

COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: 45/CR/May06 & 31/CR/May05

In the matter between:

The Competition Commission South Africa	Applicant
and	
Sasol Chemical Industries Ltd	Respondent

In re:

The Competition Commission South Africa	Applicant
and	
Sasol Chemical Industries Ltd	First Respondent
Yara South Africa (Pty) Ltd	Second Respondent
African Explosives and Chemical Industries Ltd	Third Respondent

And

In re:

The Competition Commission South Africa	Applicant
and	
Sasol Chemical Industries Ltd	First Respondent
Yara South Africa (Pty) Ltd	Second Respondent
Omnia Fertilizer Ltd	Third Respondent

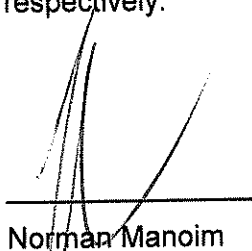
Panel : **Norman Manoim (Presiding Member), Andreas Wessels (Tribunal Member) and Mbuyiseli Madlanga (Tribunal Member)**

Heard on : **14 July 2010**

Decided on : **20 July 2010**

ORDER

The Tribunal hereby confirms the settlement agreement annexed hereto marked annexure I, as well as the first and second addenda thereto, marked annexures II and III respectively.



Norman Manoim

Concurring: Andreas Wessels and Mbuyiseli Madlanga

COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

Case No.: 45/CR/May06

And

Case No.: 31/CR/May05

In the matter between:

OMNIA FERTILISER LTD

First Applicant

AFRICAN EXPLOSIVES LTD

Second Applicant

And

THE COMPETITION COMMISSION

First Respondent

SASOL CHEMICAL INDUSTRIES LTD

Second Respondent

In Re:

THE COMPETITION COMMISSION

Applicant

And

SASOL CHEMICAL INDUSTRIES

Respondent

And

In Re:

Case No.: 45/CR/May06

THE COMPETITION COMMISSION

Applicant

SASOL CHEMICAL INDUSTRIES LTD

First Respondent

YARA SOUTH AFRICA (PTY) LTD

Second Respondent

AFRICAN EXPLOSIVES AND CHEMICAL

INDUSTRIES LTD

Third Respondent

And

In Re:

Case No.: 31/CR/May06

THE COMPETITION COMMISSION

Applicant

SASOL CHEMICAL INDUSTRIES LTD

First Respondent

YARA SOUTH AFRICA (PTY) LTD

Second Respondent

OMNIA FERTILISER LTD

Third Respondent

Panel : Norman Manoim (Presiding Member), Andreas Wessels (Tribunal Member) and Mbuyiseli Madlanga (Tribunal Member)

Heard on : 14 July 2010

Decided on : 20 July 2010

Reasons and Order

[1] This is an application for the confirmation of a settlement agreement entered into between the Competition Commission (the 'Commission') and Sasol Chemical Industries Limited ('Sasol') that purports, as between these two parties, to settle two complaints in terms of sections 8 and 9 of the Competition Act 89 of 1998 ('the Act') known as the 'Nutri-Flo'¹ and 'Profert'² complaints.³

¹ Derived from Nutri-Flo CC ('Nutri-Flo').

² Derived from Profert (Pty) Ltd ('Profert').

³ 31/CR/May05 and 45/CR/May06 respectively.

- [2] The settlement was reached shortly before we were to commence our hearing into these complaints which had been consolidated for the purpose of hearing.⁴
- [3] Prior to hearing the application to confirm the agreement, the Tribunal invited interested parties to make submissions on whether we should confirm the agreement.
- [4] Omnia Group (Pty) Ltd ('Omnia') and African Explosives Limited ('AEL') proposed specific amendments to the draft agreement in written submissions to us. At the commencement of the hearing we invited the Commission and Sasol to respond to these suggestions. They came back with a draft addendum in which they purported to do so. The addendum satisfied AEL and hence its submissions need not be considered further.⁵
- [5] The other objector, Omnia, was not satisfied and it requested that the Tribunal insert in the order, language that it considered better preserved its rights.⁶ Sasol and the Commission were unwilling to include this wording.
- [6] As there were no objections from any party to the remaining terms of the agreement and indeed much support for it, *inter alia* from the two complainants, Nutri-Flo and Profert, we confine ourselves in these reasons to the objection that Omnia raised because this was the only issue in dispute before us.
- [7] We need to consider the nature of the settlement agreement to see how Omnia's concerns arose.
- [8] The first relevant feature of the agreement is that it contains no admission of liability by Sasol, and indeed provides an express disclaimer.⁷ Despite this, it

⁴ The settlement agreement is dated 25 June 2010 (see annexure I hereto).

⁵ AEL's concerns relating to an existing ammonia supply agreement with Sasol, were addressed by clause one of the first addendum to the settlement agreement (see annexure II hereto).

⁶ Omnia was represented in this hearing through the managing director of its fertiliser division, Trevor Grant.

⁷ Clause 4.1 of the settlement agreement.

contains a wide range of binding behavioural undertakings for at least a 10 year period and an undertaking to divest of certain assets. The second feature of the agreement relevant to this consideration is that it settles the Profert and Nutri-Flo complaint referrals as between the Commission and Sasol. This is contained in clause 10 of the settlement agreement which provides as follows:

"This Settlement 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 SCI relating to alleged contraventions of section 8 and 9 of the Act that are the subject of the Nutri-Flo referral and the Profert referral and which are the subject of the Commission's investigations under case numbers 2003Dec770 and 2004Aug1148".

Omnia's concern

- [9] Omnia is both a customer and rival of Sasol. Since 1996 it has had a supply agreement with Sasol for ammonia and it alleges that a dispute exists between it and Sasol over the latter's pricing, which Omnia contends amounts to an abuse of dominance by Sasol.
- [10] Omnia has not, unlike Profert and Nutri-Flo, laid a complaint with the Commission in respect of this conduct. It relies on the fact that it raised Sasol's alleged conduct in its discussions with the Commission and provided the Commission with a witness statement from its managing director for the purpose of the complaints proceedings that are now the subject of this settlement, as past evidence of its intentions in this regard.⁸
- [11] Omnia says it may wish to proceed with a damages action against Sasol in the High Court as a result of the loss it has allegedly suffered, because of Sasol's abuse of dominance. It is common cause that: (1) in order to do so it must have a certificate issued by the Chairperson of the Tribunal in terms of section 65(6)(b) of the Act certifying *inter alia* that the *"..conduct constituting the basis for the action has been found to be a prohibited practice in terms of*

⁸ See affidavit of Grant, paragraph 7.

this Act .." (2) that it would not be competent for the Tribunal's Chairperson to do so on the basis of the settlement agreement because the agreement contains no admission of liability.

[12] This means that if the settlement agreement concludes the proceedings between the Commission and Sasol, Omnia would have to bring its own application for a declaration that the conduct it complains of constituted a prohibited practice, then obtain a certificate and proceed with its claim for damages in a civil court.

[13] Omnia argues that if the settlement agreement is confirmed it will not be able to institute these civil proceedings, through the steps outlined above because Sasol may be able to raise as a defence to any application it brings, the provisions of section 67(2) of the Act which states:

"A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct."

[14] Omnia asks us to accept that its complaint, when and if it is brought, will relate to conduct substantially the same as contemplated in the Profert and Nutri-Flo referrals.

[15] The Tribunal has previously held in *Competition Commission v South African Airways Limited, Comair Limited and Nationwide Limited ('Comair')*⁹ that the terms of a settlement agreement, where a respondent does not admit liability, does not constitute a completed proceeding and hence cannot deprive a person in the position of Omnia from bringing an application of the kind contemplated in section 49D(4) of the Act which states:

"A consent order does not preclude a complainant from applying for –

(a) a declaration in terms of section 58(1)(a)(v) or (vi); or

⁹ 83/CR/Oct04.

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant."

- [16] Omnia argues that there is legal uncertainty about the correctness of our decision in *Comair* because of a subsequent decision of the Competition Appeal Court (CAC) in *Glaxo Smith Kline South Africa Pty Ltd v David Lewis NO and 10 others*¹⁰ (*Glaxo*) where the CAC held that the mechanism of section 49D did not apply where the agreement was concluded after the complaint had been referred, as *in casu*.¹¹ The Court however said it was nevertheless competent, even after referral, for the Commission and respondent to agree the terms of a settlement. The Court in that matter did not need to pronounce on the effect of such a settlement on a complainant's or other persons rights to obtain a declaration in order to institute civil proceedings.
- [17] Omnia argues that because of the legal uncertainty, its rights should be afforded protection by language that should be inserted in the settlement agreement that acknowledges its right, and that of other third parties, to submit their own complaints to the Commission against Sasol notwithstanding that the conduct may be substantially the same as that referred to in the settlement agreement.
- [18] It seeks from the Tribunal three alternative forms of relief (1) that the Tribunal 'requires' the parties to insert such a clause in the agreement by way of an addendum, (2) that if the parties are unwilling to do so the Tribunal insert such a rider in its order confirming the settlement agreement or (3) the Tribunal should refuse to confirm the settlement agreement out of considerations of fairness.

¹⁰ 62/CAC/Apr06.

¹¹ The Court's decision turned on the wording of section 49 D which says an application under that section is competent "If, during, on or after completion of the investigation of a complaint ..." The Court held that the Tribunal was wrong to interpret 'after completion of the investigation of a complaint' to include the period after a complaint has been referred. Hence a settlement agreement made after a referral although competent is not made in terms of that section.

- [19] When the hearings commenced we asked the Commission and Sasol to indicate their response to this submission.
- [20] They prepared a draft addendum in response but expressly reserved Sasol's rights as respondent under section 67 of the Act.¹² It is not necessary for us to set out that language as all are agreed that its terms do not preclude Sasol from raising the section 67(2) defence if it is indeed competent.
- [21] Sasol and the Commission argue that the agreement should not grant Omnia a greater right than it would have if the agreement was not confirmed. The Commission argued that if there was no settlement and the case was litigated and the Tribunal made no finding of a prohibited practice, Omnia would still have no basis to institute a civil action and hence the rights it is seeking exceeded those it was entitled to. Omnia answered this by saying it was not seeking a greater right, but preventing the extinction of its rights by the conclusion of a settlement agreement that might be construed as completed proceedings.
- [22] In terms of our precedent we do not consider that Omnia's rights have been extinguished in terms of section 67(2) by a settlement made on these terms. Therefore we do not regard a settlement of this nature where we are required to make no finding and which contains no admission of liability as a completed proceeding for the purpose of section 67(2). The Tribunal's reasons for coming to this conclusion are fully set out in the *Comair* decision where the following was stated:

"Where a consent order contains no admission, then the Tribunal makes no finding or determination in relation to a prohibited practice, as on the papers, no prohibited practice is conceded by the respondent. This type of order will therefore not bring in its wake the consequences for repeat offences and civil liability. No doubt these are

¹² Paragraph 2 of the first addendum. The other right under section 67 is the right under subsection (1) to raise prescription. Notwithstanding the express reservation of the section 67 rights the addendum goes on to state that nothing in the settlement agreement detracts from the right of any person to apply for a declaratory order under section 58(1)(a)(v) or (vi) of the Act.

to the great advantage of the respondent, and hence there may be a reluctance to ever settle by way of an admission of guilt. However, there will be no immunity either, because this would not constitute a completed proceeding, the requirement that triggers the grant of immunity, and this may count heavily for some respondents, who wish to resolve a complaint finally, and not be dogged by it in future, in the face of a determined and well resourced complainant, or by other as yet undeclared putative complainants, who might emerge in the future”.

- [23] Assume however that this legal conclusion is wrong, should we take further steps to protect Omnia's rights to bring a civil claim in the manner suggested?
- [24] We have decided that such a course of action is inappropriate for the following reasons.
- [25] In the first place it is not competent for us to require the Commission and Sasol to insert such a clause in their agreement or add it as a rider to the agreement ourselves. The nature of such agreements, be they in terms of section 49D or otherwise, is that they are contracts between the parties. Whilst we can make suggestions to the parties they do not have to adopt them. (By way of example we invited the parties to consider including appropriate clauses to address our concerns over the monitoring of the extensive behavioural remedies and the parties have agreed to terms which have been incorporated into the settlement agreement as the second addendum).¹³
- [26] Further we have no power to add a rider to such agreement. Whilst we have the discretion not to grant an order or to indicate that we will not do so unless certain terms are included, it is not competent for us to impose our own additions when we confirm such a settlement. In this case we have asked the parties to respond to Omnia's concerns and they have declined to amend the agreement to the extent sought to guarantee the right to bring the civil claim. In fact as argued by Sasol, what Omnia seeks is a waiver from it that it will not

¹³ The second addendum is annexure III hereto. Our letter setting out our concerns and reasons for them is annexed to this decision, marked annexure IV.

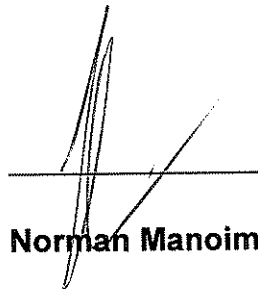
exercise its rights, assuming it has them, to rely on section 67(2) – it declines to do so. We have no power to add this term to the agreement without the contracting parties' consent.

- [27] It thus remains for us to consider refusing to grant the order of confirmation because a term protecting Omnia from the possible invocation of a section 67(2) defence was not included by the parties.
- [28] Such an exercise of our discretion would be inappropriate. If we are correct in our interpretation of the law such a clause would be superfluous. If we are wrong on the law, which we have not been persuaded of - at best we are asked to take into account that the law on this point is uncertain - then we are being asked to include a right into an agreement that the law may not permit in its absence. We are not here to act as lawmakers. If the law operates in this fashion we cannot prevent its operation by refusing to approve settlement agreements unless such a term is inserted.
- [29] This would not be a proper exercise of our discretion as an administrative tribunal, but would place us in the position of lawmaker. The relief Omnia seeks would apply to any putative litigant in respect of any order that has no admission of liability attached to it and no section 67(2) waiver. It amounts to concluding that as a matter of law an agreement of the present kind cannot ever be confirmed. Absent a finding by a higher court to the contrary and in view of our own decisions which indicate that Omnia is not deprived of its rights it is not appropriate for us to insist that the agreement must include what in the commercial lawyers parlance is a 'comfort clause'.
- [30] That would not be a proper exercise of our discretion. Nor if we insisted on such a clause do the parties have to accept its inclusion. As we noted above this is a settlement agreement; if we suggest a term the parties do not have to accept it and the consequences are that the agreement without confirmation would be of no force and effect.¹⁴ Given that all submissions we have

¹⁴ As anxious as Omnia is about preserving its rights, so is Nutri Flo as one of the original complainants about protecting it's – it has urged us to grant the order because a settlement it has with Sasol depends on the confirmation of this order.

received, including from Omnia, are that the terms of this agreement constitute an effective remedy to the competition concerns made out in the referrals it would be irresponsible for us to adopt such a course, premised not on fairness or inappropriateness of the terms of the order, but a particular apprehension about the law; an apprehension which has no express mention in the statute nor in decided case law.

[31] The objections of Omnia are dismissed and we confirm the settlement agreement with the two addenda (as explained above).



Norman Manoim

20 July 2010

Date

Andreas Wessels and Mbuyiseli Madlanga concurring.

Tribunal Researcher : I Selaledi

For the Commission : Adv G Engelbrecht instructed by Cheadle
Thompson & Haysom Inc.

For Sasol Chemical Industries : Adv J Gauntlett SC with Adv A Cockrell instructed
by Bowman Gilfillan Attorneys

For Omnia Fertiliser : Adv J Wilson instructed by Deneys Reitz Inc.

For African Explosives : Adv M Wesley instructed by Deneys Reitz Inc.

For Nutri-Flo : Adv I Moodley instructed by Livingstone Leandry
Inc.

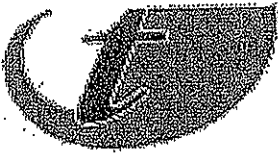
For Yara South Africa

: Adv J Pretorius instructed by Gerrit Coetzee
Attorneys

NON CONFIDENTIAL VERSION

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Form CT 6

About this Form

This form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division 1 of Part 4 of the Competition Tribunal Rules it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag 24
University of Cape Town
7700
Republic of South Africa
Tel: +27 (0) 21 959 1320
Fax: +27 (0) 21 959 1321
Email: ct@comptrib.co.za

Notice of Motion

Date: 5-Jul-2010

File #

Case Nos.

31/CR/May05,

45/CR/May06

To: The registrar of the Competition Tribunal

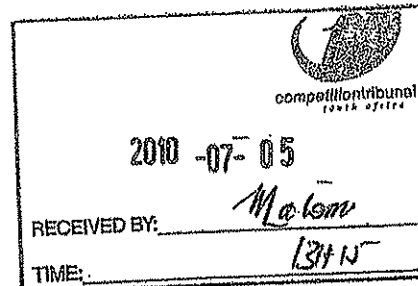
Concerning the matter between:

THE COMPETITION COMMISSION (Applicant)

and SASOL CHEMICAL INDUSTRIES LIMITED (Respondent)

Take notice that the APPLICANT intends to apply to the Tribunal for the following order:

CONFIRMATION OF THE SETTLEMENT AGREEMENT AS AN ORDER OF THE TRIBUNAL IN TERMS OF SECTION 58 READ WITH SECTION 27(1) OF THE ACT



Name and Title of person authorised to sign:

Wendy Mkwanzani: Chief Legal Counsel

Authorised Signature:

Date:

5-Jul-2010

For Office Use Only:

Tribunal File Number:

Date Filed:

COMPETITION COMMISSION

Applicant

Block C, dft Campus

77 Meintjies Street

Sunnyside

Pretoria

Ref: W Mkwanzzi

wendym@compcom.co.za

And To: The Registrar

Competition Tribunal

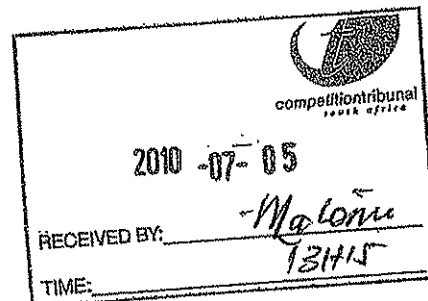
Block C, dft Campus

77 Meintjies Street

Sunnyside

Pretoria

leratom@comptrib.co.za



and to: Bowman Gilfillan Attorneys

Respondent's Attorneys

165 West Street

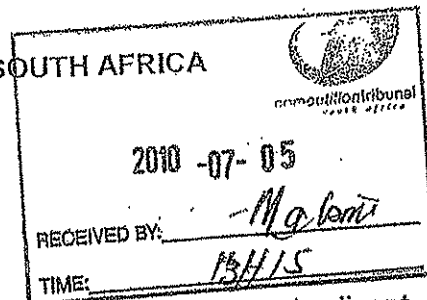
Sandton

2146

Ref. L. Mtanga

Email: l.mtanga@bowman.co.za

THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(PRETORIA)



In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED

Respondent

In re:

CT Case No: 45/CR/May06

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED
YARA SOUTH AFRICA (PTY) LIMITED
AFRICAN EXPLOSIVES AND CHEMICAL
INDUSTRIES LIMITED

First Respondent
Second Respondent

Third Respondent

and

In re:

CT Case No: 31/CR/May05

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED
YARA SOUTH AFRICA (PTY) LIMITED
OMNIA FERTILISER LIMITED

First Respondent
Second Respondent
Third Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
SASOL CHEMICAL INDUSTRIES LIMITED IN RESPECT OF ALLEGED
CONTRAVENTIONS OF SECTIONS 8 AND 9 OF THE COMPETITION ACT 89 OF
1998

The Competition Commission and Sasol Chemical Industries Limited hereby agree that application be made to the Competition Tribunal for confirmation of this Settlement Agreement as an order of the Tribunal, in terms of Section 58 read with section 27(1) of the Act. This agreement is concluded in settlement of the allegations of abuse of dominance including exclusionary conduct and price discrimination, as further detailed herein, referred by the Competition Commission to the Competition Tribunal.

1. **Definitions**

- 1.1 "Act" means the Competition Act 89 of 1998, as amended;
- 1.2 "AECI" means African Explosives and Chemical Industries Limited, a public company registered and incorporated in accordance with the laws of the Republic of South Africa with its registered office, alternatively principal place of business, at 24, The Woodlands, Woodmead, Sandton, South Africa;
- 1.3 "Affected Assets" means Sasol Nitro's granular and liquid fertiliser blending facilities in Durban, Bellville, Endicott, Kimberley and Potchefstroom;
- 1.4 "Ammonia Plant" means Sasol's ammonia production plants and/or facilities situated at Sasolburg;
- 1.5 "Ammonium Nitrate Based Fertilisers" means ammonium nitrate and derivative products used for fertilisers;

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- 1.6 **"Ammonium Nitrate Based Explosives"** means ammonium nitrate and derivative products used for explosives;
- 1.7 **"ANS"** means ammonium nitrate solution;
- 1.8 **"Average Price"** means the 12 month rolling average of the monthly volume weighted average Ex-Works price;
- 1.9 **"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, South Africa;
- 1.10 **"Commissioner"** means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;
- 1.11 **"Divestiture Conditions"** means the conditions attaching to the disposal of the Affected Assets set out in Annexure "A" read together with Annexure "B", which annexures are both confidential;
- 1.12 **"Ex-Works"** means ex Sasol Nitro's facilities within the Gert Sibande District Municipality as defined by Incoterms 2000's abbreviation "EXW", and added to which is transport and logistics costs where product is collected from the Premises outside Gert Sibande; Incoterms "EXW" definition is as at the named place where the shipment is available to the buyer loaded or unloaded and with the seller not contracting for any transportation;
- 1.13 **"LAN"** means limestone ammonium nitrate;
- 1.14 **"Nitrogen Derivative Products"** means Ammonia, ANS and ANS in dilute solution;
- 1.15 **"Nutri-Flo"** means Nutri-Flo CC and Nutri-Fertiliser CC, close corporations registered and incorporated in accordance with the laws of the Republic of South Africa, with their registered office, alternatively principal place of business, at Nutri Park, Umhlali, Kwazulu-Natal, South Africa;



- 1.16 **"Nutri-Flo referral"** means the Complaint Referral referred to the Tribunal by the Commission under case number 31/CR/May05;
- 1.17 **"Omnia"** means Omnia Fertiliser Limited, a public company registered and incorporated in accordance with the laws of the Republic of South Africa with its registered office, alternatively principal place of business, at 13 Sloane Street, Epsom Downs, Bryanston, South Africa;
- 1.18 **"Premises"** means SCI's premises situated within the Gert Sibande District Municipality and no more than 3 (three) Sasol Nitro warehouses or distribution facilities situated within a radius of 100 (one hundred) kilometres from Secunda and/or within a radius of 100 (one hundred) kilometres from Sasolburg;
- 1.19 **"Profert"** means Profert (Proprietary) Limited, a company registered and incorporated in accordance with the laws of the Republic of South Africa, with its registered office, alternatively principal place of business, at 43 Ross Street, Potchindustria, Potchefstroom;
- 1.20 **"Profert referral"** means the Complaint Referral referred to the Tribunal by the Commission under case number 45/CR/May06;
- 1.21 **"Sasol Nitro"** is the division of Sasol Chemical Industries Limited which encompasses the business activities and conduct which are the subject of this Settlement Agreement;
- 1.22 **"SCI"** means Sasol Chemical Industries Limited, a company registered and incorporated in accordance with the laws of the Republic of South Africa, with its registered office, alternatively principal place of business, at 1 Sturdee Avenue, Rosebank, Johannesburg, South Africa;
- 1.23 **"Section 4 Settlement Agreement"** means the Consent and Settlement Agreement concluded between the Commission and SCI dated 18 May 2009 and confirmed by the Tribunal as an order on 20 May 2009;
- 1.24 **"Settlement Agreement"** means this settlement agreement and all annexure

thereto, duly signed and concluded between the Commission and SCI;

1.25 "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;

1.26 "Yara" means Yara (South Africa) (Proprietary) Limited, a company previously known as Kynoch Fertiliser (Proprietary) Limited (hereinafter referred to, for convenience, as "Kynoch") that is registered and incorporated in accordance with the laws of the Republic of South Africa, with its registered office, alternatively principal place of business, at 272 Pretoria Avenue, Randburg, South Africa.

2. The Nutri-Flo complaint investigation and the Commission's findings

2.1 Nutri-Flo lodged a complaint with the Commission on 3 November 2003. In its complaint, Nutri-Flo:

2.1.1 alleged that SCI and its competitors acted in contravention of section 4 of the Act;

2.1.2 contended that SCI, while dominant in the market for the supply of LAN and ANS, committed an abuse of its dominant position by charging excessive prices for LAN and ANS;

2.1.3 complained of exclusionary conduct on the part of SCI in that SCI priced its products at a level that left Nutri-Flo no capacity to make a proper profit on resale;

2.1.4 alleged that this margin squeeze meant that Nutri-Flo could trade only at a loss; and

2.1.5 stated that Sasol took deliberate steps to prevent Nutri-Flo from expanding its market and, as a result, its market penetration has shrunk.

2.2 The Commission investigated the complaints and found that the Respondents

had contravened the Act. The Commission accordingly resolved to refer the complaints to the Tribunal, together with particulars of further instances of anti-competitive conduct engaged in by the respondents, and SCI in particular.

- 2.3 On 4 May 2005 the Commission referred the Nutri-Flo Complaint to the Tribunal under CT case number 31/CR/May05. The respondents in the Nutri-Flo referral are SCI, Omnia and Kynoch.
- 2.4 The referral was subsequently amended by the Commission.
- 2.5 In the Nutri-Flo referral, as amended, the Commission alleged that:
- 2.5.1 SCI, Kynoch and Omnia had contravened section 4(1)(b) alternatively section 4(1)(a) of the Act;
 - 2.5.2 Sasol had contravened section 8(c) alternatively section 8(d)(ii) of the Act; and
 - 2.5.3 Sasol had also contravened section 8(a) of the Act alternatively 8(c).
- 2.6 The Commission alleged that SCI charged excessive prices by a series of stratagems that enabled it to sustain the price of ammonia at import parity price, *inter alia* through:
- 2.6.1 paying AECl to close its local ammonia and urea production facilities;
 - 2.6.2 shorting the supply of Nitrogen Derivative Products and LAN to the relevant domestic markets by 'balancing' the use of ammonia between fertiliser and explosive production and exporting the product at unfavourable prices;
 - 2.6.3 acting in concert with the remaining respondents over the supply of Nitrogen Derivative Products and LAN to sustain the import parity price for ammonia; and
 - 2.6.4 pricing Nitrogen Derivative Products by reference to the import parity price of these products and LAN by reference to the import parity price of urea (though at a premium).



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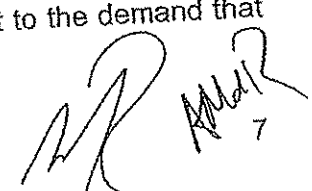
2.7 The Commission contended that the prices charged by SCI to Nutri-Flo for Ammonia, ANS and LAN were excessive when assessed against or by reference to one or other or all of the following benchmarks:

- 2.7.1 the price charged to the other respondents for sales in general and, in particular, for sales into different regions of South Africa (net of transport and related costs);
- 2.7.2 the price (net of transport and related costs) charged by SCI to customers other than Nutri-Flo, especially at the coast.
- 2.7.3 the cost of production, especially when taking account of the value of ammonia used in ANS and LAN production by reference to criteria such as SCI's own realized prices for downstream coastal sales of ammonia;
- 2.7.4 the price charged by suppliers other than SCI at times when alternative wholesale supplies of ANS became available;
- 2.7.5 the price at which Nitrogen Derivative Products, LAN and explosives were exported;
- 2.7.6 the price charged to Nutri-Flo in terms of the September 2001 agreement when compared to the prices Nutri-Flo was otherwise charged; and
- 2.7.7 the price at which Nutri-Flo was supplied ANS by AECl once the clause prohibiting AECl's competition with Kynoch ceased to operate.

2.8 Accordingly, the Commission contended that, by charging an excessive price for Nitrogen Derivative Products and LAN, SCI acted to the detriment of manufacturers of fertilisers, Nutri-Flo included, and, directly or indirectly, the ultimate consumer.

2.9 The Commission alleged further that, in order to discipline Nutri-Flo and/or exclude Nutri-Flo from the markets for the supply of fertilisers, SCI:

- 2.9.1 in September 2003 and shortly after the filing by Nutri-Flo of a complaint, materially increased the price of its fertiliser products;
- 2.9.2 embarked upon a campaign to drive Nutri-Flo out of the markets for the supply of fertilisers after Nutri-Flo refused to submit to the demand that it exit the blending market;



2.9.3 prevented Nutri-Flo from independently importing fertiliser product, urea particularly, by threatening to withdraw the supply of a key input, ANS;

2.9.4 by committing itself to sell and then selling to the remaining respondents on preferential terms concerning price and line of supply of LAN and product in the Nitrogen Derivative Products, SCI prevented suppliers other than the respondents (including Nutri-Flo) from effectively competing with them in the retail market for the supply of LAN.

2.10 The Commission found that the pricing structure of wholesale and retail prices effectively administered by SCI, together with the remaining respondents, prevented independent blenders and suppliers, Nutri-Flo included, from effectively competing and expanding within the downstream fertiliser market.

2.11 In consequence of this, the Commission alleged that SCI had engaged in exclusionary conduct which had the effect of lessening the capacity of competitors, including Nutri-Flo, to supply Nitrogen Derivative Products and LAN at lower rates into the market and to expand their penetration of the market.

2.12 In these circumstances, the Commission contended that SCI's conduct constituted a contravention of section 8(c) of the Act, as the anti-competitive effect was not outweighed by any technological, efficiency or other pro-competitive gain, in that competition was lessened and there is thereby detriment to consumers by the aforesaid effects on the structure of the downstream market. In the alternative, that by reason of the conduct described above, SCI had contravened section 8(d)(ii) of the Act.

2.13 SCI settled the allegations of section 4 contraventions in the Section 4 Settlement Agreement.

2.14 The Commission continued to prosecute the Nutri-Flo referral in respect of the section 8 complaints described more fully above.

A handwritten signature in black ink, appearing to be 'AMAR' followed by a stylized flourish.

3. The Profert complaint investigation and the Commission's findings

3.1 In August 2004 Profert filed a complaint against SCI alleging that it had abused its dominance in the supply of LAN.

3.2 Profert complained that SCI had:

3.2.1 charged discriminatory discounts in favour of Kynoch (Profert's competitor);

3.2.2 refused to supply LAN to Profert, and thus had limited the ability of Profert to compete effectively and/or expand in the fertiliser market.

3.3 Accordingly, it was contended that Sasol had contravened sections 9(1), 8(c) and/or alternatively 8(d)(ii) of the Competition Act.

3.4 The Commission investigated the complaints and concluded that SCI had contravened the Act as alleged. The Commission accordingly decided to refer the complaints to the Tribunal.

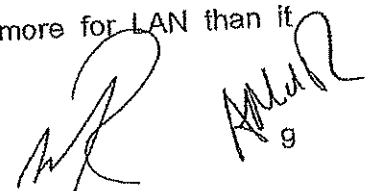
3.5 On 25 May 2006, the Commission referred the Profert complaint against SCI, Kynoch and AECL. No relief was sought against Kynoch and AECL.

3.6 In the Profert referral, the Commission contended that:

3.6.1 the agreements, arrangements or understandings between Sasol and AECL/Kynoch had the effect of constructing and dividing the market to make Sasol the exclusive supplier of LAN to the wholesale market and the dominant supplier of LAN in the retail market, in contravention of section 4(1)(b) alternatively 4(1)(a) of the Act;

3.6.2 the agreements, arrangements or understandings by which SCI committed itself to give and then gave Kynoch preference in price and line of supply of LAN amounted to an abuse of dominance as contemplated in section 8(c) and/or section 8d(ii) of the Act; and

3.6.3 SCI was guilty of an abuse of dominance in terms of section 9 of the Act by charging customers, including Profert, more for LAN than it charged Kynoch.



3.7 The Commission abandoned the prosecution of the section 4 complaint in the Profert referral.

3.8 The Commission continued to prosecute the section 8 and 9 complaints in the Profert referral.

3.9 The Commission consolidated its allegations against Sasol of abuse of dominance in the Nutri-Flo and Profert complaints for purposes of prosecution.

4. Settlement discussions

4.1 Notwithstanding the Commission's allegations as outlined above, SCI contends that it was not engaged in any unlawful conduct in contravention of sections 8 and 9 of the Act. Neither SCI nor the Commission makes any concessions or admissions with respect to their differing views.

4.2 With a view to settling the Nutri-Flo and Profert referrals of sections 8 and 9, the parties engaged on the following, which they expect to result in a more competitive outcome. That SCI would:

4.2.1 sell Ammonium Nitrate Based Fertilisers on an Ex-Works basis;

4.2.2 commit not to differentiate in its pricing of Ammonium Nitrate Based Fertilisers, other than on standard commercial terms such as volume and off-take commitments;

4.2.3 dispose of the Affected Assets so as to give practical effect to the above; and

4.2.4 cease the importation of ammonia on behalf of third parties.

4.3 The Commission engaged in settlement negotiations on the basis that SCI would make reasonable endeavours to settle with Nutri-Flo and Profert.


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5. Undertakings

5.1 SCI undertakes, following the divestiture and disposal of the Affected Assets as contemplated below, and in any event no later than 12 (twelve) months after the date on which this Settlement Agreement is confirmed by the Tribunal as an order or such later date as may be agreed by the Commission or ordered by the Tribunal:

5.1.1 to sell all Ammonium Nitrate Based Fertilisers to its customers on an Ex-Works basis from the Premises;

5.1.2 not to impose any restriction or obligation upon any customer as regards the terms of resale of the abovementioned fertiliser products;

5.1.3 not to differentiate in its pricing, other than on standard commercial terms such as volume and off-take commitments;

5.1.4 that any discounts and/or allowances granted shall be transparent and available to all customers willing and able to meet such volume and off-take commitments; and

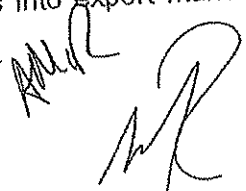
5.1.5 without detracting from the generality of the foregoing:

5.1.5.1 SCI shall be entitled to give discounts and/or other allowances for reasons associated with volume and/or off-take commitments, as detailed in Annexure C;

5.1.5.2 SCI shall be entitled to give discounts and/or allowances where customers have been subject to specification deviation and supply disruption.

5.2 In order to give practical effect to the undertakings contemplated in 5.1 above Sasol Nitro hereby undertakes and commits to divest and dispose of the Affected Assets in accordance with the Divestiture Conditions contained in Annexure A.

5.3 Sasol undertakes, within twelve months of the confirmation of this Settlement Agreement as an order of the Tribunal, to house the Ammonia Plant and business operations relating thereto as a business unit separate from Sasol Nitro and with separately audited books of account, such that:

- 5.3.1 this separate business unit will be responsible for the operation of the Ammonia Plant in Sasolburg and for the marketing of ammonia produced at Sasolburg and supplied from Secunda;
- 5.3.2 the executive management of the business unit will be separate from that of the remainder of Sasol Nitro, with its own decision making power, separate audited accounts and will be incentivised according to the performance of the separate business unit; and
- 5.3.3 this business unit will sell ammonia on an arms length basis to Sasol's own operations and to third parties.
- 5.4 After the date on which this Settlement Agreement is confirmed by the Tribunal as an order, and other than for internal use within the Sasol Limited group, SCI undertakes to:
- 5.4.1 cease all importation of ammonia into the Republic of South Africa, within a period of 25 months of confirmation of the Settlement Agreement other than those imports on behalf of third parties that may be occasioned due to supply and logistic disruptions and plant maintenance shutdowns; and
- 5.4.2 consequentially adjust its logistics infrastructure requirements.
- 5.5 To address concerns of possible unintended consequences which may result from the undertakings set out in 5.1 to 5.4 above, SCI confirms that, save to the extent specified herein, this Settlement Agreement shall not:
- 5.5.1 unduly alter SCI's investment decisions with respect to ammonia based fertilisers;
- 5.5.2 result in SCI unduly limiting supply of ammonia and ammonia nitrate products to any of its customer(s); or
- 5.5.3 sell ammonium nitrate explosives into export markets at prices below the Average Price in South Africa.
- 

5.6 For the avoidance of doubt, it is recorded that SCI's entitlement to make investment decisions and decisions relating to the supply of ammonia and nitrate products independently of the effect of this Settlement Agreement is not affected by the undertakings in 5.5.

5.7 Confidential aspects of the undertakings contained in 5.1 to 5.5 are contained in Annexure C.

6. Administrative penalty

No administrative penalty shall be payable in terms of the Act and/or in terms of this Settlement Agreement.

7. Settlement

SCI confirms that it has engaged with the relevant complainants and it has agreed to the terms of the settlement agreements with respectively, Profert and Nutri-Flo, subject to this Settlement Agreement being confirmed by the Tribunal.

8. Duration

8.1 This Settlement Agreement shall come into effect on the date on which it is confirmed by the Tribunal as an order.

8.2 The undertakings made herein shall remain binding upon SCI for a period of 10 (ten) years after the disposal of the Affected Assets in terms of clause 5.2 hereof as read with the Divestiture Conditions contained in Annexure "A", after which such undertakings shall lapse and be of no further force or effect.

9. Variation

9.1 This Settlement Agreement may not be varied; provided that SCI shall be entitled, upon good cause, to make reasoned application to the Commission

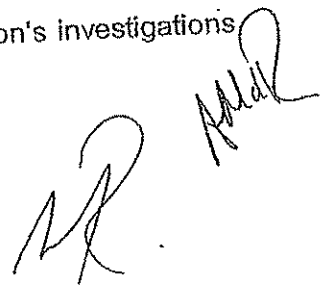
to waive, modify and/or substitute one or more of the terms of this Settlement Agreement, which consent shall not be unreasonably withheld.

9.2 In the event of the Commission and SCI agreeing upon the waiver, modification and/or substitution of any aspect of this Settlement Agreement, the Commission and SCI shall make application to the Tribunal for confirmation by it of such waiver, modification and/or substitution of any one or more terms of this Settlement Agreement.

9.3 For purposes of this Settlement Agreement, "good cause" means circumstances that could not have reasonably been foreseen by SCI and/or the Commission at the time this Settlement Agreement was entered into.

10. Full and final resolution

This Settlement 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 SCI relating to alleged contraventions of section 8 and 9 of the Act that are the subject of the Nutri-Flo referral and the Profert referral and which are the subject of the Commission's investigations under case numbers 2003Dec770 and 2004Aug1148.



DATED at Rosebank on this the 25th day of June 2010

AM de R -
Director of Sasol Chemical Industries Limited
Authorised signatory for Sasol Chemical Industries Limited

DATED at Hyde Park on this the 25th day of June 2010

Shan Ramburuth
Shan Ramburuth
Commissioner, Competition Commission

THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(PRETORIA)

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED

Respondent

In re:

CT Case No: 45/CR/May06

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED
YARA SOUTH AFRICA (PTY) LIMITED
AFRICAN EXPLOSIVES AND CHEMICAL
INDUSTRIES LIMITED

First Respondent

Second Respondent

Third Respondent

and

In re:

CT Case No: 31/CR/May05

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED
YARA SOUTH AFRICA (PTY) LIMITED
OMNIA FERTILIZER LIMITED

First Respondent

Second Respondent

Third Respondent

Handwritten signatures at the bottom right of the page.

Panel : N Manoim (Presiding Member)
A Wessels (Tribunal Member); and
M Madlanga SC (Tribunal Member).

Heard on : 14 July 2010

Decided on :

DRAFT ORDER

The Tribunal hereby confirms the Settlement Agreement concluded by the Competition Commission and the Respondent, annexed marked "A", as an order of the Tribunal in terms of section 58 as read with section 27(1) of the Competition Act no. 89 of 1998 as amended ("the Act"), subject to the further order (to which the Competition Commission and the Respondent have consented) that:

1. Nothing in the Settlement Agreement shall be read as interfering with the Respondent's obligations in terms of its current ammonia supply contracts with its customers, or as constituting an event of hardship or force majeure in terms of such contracts entitling the Respondent to cease or limit its supply obligations to its customers in terms of such contracts;
2. Subject to any rights of the Respondent under section 67 of the Act, nothing in the Settlement Agreement shall be read as depriving a prospective complainant of any right to submit a complaint to the Commission to be addressed under the Act;
3. The terms of the Settlement Agreement do not detract from any right of any person to apply for a declaratory order in terms of section 58(1)(a)(v) or (vi) of the Act.



Norman Manoim

Presiding Member

Concurring: A Wessels and M Madlanga SC

Two handwritten signatures in black ink. The first signature, on the left, is a cursive 'AW' for A Wessels. The second signature, on the right, is a cursive 'MM' for M Madlanga.

The terms of the draft order attached are duly confirmed by the Applicant
and the Respondent

DATED at Rosebank on this the 16th day of July 2010

AM de Ruyter

Andre de Ruyter

Sasol Chemicals Industries Limited (the Respondent)

Authorised signatory for Sasol Chemicals Industries Limited

DATED at Pretoria on this the 19. day of July 2010

Shan Ramburuth

Shan Ramburuth

Commissioner, The Competition Commission of South Africa (the
Applicant)

ADDENDUM TO THE SETTLEMENT AGREEMENT

1. Further to the Settlement Agreement concluded by the Commission and SCI and the undertakings made by SCI therein, SCI undertakes to provide the Commission with annual reports and such information as the Commission may reasonably require regarding its compliance with the undertakings in clause 5 of the Settlement Agreement and in clauses 3 to 6 of Annexure "C" thereto. This information includes and is not limited to audited financial accounts and supporting documentation in respect of such accounts.
2. The Commission shall be entitled to request such reports, information and supporting documentation referred to in clause 1 above at any time on reasonable notice.
3. SCI undertakes to notify the Commission by way of a letter once its obligations under clause 5.3 of the Settlement Agreement have been completed and to provide such information as the Commission may reasonably require evidencing such implementation.

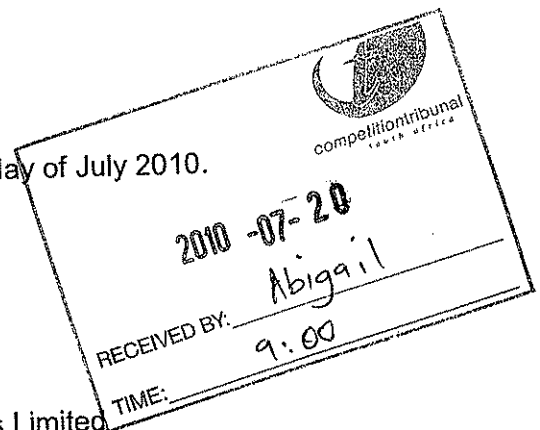
DATED at Rosebank on this the 16th day of July 2010.

AM de Ruyter

Andre de Ruyter

Sasol Chemicals Industries Limited

Authorised signatory for Sasol Chemicals Industries Limited



DATED at Pretoria on this the 19 day of July 2010.

Shan Ramburuth

Shan Ramburuth
Commissioner, The Competition Commission of South Africa



Case Numbers: 31/CR/May05 and 45/CR/May06

15 July 2010

Competition Commission

Per email: WendyM@compcom.co.za; SimonR@compcom.co.za;
TembinkosiB@compcom.co.za

Cheadle Thompson & Haysom

Per email: Doris@cth.co.za; Sibongile@cth.co.za

Bowman Gilfillan

Per email: d.lotter@bowman.co.za; l.mtanga@bowman.co.za

Dear All,

Re: Settlement Agreement between the Competition Commission ("Commission") and Sasol Chemical Industries Ltd ("Sasol") in respect of alleged contraventions of sections 8 and 9 of the Competition Act of 1998: case numbers 31/CR/May05 and 45/CR/May06

We refer to the hearing of the above matter which was held on Wednesday, 14 July 2010.

The panel is in principle satisfied with the terms of the settlement agreement as amplified by the draft order handed up during the hearing. We have, however, identified certain issues that first require your further consideration and response, before we make a final determination about whether to confirm the agreement:

1. Draft order:

For the sake of completeness, we request that the draft order that was handed up during the hearing be signed by all parties to the settlement agreement.

2. Monitoring mechanism of behavioural remedies:

We have a concern regarding the monitoring aspect of the behavioural undertakings by Sasol as contained in the settlement agreement. We note that the monitoring mechanisms which Mr. Brand of Sasol and Ms. Mkwanzani of the Commission explained at the hearing in response to our queries do not form part of the signed settlement agreement.

We therefore invite the parties to consider the insertion of appropriate clauses in regard to the monitoring mechanism of the behavioural remedies in the settlement agreement. We base this request *inter alia* on the following considerations (i) given that the undertakings in the settlement agreement will remain binding on Sasol for a period of ten years after the disposal of the affected assets, the responsible persons at Sasol and/or the Commission overseeing compliance with these undertakings are likely to change over this period and thus even though those currently involved in the negotiations have a clear understanding of these mechanisms later ones may not which may lead to disputes; and (ii) certain of Sasol's undertakings in our view would not be transparent and therefore would not be detected and effectively monitored by market participants, for example certain undertakings in the Confidential Supplementary Undertakings contained in Annexure "C" to the settlement agreement.

Given that Sasol at the hearing provided undertakings in the above regard, we are confident that the Commission and Sasol can formulate appropriate undertakings in regard to an effective monitoring mechanism to be included, as an addendum, to the settlement agreement. We ask that you consider providing us with such an addendum and that if you do so, that it is duly signed by all parties to the settlement agreement.

We await your urgent consideration of this letter.

Kind regards,

Ipeleng Selaledi

Researcher

On behalf of the panel

Direct Line: 012 394 3344

Fax No: 012 394 4344

Email: IpelengS@comptrib.co.za

(transmitted electronically without signature)