

SOUTH AFRICA / JUDGMENT

Competition Commission v Engen Petroleum Ltd (06/CR/Mar 10) [2012] ZACT 14; [2012] 1 CPLR 69 (CT) (22 February 2012)

[2012] ZACT 14

COURT

Competition Tribunal

BEFORE

A Wessels, M Mokuena, M Holden

CASE / FILE NUMBER

06/CR/Mar10

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No:06/CR/Mar10

In the matter between:

The Competition CommissionApplicant

and

Engen Petroleum LtdRespondent

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

Heard on : 22 February 2012

Decided on : 22 February 2012

Order

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

Presiding Member

A Wessels

Concurring: M Mokuena and M Holden

IN THE COMPETITION! TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT Case No. 06/CR/Mar 10

CG Case No. 2009Jan4223

In the matter between

COMPETITION COMMISSION

.....Applicant

ENGEN PETROLEUM LIMITED

.....Respondent.

in re

CHEVRON SA (PTY) LTDFirst
Respondent

ENGEN PETROLEUM LIMITED

.....Second Respondent

SHELL SA (PTY) LTDThird
Respondent

TOTAL SA (PTY) LTD

.....Fourth Respondent

MASANA PETROLEUM SOLUTIONS (PTY) LTD

.....Fifth Respondent

SOUTH AFRICAN BITUMEN ASSOCIATION

.....Sixth Respondent

SASOL LIMITED Seventh Respondent

TOSAS (PTY) LTD Eighth Respondent

SETTLEMENT AGREEMENT

BETWEEN THE COMPETITION COMMISSION ENGENPETROLEUM LIMITED IN RESPECT OF AN
ALLEGED CONTRAVENTION OF SECTION 4(i).{b}(i)f OF THE COMPETITION ACT, 1998 (ACT NO.89
OF 1998), AS AMENDED

The Commission and Engen Petroleum Limited (“Engen”) hereby, agree that 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, 1998 {Act No. 89 of 1998}, as amended, on the terms set out below. 1.

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 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 f81 Floor, MuLayo Building (Block C, the DTI Campus, 77 Meintjie's Street, Sunnysicfe, 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-ease number 2009Jan4223;
- 1.7. "Settlement Agreement?" means this-agreement duly signed and concluded between the Commission and Engen;-
- 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 failing within, its Jurisdiction in terms.of the Act;
- 1.9. "Engen " means Engen Petroleum Limited, a company duiy incorporated and- registered in terms of the company laws of the Republic of South Africa with its principal place of business at Btsjeh'tSourt Thfbault Square, corner of Riebeeck and Long Streets, Cape Town.
- 1.10 "Masana" means Masana Petroleum: Solutions (Pty} Limited, a 'company duly incorporated and registered7 in terms of the company iaws 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 Engen;
- 1.12. "SABITA" means Southern African Bitumen Association ("SABITA") a: voluntary nonprofit association with-its. principal place of business at 5 Lonsdale, Lonsdale Wifey, P'iheiands; Cape Town;
- 1.13. "Sasol means Saso! Limited, {-Saso'i-}, a- company duly incorporated and registered in terms of the company iaws of the Republic of South Africa, with its principal place of business at i: Sturdee Avenue, Rbsebanfe, Johannesburg;
- 1.14. "Shell" means. Shelf SA (Pty) Ltd; (-Shell).a-.company duly incorporated and

registered. trf'terrrrfs 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" means1 Tosass (Pty) Ltd (Tosas"), a company duly incorporated and

registered in terms of the company la^s.of the Republic of South Africa, with its. pri'ncipaJ place of. business at 12'Commercial. Road, Wadeville, Johannesburg, The eighth'respondent is a wholly owned subsidiary of the seventh respondent. Prior 'to:'Aprif.2'00S-, the1 eighth respondent was a jointventure between Sasol and Total in terms of Which Sasdf owned 70^ of ihe issued share capital and Total owned 30%';

1.16-. 'Totar means Total SA (Pty) Ltd .("Total!., a company duly incorporated and registered In terms of the company iaws of'the Republic of South Africa, with it& principal place: of business at Total House,- 3 Blerma'nn Avenue; Ro^ebank,-Johannesburg;

1.17 "Tribunat means tftc Competition Tribunal of South. Africa, a statutory body establishes" -in terms of section' 26 'of the Act, .frith its' principal place of business at; 3* Floor, Mulayo building (Block C), the DTI Campus,'77 fences Street Sunnyside, Pretoria, Gauteh'g,

2. The Complaint and Complaint Investigation 2.1 On 10 September 2008,. S8\$pf together yvitfx its-'subsidiaries, including 'Tpsas,applied, for and' subsequently obtained conditional immunity in terms ofparagraph '12' of the applicant's; CtP, in. respect: of'their participation- in the'development of, and agreement to adopt, .a. pricing'mechanism Iri respectoT thesale of base b'ibmen and bituminous product's. 2.2 in its application for leniency Saso/'aiieged'th'at-it, together with Chevron, Ehgem Shelf, Total, Masana and Tosas being, parties in a horizontal relationship., had contravened;, section 4(ij{b)(i) of the Act by engaging in price fixing by agreeing to. a- mechanism to calculate the WL8.P (Wholesale List Selling'Priced and fcxthe development and'implementation of the BPAF (Bitumen Prs£.e Adjustment Factor) in relation to the sale of base bitumen-and bituminous products. 2.3. On 12 January 2009, and pursuant'to \$&sot's lepiendV application, the applicant Initiated a .complaint in terms of section 49(B) (1 > of the Act- against the' respondents as described in the complaint referral The applicant conducted an investigation- into the relevant facts disclosed by Sasol and concluded that Chevron, Eng'en, \$tieti; Total, MasmaF. S'asoi and Tosas had indeed engaged in restrictive horizontal practices^in contraventibn'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 2QQ9, and possibly thereafter, Chevon, Engem Shell, Total, Masana, Sssol and Tosas, being "parties in a'horizontal relationship, acting through their representatives,, entered into various agreements; and.- engaged" in conduct'that

involved'concerted pra'btices'andf'orto'bK 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(:1j(b){i) of'the Act 2.4.2. Chevron, Engen, Shell, Total, Sksol and Tosas.- are' producers--and / or suppliers of bitumen, arid compete With one another in the production.and / or sate of bitumen and bituminous products in- the Republic: Chevron,' Ehgeh.

Shelly Total, and Sasol are also members of SA&TAF a non-profit organisation that represents inferior producers of and applicators of bituminous products. 2.4.3. The respondents, operating through SAB/FA 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, prior to the Act coming into force, 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 by all petroleum companies and was referred to as the Wholesale-List Selling Price (WLSP)". From 1986 until 2000 the WLSP was government sanctioned and exempted from the price-fixing prohibitions that applied at the time ("the WLSP exemption"). 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 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 (BPI) later called the Bitumen Price Adjustment Factor (BPAF). The respondents adopted the BPI/BPAF as a basis for adjusting their list prices from time to time,

3. The Complaint Referral 3.1. The Commission referred the above complaint to the Tribunal on 4 March 2010. 3.2. Engen has engaged with the Commission in settlement discussions since May 2010.
4. Statement of Conduct Engen admits that it has contravened section 4(1)(b)(i) of the Act, in that the bitumen department in its Engen Sales and Marketing

division (ESM) agreed with its competitors to a mechanism to calculate its WLSP (Wholesale List Selling Price), and to the development and implementation of the BPI/BPAF in relation to the sale of penetration grade bitumen in South Africa.

5. Agreement concerning future conduct 5.1 Engen agrees to: 5.1.1. fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, Engen specifically agrees to:
 - (a) testify in the complaint referral (if any) in respect of alleged contraventions covered by this Settlement Agreement; and
 - (b) to the extent that it is in existence, provide evidence; Written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Settlement Agreement; 5.1.2. desist from the conduct described above; 5.1.3. further develop, implement and monitor its 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:

- 5.1.3.1. include a competition policy to be drafted and implemented
- 5.1.3.2. provide specific training, on competition law aspects particularly relevant to Engen;
- 5.1.3.3 ensure that such training will be made available, to all new employees joining Engen.

Furthermore, Engen will update such training annually; 5.1.4 submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Settlement Agreement as an order by the Competition Tribunal; 5.1.5. To circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed, at Engen within 60 days from the date of confirmation of this Settlement Agreement by the Tribunal;

6. Administrative Penalty

6.1. Having regard to the provisions of sections 50(1)(a)(iii) as read with sections 50(1)(a), 59(2) and 59(3) of the Act, Engen accepts that it is liable to pay an administrative penalty. The parties have agreed that Engen will pay; an administrative penalty in the amount of R28 800 000* (twenty-eight million eight hundred thousand rand);

6.2. This amount shall not exceed 10% of Engen's total annual income in the Republic and its exports from the Republic for its 2009 financial year;

6.3. Engen will pay the amount set out in paragraph 6.1 above to the Commission within 10 business days from the date of confirmation of this Settlement agreement by the Tribunal;

6.4. The penalty must be paid into the Commission's bank account which is as follows:-

NAME: THE COMPETITION COMMISSION FEE ACCOUNT BANK: ABSA BANK, PRETORIA ACCOUNT NUMBER: 4650778576 BRANCH CODE: 323345

6.5. 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;

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 and Engen 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 CAPE TOWN on the 10th day of February 2012 For Engen Petroleum Limited Chief Executive Officer Dated and signed at Pretoria on the 10th day of February 2012 For the Commission Competition Commissioner

1.17 "Tribunal means the Competition Tribunal of South Africa, a statutory body

establishes" 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 Fences Street Sunnyside, Pretoria, Gauteng,

2. The Complaint and Complaint Investigation

2.1 On 10 September 2008, Sasol together with its subsidiaries, including Tpsas, applied, for and subsequently obtained conditional immunity in terms of paragraph 12 of the applicant's; CtP, in respect of their participation in the development of, and agreement to adopt, a pricing mechanism in respect of the sale of base oil and bituminous products.

2.2 in its application for leniency Sasol alleged that it, together with Chevron, Esheria

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 Priced and 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 the applicant's application, the applicant initiated a complaint in terms of section 49(B) (1) of the Act- against the respondents as described in the complaint referral. 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 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 SAAITA a non-profit organisation that represents other producers of and applicators of bituminous products.

2.4.3. The respondents, operating through SAB/FA as well as through other forms of communication- including bilateral communications

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

2.4.4. Historically, prior to the Act coming into force, 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 by all petroleum companies and was referred to as the Wholesale-List Selling Price (WLSP)". From 1986 until 2000 the WLSP was government sanctioned and exempted from the price-fixing prohibitions that applied at the time ("the WLSP exemption").

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 1 SABITA's 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 (BPI) later called the. Bitumen price Adjustment Factor' (BPAF), The- respondents adopted the BPI/BPAF as a basis for adjusting their list prices from time to time,

3. The Complaint Referral

3.1. The Commission referred the above complaint to the Tribunal on 4 March 2010.

3.2. Engen has engaged with the. Commission in settlement discussions since May 2010.

4. Statement of Conduct

Engen admits that it has contravened section 4(1)(b)(i) of the Act, in that the bitumen department in its Engen Sales and Marketing

division (ESM) agreed with its-competitors to -a"; mechanism to calculate its: WLSP (Wholesale List Selling Price), and to, the development & implementation of the BPI/BPAF in relation to the- sale, of penetration grade bitumen in South Africa.

5. Agreement concerning future conduct

5.1 Engen agrees to:

5.1.1. fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of. the foregoing, Engen specifically agrees to:

- (a) testify in the. complaint referral (if any) in respect of alleged contraventions covered by this Settlement Agreement; and
- (b) to the extent that it is in existence, provide- evidence; Written or otherwise,, which is- in its possession or under its control, concerning' the alleged contraventions contained in this Settlement Agreement;

5.1.2. desist from the conduct described above;

5.1.3. further develop, implement and monitor its 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:

5.1.3.1. include a. competition policy to be drafted and implemented

5.1.3.2. provide specific- training, on competition law aspects particularly relevant to-'Eng&n;-

5.1.3.3 ensure: that such training will be made.available, to all new employees joining Engen-. Furthermore, Eftgeh Wiil update such training annually;

5.1.4 submit a copy of such compliance programme to the' Commission within 60 days of the date of confirmation' of the Settlement'Agreement- as :an order by the Competition Tribunal;;

5.1.;5. To.circulate a. statement summarising the-contents of this-Settlement-Agreement to all management and operational staff employed, at- Engen within 60 days from the date of confirmation of this Settlement Agreement' by the Tribunal';

6. Administrative Penalty

6.1. Having regard to the provisions of sections §8<:1}|a)(iii} as read wftfr "sections

50(1 fta), 59(2) and- 59(3) of the Act, Erig&n accepts that it is liable' to' pay an administrative penalty.

The parties have agreed that Engen will pay; an-- administrative penalty in the amount b'f R28 800 000* (twenty"eight million eight hundred thousand rand);

6.2. This- amount cJq^s not exceed 10% of En\$&h\$. total artriuat income- in the

Republic- and its:exports'from'-the Republic for its 20Q9 financial year;.

6.3. Engen will pay- the amount set out in paragraph 6-1 above' to the Commission

within iSO business. dav.s-from the date of confirmation of-this Settlement" agreement by the Tribunal,

6.4. The penalty must be' paid Into the Commission's' bank' account" which is asfollows'-:

NAME:'THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER; 4650778576

BRANCH CODE': 323345

6.5. The penalty will be pa[d over' by the Commission, to the National Revenue Fundin accordance with the provisions of 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 and' Engen 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 Ho. 06/CR/Mar10

Dated and signed at CAPE TOWN on the 10th day of February 2012

For Engen Petroleum Limited

Chief Executive Officer

Dated and signed at Pretoria on the 10th day of February 2012

For the Commission

Competition Commissioner

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