock at a favourable price advantage compared with the world. This new pricing policy ought to benefit the ultimate consumers of animal feed and crop fertiliser in the agricultural sector

4.3 The removal of freight and interest charges from its pricing formula for phosphoric acid ensured that after August 2008 local customers have benefited from significantly reduced prices.

4.4 Furthermore, until July 2008, Foskor, as producer also of two phosphoric acid rich products used in the fertiliser industry, namely MAP and DAP sold these two products only to the wholesale market. Since August 2008, however, Foskor now sells bulk MAP and DAP consignments at the wholesale price directly to the retail farming community.

4.5 The grave concerns that the Commission had regarding Foskor's past pricing policy have been alleviated through the timely steps Foskor has taken to reduce its prices and alter its pricing policy,

5.

Agreement Concerning Future Conduct

5.1. The Parties record that Foskor's participation in the conduct that formed the subject matter of the Complaint only as regards its pricing and sales policy ceased in July 2008.

5.2. Foskor undertakes to refrain from engaging in excessive pricing in contravention of sections 8 (a) of the Act, in relation to the manufacture and supply of phosphoric acid in South Africa.

5.3. Foskor undertakes to implement measures it adopted aimed at increasing transparency in the downstream market for fertiliser products.

5.4. Foskor undertakes not to revert to its past pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP.

5.5 Foskor agrees to 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 Competition Act, a copy of which programme shall be submitted to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Competition Tribunal.

6.

Full and Final Settlement

6.1 The Parties agree that Foskor will not pay an administrative penalty in light of its remedial action to change its pricing policy.

This Consent Agreement is entered into in full and final settlement and upon confirmation as a Consent Order by the Tribunal, concludes all proceedings between the Commission and Foskor relating to any alleged contravention by Foskor of sections 8(a) of the Act that are the subject of the Complaint and the Commission's investigations under Case Ho. 2007Dec3382.

Dated and signed in Johannesburg in this the 22 day of July 2010

Managing Director:

Foskor (Proprietary) Limited

Alfred Pitse

Dated and signed in Pretoria in this the 26 day of July 2010

Shan Ramburuth

The Commissioner

Competition Commission

Dated and signed in Pretoria in this the 26 day of July 2010

Competition Commission

AMENDMENT TO THE CONSENT AGREEMENT

The Competition Commission and Foskor hereby agree to the following amendment: -

The substitution of clause 5.4 of the Consent Agreement with the following: -

5.4 Foskor undertakes not to revert to its past pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India. Henceforth,

Foskor will charge a price based on the FOB Richards Bay Port in respect of phosphoric acid.

Dated and signed in Pretoria on this the 26th day of January 2011.

Foskor (Proprietary) Limited

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD AT PRETORIA

CC Case No. 2007Dec3382

CT Case No. 43/CR/Aug10

In the matter between

THE COMPETITION COMMISSION Applicant

FOSKOR (Pty) Ltd Respondent

FURTHER ADDENDUM TO THE CONSENT AGREEMENT

Further to the Consent Agreement concluded by the Commission and Foskor on 28 July 201 and the undertakings made by Foskor therein, it is hereby further agreed as follows: Admission 1. Foskor admits that its pricing prior to August 2008 included a notional transport cost not related to the supply of phosphoric acid to local customers. This transport cost, unilaterally determined by Foskor, comprised 75% of the freight rate for shipping phosphoric acid to India. Administrative Penalty 2.1 in accordance with the provisions of section 58(1)(a)(iii) as read with 59(1)(a) and 59(2), Foskor will pay a administrative penalty in the sum of R6 481 889.65 (six million four hundred and eighty one thousand eight hundred and eighty nine rand and sixty five cents) which amount is equivalent to 3% of its local sales in the 2009 financial year. 2.2 This payment shall be made into the Commission's bank account, details of which are as follows:

Further to the Consent Agreement concluded by the Commission and Foskor on 28 July 201 and the undertakings made by Foskor therein, it is hereby further agreed as follows:

Admission

1. Foskor admits that its pricing prior to August 2008 included a notional transport cost not related to the supply of phosphoric acid to local customers. This transport cost, unilaterally determined by Foskor, comprised 75% of the freight rate for shipping phosphoric acid to India.

Administrative Penalty

2.1 in accordance with the provisions of section 58(1)(a)(iii) as read with 59(1)(a) and 59(2), Foskor will pay a administrative penalty in the sum of R6 481 889.65 (six million four hundred and eighty one thousand eight hundred and eighty nine rand and sixty five cents) which amount is equivalent to 3% of its local sales in the 2009 financial year.

2.2 This payment shall be made into 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: 4050770578 Account type: Current Account Branch Code: 323345

Bank name; Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050770578

Account type: Current Account

Branch Code: 323345

2.3 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act. Dated and signed in Midrand in this the 22 day of Febraury 2011
Managing Director: Foskor (Proprietary) Limited Dated and signed in Pretoria in this the 23 day of February 2010 Shan Ramburuth The Commissioner Competition Commission

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

Dated and signed in Midrand in this the 22 day of Febraury 2011

Managing Director:

Foskor (Proprietary) Limited

Dated and signed in Pretoria in this the 23 day of February 2010

The Commissioner

Competition Commission

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