

**competitiontribunal**  
*south africa*

Pages: 16 (including cover)

20 May 2009

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Dear Sirs

**The Competition Commission and Sasol Chemical Industries Ltd, Kynoch  
Fertilizer (Pty) Ltd, Omnia Fertilizer Ltd  
Case no: 31/CR/May05 (Consent Order)**

Attached please find the order in the above matter.

Regards

Tebogo Mputle

**COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA**

**Case No: 31/CR/May05**

**CC Case NO'S: 2007AUG3147 & 2007DEC3382**

**In the matter between:**

<b>The Competition Commission South Africa</b>	Applicant
And	
<b>Sasol Chemical Industries Ltd</b>	Respondent
<i>In re:</i>	
<b>The Competition Commission South Africa</b>	Applicant
And	
<b>Sasol Chemical Industries Ltd</b>	First Respondent
<b>Yara South Africa (Pty) Ltd</b>	Second Respondent
<b>Omnia Fertilizer Ltd</b>	Third Respondent
And	
<i>In re:</i>	
<b>The Competition Commission South Africa</b>	Applicant
And	
<b>Foskor (Pty) Ltd</b>	Respondent
<b>Sasol Chemical Industries Ltd</b>	Second Respondent

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Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 20 May 2009

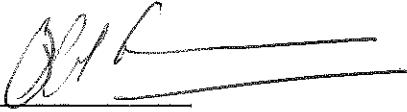
Decided on : 20 May 2009

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**ORDER**

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The Tribunal hereby confirms as an order, the consent and settlement agreement proposed by the Competition Commission and the respondent in respect of CC Case NO'S: 2007AUG3147 & 2007DEC3382 and CT 31/CR/May05, attached hereto as Annexure A.

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D Lewis

**Concurring: N Manoim and Y Carrim**

**BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(PRETORIA)**

CT CASE NO: 31/CR/May05 & CC CASE NO'S: 2007AUG3147 & 2007DEC3382

In the matter between:

**THE COMPETITION COMMISSION OF SOUTH AFRICA** Applicant

and

**SASOL CHEMICAL INDUSTRIES LIMITED** Respondent

In re:

**THE COMPETITION COMMISSION OF SOUTH AFRICA** Applicant

and

**SASOL CHEMICAL INDUSTRIES LIMITED** First Respondent

**YARA SOUTH AFRICA (PTY) LIMITED** Second Respondent

**OMNIA FERTILIZER LIMITED** Third Respondent

and in re:

**THE COMPETITION COMMISSION OF SOUTH AFRICA** Applicant

and

**FOSKOR (PTY) LIMITED** First Respondent

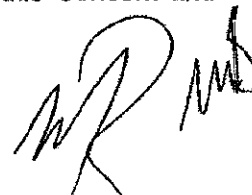
**SASOL CHEMICAL INDUSTRIES LIMITED** Second Respondent

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**CONSENT AND SETTLEMENT AGREEMENT BETWEEN THE COMPETITION  
COMMISSION AND SASOL CHEMICAL INDUSTRIES LTD IN REGARD TO  
CONTRAVENTIONS OF SECTION 4(1) OF THE COMPETITION ACT 89 OF 1998**

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The Competition Commission and Sasol Chemical Industries Ltd hereby agree that application be made to the Competition Tribunal for confirmation of this Consent and



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Settlement Agreement as an order of the Tribunal in terms of sections 49D and 58(1)(a)(iii) of the Competition Act 89 of 1998 (as appropriate), on the terms set out below:

## 1 Definitions

- 1.1 "Act" means the Competition Act 89 of 1998;
- 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 "ANS" means ammonium nitrate solution;
- 1.4 "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;
- 1.5 "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;
- 1.6 "Commissioner" means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;
- 1.7 "DAP" means di-ammonium phosphate;
- 1.8 "Foskor" means Foskor (Pty) 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 Block G, Riverview Office Park, Janadel Road, Midrand;
- 1.9 "ICH" means Industrial Commodities Holdings, 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  
19 Bath Ave, cnr Selby Road, Parkwood, 2193;

- 1.10 "IPC" means the Import Planning Committee;
- 1.11 "LAN" means limestone ammonium nitrate;
- 1.12 "MAP" means mono-ammonium phosphate;
- 1.13 "NBC" means Nitrogen Balance Committee;
- 1.14 "Nutri-Flo" means Nutri-Flo CC and Nutri-Fertilizer 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 (opposite Compensation Station), Umhlali, Kwazulu-Natal, South Africa;
- 1.15 "Nutri-Flo referral" means the Complaint Referral referred to the Tribunal by the Commission under case number 31/CR/May05;
- 1.16 "Omnia" means Omnia Fertilizer 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;
- 1.17 "Sasol" 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 15 Baker Street, Rosebank, Johannesburg, South Africa;
- 1.18 "Sasol Nitro" is the division of Sasol Chemical Industries Limited which encompasses the business activities and conduct which are the subject of this agreement;
- 1.19 "Settlement Agreement" means this consent and settlement agreement duly signed and concluded between the Commission and Sasol;

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1.20 "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; and

1.21 "Yara" means Yara (South Africa) (Pty) Limited, a company previously known as Kynoch Fertilizer (Pty) 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.

## **Complaint investigations and Commission's findings**

### **2 The Nutri-Flo referral**

2.1 Nutri-Flo lodged a complaint with the Commission on 3 November 2003 against Sasol, in which it alleged that Sasol and its competitors (Kynoch and Omnia) were engaged in the following conduct:

2.1.1 collusion in dividing the market for LAN;

2.1.2 collusion in respect of prices of LAN and of certain other fertilizers;

2.1.3 excessive pricing in respect of LAN and ANS; and

2.1.4 exclusionary conduct through an effective margin squeeze, which became increasingly severe after Nutri-Flo lodged the second complaint with the Commission, and which resulted in it closing its granulation facility.

2.2 The Commission then conducted an investigation into the matter as a result of which it found that Sasol, Kynoch and Omnia had contravened section 4 of the Act as alleged. Pursuant to its investigation, the Commission found that the following anti-competitive conduct occurred in contravention of section 4 of the Act:

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- 2.2.1 Collusion in constructing and dividing the market such that Sasol became the exclusive supplier of LAN to the wholesale market;
- 2.2.2 Agreements, arrangements and understandings concluded within the IPC, NBC and Export Club that amount to collusion in respect of ammonia, potash, urea, MAP, DAP and LAN; and
- 2.2.3 Excessive pricing and exclusionary conduct, the details of which are not relevant for the purposes of this Agreement.
- 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 Sasol, Omnia and Kynoch. The referral was subsequently amended by the Commission.
- 2.4 In the Nutri-Flo referral, as amended, the Commission alleges that the respondents have contravened:
- 2.4.1 section 4(1)(b) alternatively section 4(1)(a) of the Act;
- 2.4.2 section 8(c) alternatively section 8(d)(ii) of the Act; and
- 2.4.3 section 8(a) of the Act
- 2.5 In respect of section 4(1) the Commission found that Sasol, Omnia and Kynoch have contravened section 4(1)(b), alternatively section 4(1)(a) of the Act, due to the following conduct:
- 2.5.1 Sasol entered into a framework of agreements, arrangements and understandings with Omnia, Kynoch and AECI which had the effect of constructing and dividing the market in such a way as to ensure that Sasol became the exclusive supplier of LAN to the wholesale market, as well as maintaining agreed margins.
- 2.5.2 Sasol established and participated in various committees composed of producers and suppliers. The members of these

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committees included Sasol, Kynoch and Omnia. These committees included the IPC, the NBC and the Export Club. These committees were used, amongst other things, to: co-ordinate business practices and goals; exchange information about production, supply and demand; allocate, redistribute and swap sales by reference to sales targets, prevailing market shares and product availability; and agree on export volumes and prices, directly or indirectly fixing prices, dividing markets by allocating customers, suppliers or specific types of goods.

2.5.3 The products covered in the committees included ammonia, potash, urea, MAP, DAP, LAN and ANS. The committees aimed to ensure 'balance' of supply and demand at well understood and communicated pricing levels.

2.5.4 The agreements, arrangements and understandings in the committees had the effect of directly or indirectly fixing prices, and dividing markets by allocating customers, suppliers or specific types of goods.

2.5.5 Further, the anti-competitive effect of these agreements, arrangements and understandings is substantial in that they serve to lessen the capacity of competitors, including Nutri-Flo, to supply fertilizers to the market at lower rates and to expand their penetration of the market; and, they generally operate to the detriment of consumers.

2.5.6 No technological, efficiency or other pro-competitive gain has been demonstrated to outweigh such effects within the contemplation of section 4(1)(a) of the Act.

### 3 The Foskor matter

3.1 On 23 August 2007, the Commissioner initiated a complaint against Foskor and Sasol regarding possible contraventions of section 4 the Act

with regards to phosphoric acid. On 3 December 2007, the Commission received a complaint from the animal feeds producers (i.e. Bio-Mineral (Pty) Ltd, Kemira Phosphate (Pty) Ltd t/a KK Animal Nutrition, N-West Fosfaat CC and SA Feed Phosphates (Pty) Ltd) against Foskor and Sasol on substantially identical charges / allegations regarding the tolling agreement.

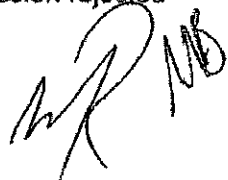
3.2 On 12 May 2008, Foskor applied for corporate leniency in terms of the Commission's CLP in relation to contraventions of section 4(1)(b) of the Act.

3.3 The conduct under investigation and referred to in the corporate leniency application, insofar as such conduct contravenes section 4 of the Act, relates to the toll production agreement between Sasol and Foskor, and related interactions and communications between Sasol and Foskor on various levels. In particular, this conduct relates to division of markets by allocating customers and territories with regard to phosphoric acid and its derivatives.

#### 4 Settlement discussions

4.1 As a result of a competition law compliance review initiated by Sasol Limited during July 2008, Sasol identified areas of concern and on 1 December 2008, Sasol filed a marker application under the Commission's CLP in respect of the contravention of section 4(1)(b) relating to price fixing of various fertilizer products. The Commission rejected the application as it was not in a position to evaluate the need for a marker, given the scope of the immunity sought and the applicability of the CLP thereto, taking into account pending investigations and matters that had been referred which may be relevant.

4.2 On 15 December 2008, Sasol applied for a marker for possible contraventions of section 4(1)(b)(ii) of the Act in relation to dividing markets by allocating suppliers, territories, or specific types of goods in export markets, in respect of phosphoric acid. The Commission rejected

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the application taking into account pending investigation(s) and/or existing application(s) for leniency.

4.3 Sasol's attorneys sent a letter to the Commission on 19 December 2008 in which they proposed to settle the complaint referrals insofar as they relate to contraventions of section 4(1)(b) of the Act as well as additional contraventions of section 4(1)(b) which had not yet been referred to the Tribunal.

4.4 In this letter, Sasol's attorneys confirmed that their client has engaged in the following conduct in contravention of the Act:

4.4.1 During the period from 1996 to 2004, Sasol and its competitors, Omnia and Kynoch met and agreed to:

4.4.1.1. fix prices in respect of certain fertilizer products in contravention of section 4(1)(b)(i) of the Act;

4.4.1.2. divide markets by allocating customers and the manufacture of certain products in contravention of section 4(1)(b)(ii) of the Act; and

4.4.1.3. collusively tender for supply contracts in contravention of section 4(1)(b)(iii) of the Act.

4.5 The conduct referred to above occurred in, *inter alia*:

4.5.1 KwaZulu Natal;

4.5.2 Gauteng;

4.5.3 Free State;

4.5.4 Mpumalanga;

4.5.5 Limpopo

4.5.6 Western Cape; and

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- 4.5.7 Eastern Cape.
- 4.6 The products in respect of which the admitted contraventions of section 4(1)(b) took place include:
- 4.6.1 Nitrogen-based fertilizers including LAN, urea, ammonium sulphate and ammonium sulphate nitrate;
  - 4.6.2 Phosphate-based fertilizers including MAP, DAP and various blended products;
  - 4.6.3 Potassium-based fertilizers including potassium chloride, potassium sulphate and potassium nitrate; and
  - 4.6.4 Blends of the nitrogen-, phosphate- and potassium- based fertilizers.
- 4.7 Sasol and the Commission then engaged in protracted settlement discussions, the outcome of which is this Settlement Agreement.
- 4.8 Pursuant to further internal investigation by Sasol, Sasol identified the conduct described in 5.1.9 below on 12 May 2009, which conduct was confirmed after subsequent interviews held on 14 May 2009.

## 5 Admissions

- 5.1 Sasol admits the following facts:
- 5.1.1 Sasol entered into a series of agreements, arrangements and understandings with Omnia, Kynoch and AECI, including but not limited to, the tolling and supply agreements relating to the products referred to in this Settlement Agreement.
  - 5.1.2 These agreements, arrangements and understandings contributed to Sasol becoming the principal supplier of LAN to wholesale customers.
  - 5.1.3 Sasol participated in the IPC, the Export Club and the NBC, which was established by Sasol. These committees were

composed of producers and suppliers. The members of these committees included Sasol, Kynoch and Omnia.

- 5.1.4 These committees were used, amongst other things, to co-ordinate business practices; to exchange information about production, supply and demand; to allocate, redistribute and swap product by reference to sales targets, prevailing market shares and product availability monthly, by product and market and to discuss export volumes.
- 5.1.5 From the exchange of such information the members of the committees were able to derive forecasted market shares.
- 5.1.6 The NBC was also used to ensure balance of supply and demand.
- 5.1.7 The members of the committees engaged in swaps of various products and in particular, in relation to LAN, potash and urea. Such swaps were facilitated by the exchange of the information referred to above.
- 5.1.8 The products variously covered in the committees included ammonia, potash, urea, MAP, DAP, LAN, ammonium sulphate, sulphate of potash, triple super phosphate and ANS. Members of the committees further communicated estimated landed cost of imported products based upon published international prices and estimated freight costs.
- 5.1.9 In 2001, a meeting was held between managers and/or employees of Sasol Nitro, Omnia and Kynoch at a hotel in Johannesburg. At the meeting, agreement was reached between Sasol Nitro, Omnia and Kynoch as to pricing formulae from which base prices would be derived for the fertilizer products sold by the parties to the agreement. Agreement was also reached as to the range of discounts that the parties would offer off the base prices. In the period of approximately

2001 to 2005, meetings were held between Sasol Nitro, Omnia and Kynoch in order to address any instance of deviations by any of other parties from the agreement. To the best of Sasol's knowledge, no meetings were held after 2005 but Sasol is not able to say whether the other parties continue to apply the formulae in respect of fertilizer products. Sasol Nitro continues to price its fertilizer products according to the concepts embodied in the original formulae; however, Sasol Nitro has independently amended the formulae in a number of material respects, specifically the margins.

5.1.10 The existence of the committees described in 5.1.3 – 5.1.8 above facilitated the continued application of the pricing agreement described in 5.1.9 above.

5.2 Sasol admits the facts as set out in paragraph 5.1 and admits that it has contravened section 4(1)(b) of the Act in those respects.

5.3 Sasol admits the facts as set out in paragraph 3.3 above and admits that it has contravened section 4(1)(b) of the Act in those respects.

5.4 Sasol admits the facts as set out in paragraphs 4.4 to 4.6 above and admits that it has contravened section 4(1)(b) of the Act in those respects.

## **6 Agreement concerning future conduct**

Sasol undertakes to:

6.1 circulate a statement summarising the content of this Settlement Agreement to all Sasol employees who are middle managers and above or of job grading level 5 and above within 30 days of the date of confirmation of this Agreement as an order of the Tribunal;

6.2 desist from all anti-competitive behaviour;

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6.3 develop and implement a compliance programme, with corporate governance designed to ensure that all employees are aware of the provisions of the Act and do not contravene them; and

6.4 submit a copy of the compliance programme outlined above to the Commission within 90 days of the date of confirmation of this Agreement as an order of the Tribunal.

## **7 Co-operation**

7.1 Sasol undertakes to co-operate fully with the Commission in its prosecution of the remaining respondents in the Nutri-Flo referral.

7.2 This assistance includes, but is not limited to:

7.2.1 providing the Commission with all relevant evidence available to it that might assist the Commission in its prosecution of the remaining respondents in the Nutri-Flo referral under section 4; and

7.2.2 ensuring that all current Sasol employees, and to the extent possible, former employees, who have knowledge of these contraventions are available to and do co-operate with the Commission in good faith, both for the purposes of consultation and to give evidence in proceedings before the Tribunal.

## **8 Administrative penalty**

8.1 In terms of section 58(1)(a)(iii) and 59(1)(a), 59(2) and 59(3) of the Act, Sasol is liable to pay an administrative penalty.

8.2 An administrative penalty in the amount of 8 per cent of Sasol Nitro's turnover (excluding turnover attributable to detonators and certain accessories) for the financial year ending in 2004/2005 is hereby imposed on Sasol for the section 4(1)(b) contraventions by its Sasol

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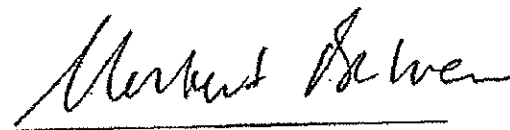
Nitro division set out above. This penalty amounts to R250 680 000,00 (two hundred and fifty million six hundred and eighty thousand rand )

8.3 The penalty amount will be paid by Sasol to the Commission within 60 days of the date of confirmation of this Settlement Agreement as an order of the Tribunal.

**9 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 Sasol relating to alleged contraventions of section 4(1) of the Act that are the subject of the Commission's complaint referral under CT case number 31/CR/May05, the conduct referred to in paragraphs 4.4 – 4.6 above, the conduct referred to in paragraph 5.1 above and the Commission's investigations under CC case numbers 2007AUG3147 and 2007DEC3382.

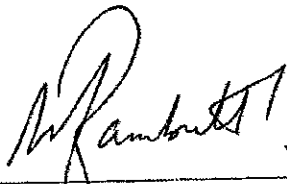
DATED at Sandton on this the 18<sup>th</sup> day of May 2009.



*authorised signatory*

**Director of Sasol Chemical Industries Limited**  
Authorised signatory for Sasol Chemical Industries Ltd

DATED at Pretoria on this the 18<sup>th</sup> day of May 2009.



**Shan Ramburuth**  
**Commissioner, Competition Commission**



\* \* \* Communication Result Report ( 20.May. 2009 16:26 ) \* \* \*

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Date/Time: 20.May. 2009 15:52

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Dear Sirs

The Competition Commission and Sasol Chemical Industries Ltd, Kynoch  
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 Case no: 31/CR/May05 (Consent Order)

Attached please find the order in the above matter.

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