

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 38/CR/Apr08

In the matter between:

The Competition Commission

Applicant

and

Bonheur 50 General Trading (Pty) Ltd

1st Respondent

Komatiland Forests (Pty) Ltd

2nd Respondent

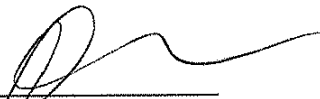
Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 07 May 2008

Decided on : 07 May 2008

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A", in terms of section 49D(2)(a) of the Competition Act .



D Lewis

Concurring: N Manoim and Y Carrim

"DM1"

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA**

CT Case No:

CC Case No: 2004Jun1077

In the application by:

THE COMPETITION COMMISSION

APPLICANT

and

**BONHEUR 50 GENERAL TRADING
(PTY) LTD**

1ST RESPONDENT

**KOMATILAND
FORESTS (PTY) LTD**

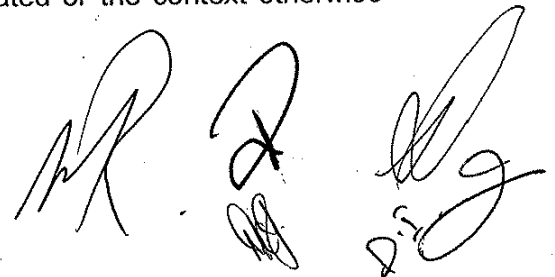
2ND RESPONDENT

**AGREEMENT BETWEEN APPLICANT AND RESPONDENTS ON THE TERMS OF
AN APPROPRIATE CONSENT ORDER**

The Competition Commission and the Respondents hereby agree that an application be made by the Competition Commission to the Competition Tribunal for a consent order on the terms set out below.

1. DEFINITIONS

For the purposes of this agreement and any consent order pursuant thereto, the following definitions shall apply unless otherwise stated or the context otherwise requires –



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

"Applicant / 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;

"Consent Order Agreement" means this agreement duly signed and concluded between the Commission and the Respondents;

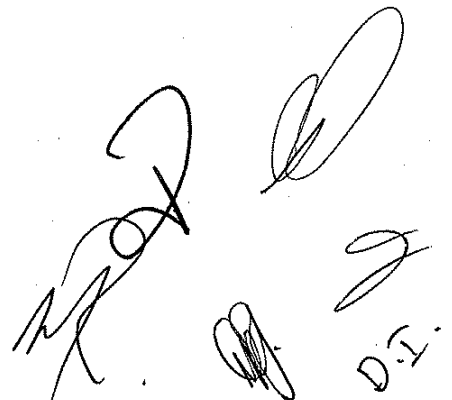
"First Respondent / Bonheur" means Bonheur 50 General Trading (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 3 Main Street (Corporate Office), Sabie, Mpumalanga;

"Respondents" means the First and Second Respondents collectively;

"SAFCOL" means South African Forestry Company Limited a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 13 Stamvrug Street, Val-de-Grace, Pretoria, 0184;

"Second Respondent / KLF" means Komatiland Forests (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 13 Stamvrug Street, Val-de-Grace, Pretoria;

"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, Mulayo Building, (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

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2. BACKGROUND

2.1 On 31 March 2004 SAFCOL, Bonheur and KLF entered into a Share Sale Agreement ("Share Sale Agreement") in terms of which Bonheur was to acquire a 75% interest in KLF from SAFCOL.

2.2 The value of the transaction having met the threshold for an intermediate merger in terms of the Act, same was on 29 June 2004 duly notified to the Commission as such.

2.3 On 22 September 2004, the Commission decided that the merger would result in substantial lessening and/or prevention of competition in the relevant market (s) and accordingly prohibited it.

2.4 On 28 November 2004, the Respondents lodged an application with the Tribunal requesting the latter to consider the Commission's decision in terms of section 16(1) of the Act.

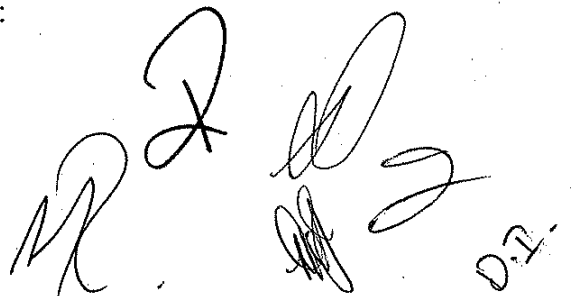
2.5 In February 2006, while a hearing into the application referred to in 2.4 above was underway, the Respondents withdrew their application and subsequently abandoned the merger.

3. COMMISSION'S FINDINGS

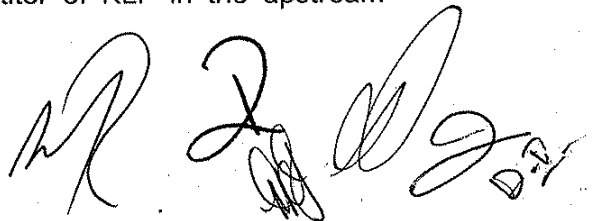
3.1. In November 2004, the Commission's attention was drawn to a possible prior implementation of the merger, arising from certain conduct of the Respondents before, during and after the merger review process.

3.2 The Commission subsequently caused an investigation to be conducted into this possibility.

3.3. The Commission's investigation found that:

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- 3.3.1 Clause 20 of the Share Sale Agreement referred to in 2.1 above, ("Clause 20") provided for the attendance at KLF Management Committee ("Manco") meetings, by representatives of Bonheur.
- 3.3.2 The Bonheur representatives would attend these meetings on an observer status, as such, though permitted to speak at the meetings, they were prohibited from voting.
- 3.3.3. They were also prohibited from otherwise exercising control or influence over the management or operation of KLF.
- 3.3.4. The rationale for allowing Bonheur representatives an observer status in the KLF Manco meetings, was to give Bonheur insight into the business of KLF and its management in order to protect the former's position as a prospective investor in KLF.
- 3.3.5. Bonheur representatives had indeed regularly attending KLF Manco meetings pursuant to the signing of the Share Sale Agreement.
- 3.3.6. This practice had continued during and after the merger review process.
- 3.3.7. Contrary to the express provisions of Clause 20, some of the Bonheur representatives in attendance in several of the KLF Manco meetings had, through their level of participation in the discussions and deliberations in the meetings, conducted themselves in a manner that amounted to the exercise of control over the management and/or operation of KLF.
- 3.3.8. Furthermore, the attendance at the KLF Manco meetings by the Bonheur representatives had resulted in the latter being exposed to certain classes of competitively sensitive information which, but for their attendance at these meetings, would not have been readily available to Bonheur, then a competitor of KLF in the upstream

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market for the production and supply of softwood sawlogs and the downstream market for the production and supply of sawn timber.

3.3.9. The conduct of the respondents as outlined in 3.3.7 and 3.3.8 above went beyond the scope of :

- normal commercial interaction between competitors in the ordinary course of business; and
- normal commercial interaction between competitors in the process of a merger ;

and effectively amounted to the implementation of the merger absent the approval thereof by the Commission, in contravention of section 13A(3) of the Act.

4. RELEVANT PROVISIONS OF THE ACT

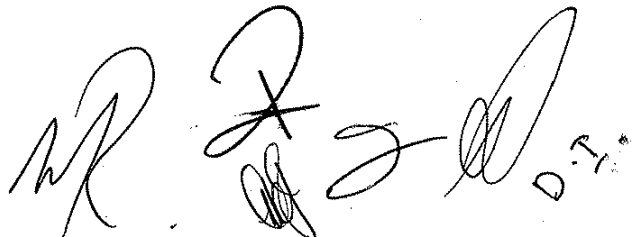
Section 13A(3) of the Act states that :

“The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.”

5. THE RESPONDENTS CONTENTIONS

5.1. The Respondents contend that –

5.1.1. they did not seek to hide the fact that Bonheur representatives were attending KLF Manco meetings, hence the Share Sale Agreement bearing Clause 20 was made available to the Commission as part of the merger filing;



5.1.2. a clause which was substantially similar to Clause 20 had been included in similar agreements that SAFCOL had concluded with third parties regarding the sale of its interests in other forestry companies;

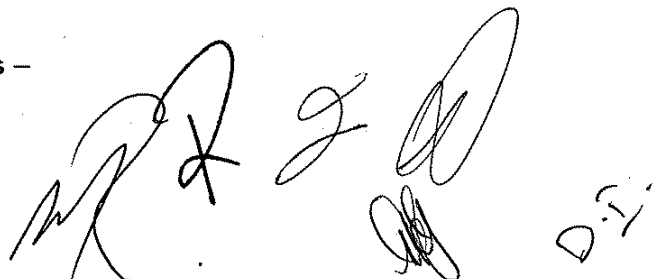
5.1.3. as recorded in Clause 20, the rationale for allowing Bonheur representatives to attend management meetings of KLF was to give Bonheur insight into the business of KLF and its management in order to protect Bonheur's position as a prospective investor in KLF. The acquisition price in respect of this interest was agreed in March 2004. At the time when the Share Sale Agreement was signed, SAFCOL and Bonheur had contemplated that implementation of the proposed transaction could be suspended for many months as the Share Sale Agreement had been conditional on approval in terms of the Act and the signature of a notarial lease between the Government of the Republic of South Africa and KLF. In terms of the Share Sale Agreement, Bonheur was required to provide SAFCOL with bank guarantees for the full purchase price. These guarantees had to be renewed periodically and, in order to retain the commitment of the funders concerned, it was necessary for Bonheur to have insight into the performance of KLF and into any changes that could impact on the initial valuation model;

5.1.4. this practice was followed in the bona fide belief that the implementation of such a clause did not give rise to any contravention of the Act and that the manner in which clause 20 was implemented did not in fact contravene the Act.

6. AGREED FACTS

6.1. The Commission and the Respondents agree on the following facts—

6.2. At all material times, the Respondents –

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6.2.1 had not intended to evade the Act in order to obtain some commercial or other advantage;

6.2.2 cooperated fully and openly with the Commission once their attention was drawn to the possible contravention of the Act;

6.2.3 had not previously contravened the Act;

6.2.4 were *bona fide* in their actions and their intentions to comply with the Act.

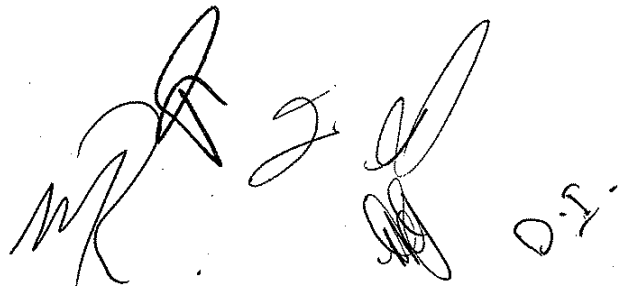
6.3. The merger was eventually abandoned and as such, no loss was suffered, no damage was caused and nothing was gained by the Respondents from the prior implementation thereof.

7. ADMINISTRATIVE PENALTY

7.1. In order to settle the matter, the First Respondent agrees to pay an administrative penalty in the sum of R500 000.00 (five hundred thousand rand) in terms of section 59(1)(d)(iv) as read with section 59(2) and section 59(3) of the Act.

7.2. The penalty amount does not exceed 10% of either of the Respondents' annual turnover in the Republic and exports from the Republic during their preceding financial year.

7.3. The administrative penalty will be paid not later than thirty business days after the confirmation of this Consent Order Agreement as a Consent Order by the Tribunal.



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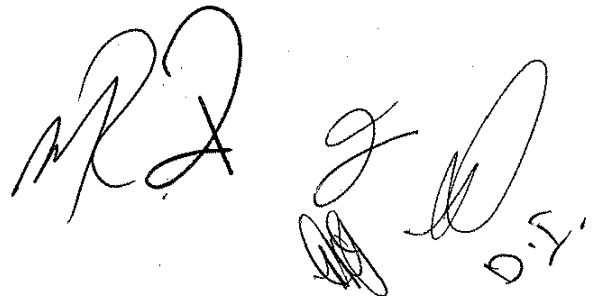
7.4. The penalty amount is to be paid to the Commission whose banking details are as follows –

Bank : ABSA
Name of Account : The Competition Commission Fees
Branch Name : Pretoria
Branch Code : 323345
Account Number : 4050778576

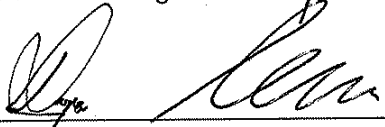
7.5. The Commission will pay over the penalty amount to the National Revenue Fund, referred to in section 59(4) of the Act.

8. VARIATION

No contract varying, adding to, deleting from or cancelling this Consent Order Agreement, and no waiver of any right under this Consent Order Agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

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Dated and signed at Cape Town on this the 27th day of March 2008.

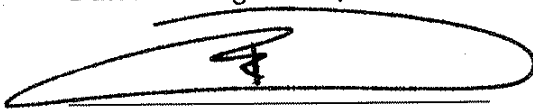


On behalf of First Respondent

L.S. Cooper / JOHN LEAMAN

Name

Dated and signed at Pretoria on this the 7th day of April 2008.

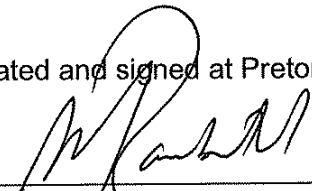


On behalf of Second Respondent

P.F. Kruse
_____ *duly authorised*
✓ hereunto

Name


Dated and signed at Pretoria on this the 09th day of April ~~March~~ 2008.



On behalf of Competition Commission

Shan Ramburuth

The Commissioner

 D.T.