

SOUTH AFRICA / JUDGMENT

Competition Commission v Shell South Africa Marketing (Pty) Ltd (06/CR/Mar10) [2012] ZACT 12; [2012] 1 CPLR 115 (CT) (22 February 2012)

[2012] ZACT 12

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

Shell South Africa Marketing (Pty) 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

TIN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT Case No. Q6/CR/Mar10

CC Case No. 2009Jan4223

in the matter between

COMPETITION COMMISSION

.....Applicant

SHELL SOUTH AFRICA MARKETING (PTY) LTD

.....Respondent

In re

CHEVRON SA (PTY) LTD

.....First Respondent

ENGEN PETROLEUM LIMITED

.....Second Respondent

SHELL SOUTH AFRICA MARKETING (PTY) LTD

.....Third Respondent

TOTAL SA (PTY) LTD

.....Fourth Respondent

MASANA PETROLEUM SOLUTIONS (PTY) LTD

Fifth Respondent

SOUTHERN AFRICAN BITUMEN ASSOCIATION

.....Sixth Respondent

SASOL LIMITEDSeventh
Respondent

TOSAS (PTY) LTDEighth
Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SHELL, SOUTH AFRICA MARKETING (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED The Commission and SHBL SOUTH AFRICA MARKETING (PTY) LTD ("Shell") hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as *i .order of the Competition Tribunalm terms of section 27(1)(d) read with section 58 (1) (a) (iii) of the Compete Act, 1998 (Act No. 89 of 1998), as amended, on the term, set 1. Definitions

SETTLEMENT AGREEMENT

BETWEEN THE COMPETITION COMMISSION AND SHELL, SOUTH AFRICA MARKETING (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The Commission and SHBLL SOUTH AFRICA MARKETING (PTY) LTD ("Shell") hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as *i .order of the Competition Tribunalm terms of section 27(1)(d) read with section 58 (1) (a) (iii) of the Compete Act, 1998 (Act No. 89 of 1998), as amended, on the term, set

1. Definitions

For the purposes of this Settlement Agreements following definitions shall apply: 1.1. "Act means the Competition Act, 1998 (Act Ho. 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 Republfc of South Africa, with its principal ptace of business at 19 DF Maian 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 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyslde, 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 498 of fhe Act under case number 2009Jan4223; 1.7. "Settlement Agreement*" means this agreement duly signed and concluded between the Commission and Shell; 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 falling within its jurisdiction in terms of the Act; 1.9."Engen" means Engen Petrofeum Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa wfm its principal place of business at Engen Court, Thibault Square, corner of Riebeeck and Long Streets, Cape Town. 1.10. "Masana" means Masana Petroleum Solutions (Pfy) Limited, a company duly incorporated and registered in terms of the company Jaws of the

Republic of South Africa with Hs principal place of business at 10 Junction Avenue, Parktown, Johannesburg. 1.11. "Parties" means the Commission and Shell; 1.12. "SABiTA" means Southern African Bitumen Association ("SABITA") a voluntary non-profit association with its principal place of

business at 5 Lonsdale, Lonsdale Way, Pinefands, Cape Town; 1.13. "Sasol" means Saso! Limited ("Sasol"), a company duly Incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1 Sturdee Avenue, Rosebank, Johannesburg; 1.14. "Shell" means Shell South Africa Marketing (Piy) Ltd ("Shell") a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at The Campus, Twickenham Building, 57 Sloane Street, Bryanston, Johannesburg; 1.15 "Tosas" means Tosas (Pty) Ltd (Tosas"), a company duly incorporated and

registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 12 Commercial Road, Wadeville, Johannesburg. The eighth respondent is a wholly owned subsidiary of the seventh respondent. Prior to April 2005, the eighth respondent was a joint venture between Sasol and Total in terms of which Sasol owned 70% of the issued share capital and Total owned 30%; 1.16. "Total" means Total SA (Pty) Ltd ("Total"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Total House, 3 Biermann Avenue, Rosebank, Johannesburg;

For the purposes of this Settlement Agreements 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 Republic of South Africa, with its principal place of business at 19 DF Maian 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 1st 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 of the Competition Commission in terms of section 498 of the Act under case number 2009Jan4223;

1.7. "Settlement Agreement*" means this agreement duly signed and concluded between the Commission and Shell;

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 falling within its jurisdiction in terms of the Act;

1.9. "Engen" means Engen Petroleum Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its principal place of business at Engen Court, Thibault Square, corner of Riebeeck and Long Streets, Cape Town.

1.10. "Masana" means Masana Petroleum Solutions (Pty) Limited, a company duly incorporated and registered in terms of the company laws 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 Shell;

1.12. "SABiTA" means Southern African Bitumen Association ("SABITA") a voluntary non-profit association with its principal place of

business at 5 Lonsdale, Lonsdale Way, Pinefands, Cape Town;

1.13. "Sasol" means Saso! Limited ("Sasol"), a company duly Incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1 Sturdee Avenue, Rosebank, Johannesburg;

1.14. "Shell" means Shell South Africa Marketing (Pty) Ltd ("Shell") a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at The Campus, Twickenham Building, 57 Sloane Street, Bryanston, Johannesburg;

1.15 "Tosas" means Tosas (Pty) Ltd (Tosas"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 12 Commercial Road, Wadeville, Johannesburg. The eighth respondent Is a wholly owned subsidiary of the seventh respondent. Prior to April 2005, the eighth respondent was a joint venture between Sasol and Total in terms of which Sasol owned 70% of the issued share capital and Total owned 30%;

1.16. "Total" means Total SA (Pty) Ltd ("Total"), a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Total House, 3 Biermann Avenue, Rosebank, Johannesburg;

1.17. "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 3rd Floor, Muiayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gautertg. 2. The Complaint and Complaint Investigation 2.1. On 10 September 2008, Saso} together with its subsidiaries, including Tosas, applied for and subsequently obtained conditional immunity in terms of paragraph 12 of the applicant's CLP, In respect of their participation in the development of, and agreement to adopt, a pricing mechanism in respect of the sale of base bitumen and bituminous products. 2.2. in its application for leniency Sasof alleged that it, together with Chevron, Engen, 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 Price), and to 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 Sasol's leniency application, the applicant Initiated a complaint in terms of section 49(B) (1) of the Ac! against the respondents as described in the complaint referral. The applicant conducted an investigation info the relevant facts disclosed by Sasof and concluded that Chevron, Engen, She}}, Total, Masana, Saso! 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:

1.17. "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 3rd Floor, Muiayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gautertg.

2. The Complaint and Complaint Investigation

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

2.2. in its application for leniency Sasol alleged that it, together with Chevron, Engen, 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 Price), and to 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 Sasol's leniency 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, Brtgen, 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 took 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, Masana, 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 SABITA, a non-profit organisation that represents inter alia producers of and applicators of bituminous products. 2.4.3. The respondents, operating through SABITA, 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 collectively 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 firstly by the Durban Bunker price. Added to the IBLC to arrive at the WLSP were the SAB HA levy, the 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. Shell has engaged with the Commission in settlement discussions prior to the referral of the matter. 4. Statement of Conduct Shell admits that it has contravened section 4(1)(b)(i) of the Act, in that it agreed with its competitors to a mechanism to calculate the WLSP (Wholesale List Setting Price), and to the development and implementation of the BPI/BPAF in relation to the sale of penetration grade bitumen in South Africa.

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 took 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, Masana, 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 SABITA, a non-profit organisation that represents inter alia producers of and applicators of bituminous products.

2.4.3. The respondents, operating through SABITA, 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 collectively 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 SAB HA levy, the margin and the Road Equalisation Factor ("REF"), which was subsequently replaced by the Crude Oil Pipeline tariff.

2.4.6. Chevron, Bngweni, 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 TM on 4 March 2010.

3.2. Shell has engaged with the Commission in settlement discussions prior to the referral of the matter.

4. Statement of Conduct

Shell admits that it has contravened section 4(1)(b)(i) of the Act, in that it agreed with its competitors to a mechanism to calculate the WLSP (Wholesale List Setting 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. Shell 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, Shell 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. 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 the following: 5.1.3.1. a competition policy to be drafted and implemented by Shell; 5.1.3.2. provide specific training on competition law aspects particularly relevant to Shell; 5.1.3.3. ensure that such training will be made available to all new employees joining Shell. Furthermore, Shell 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 Shell within 60 days from the date of confirmation of this Settlement Agreement by the Tribunal;

5. Agreement concerning future conduct 5.1. Shell 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, Shell 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. 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 the following:

5.1.3.1. a competition policy to be drafted and implemented by Shell;

5.2.3.2. provide specific training on competition law aspects particularly relevant to Shell;

5.1.3.3. ensure that such training will be made available to all new employees joining Shell. Furthermore, Shell 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 Shell 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 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Shell accepts that it is liable to pay an administrative penalty. The parties have agreed that Shell will pay an administrative penalty in the amount of R 26 259 480 (twenty six million two hundred fifty nine thousand four hundred and eighty rand);

6. Administrative Penalty

6.1 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, Shell accepts that it is liable to pay an administrative penalty.

The parties have agreed that Shell will pay an administrative penalty in the amount of R 26 259 480 (twenty six million two hundred fifty nine thousand four hundred and eighty rand);

6.2. This amount does not exceed 10% of Shell's total annual income in the Republic and its exports from the Republic for its 2009 financial year; 6.3. Shell will pay the amount set out in paragraph 6.1 above to the Commission within 30 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: 4050778576 BRANCH CODE: 323 345 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 Shell 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/MartO.

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

6.3. Shell will pay the amount set out in paragraph 6.1 above to the Commission within 30 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: 4050778576 BRANCH CODE: 323 345

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 Shell 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/MartO.

Dated and signed at BRYASTON on the 17th day of February 2012

For the Shell South Africa Marketing Limited

Chief Executive Officer

Dated and signed at Pretoria on the 20th day of February 2012

For the Commission

Competition Commissioner

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