

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:
CO037Aug10/VAR026Apr17

In the matter between:

Competition Commission

Applicant

And

Foskor (Pty) Ltd

Respondent

Panel : Y Carrim (Presiding Member)
: A Ndoni (Tribunal Panel Member)
: A Wessels (Tribunal Panel Member)
Heard on : 29 April 2020
Decided on : 29 April 2020

ORDER

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Foskor (Pty) Ltd annexed hereto marked "A".

Presiding Member
Ms Yasmin Carrim

29 April 2020

Date

Concurring: Ms Andiswa Ndoni and Mr Andreas Wessels

C0037 Aug 10 / VAR 026 Apr 17

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

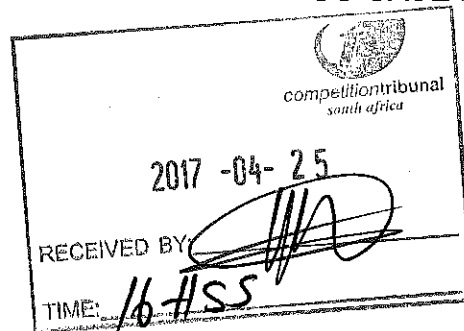
CT CASE NO: 43/CR/Aug10

CC CASE NO: 2007DEC3382

COMPETITION COMMISSION

And

FOSKOR (PTY) LTD



APPLICANT

RESPONDENT

FILING SHEET

(VARIATION AGREEMENT) CONFIDENTIAL

DOCUMENT FILED: Agreement between the Competition Commission and Foskor (Pty) Limited ("the parties") to amend the terms of the consent agreement dated 28 February 2011 entered into by the parties in regard to the alleged contravention of section 8(a) of the Competition Act No. 89 of 1998 (as amended).

DATED at **PRETORIA** on this the 25 day of **April** 2017.

COMPETITION COMMISSION

DTI Campus

77 Meintjies Street

Sunnyside, Pretoria

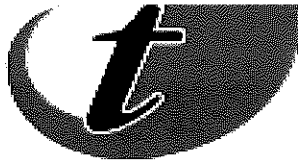
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competitiontribunal south africa

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 E 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
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Republic of South Africa
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Notice of Motion

Date: 25-Apr-2017 **File #** C0037Aug10/VAR026Apr17

To: The registrar of the Competition Tribunal

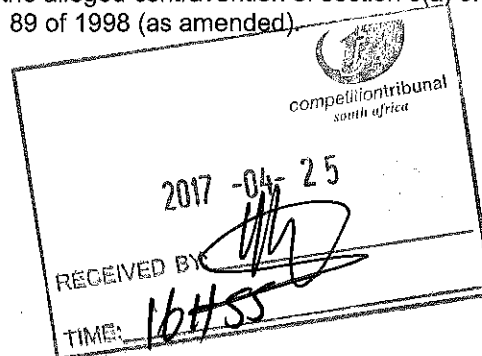
Concerning the matter between:

COMPETITION COMMISSION (Applicant)

and FOSKOR PROPRIETARY LIMITED (Respondent)

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

To amend the terms of the consent agreement dated 28 February 2011 entered into between the Competition Commission and Foskor (Pty) Limited in regard to the alleged contravention of section 8(a) of the Competition Act No. 89 of 1998 (as amended).



Name and Title of person authorised to sign:

Bukhosibakhe Majenge: Chief Legal Counsel

Authorised Signature:

Date:

25-Apr-2017

For Office Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

C0037Aug10/NAR026Apr17

CT Case No: 43/CR/Aug10

CC Case No: 2007Dec3382

In the matter between

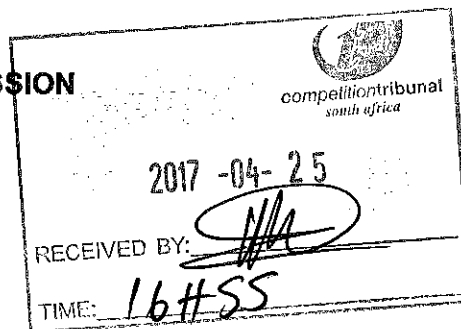
THE COMPETITION COMMISSION



Applicant

And

FOSKOR (PTY) LTD



Respondent

AGREEMENT BETWEEN THE COMPETITION COMMISSION AND FOSKOR (PTY) LTD TO AMEND THE CONSENT AGREEMENT DATED 28 FEBRUARY 2011 IN REGARD TO THE ALLEGED CONTRAVENTION OF SECTION 8(a) OF THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED)

The Competition Commission and Foskor (Pty) Ltd hereby agree to amend the Consent Agreement dated 28 February 2011 concluded between the parties on the terms set out below.

DEFINITIONS

1. For the purposes of this Agreement the following definitions shall apply:
 - 1.1 **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
 - 1.2 **"Agreement"** means this agreement duly signed and concluded between the Commission and Foskor.
 - 1.3 **"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 Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
 - 1.4 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
 - 1.5 **"Complaint"** means the complaint submitted by Animal Feed Producers in terms of section 49B(2)(a) of the Act and the complaint initiated by the Commissioner in terms of section 49B(1) of the Act under case number: 2007 Dec3382;
 - 1.6 **"Consent Agreement"** means the consent agreement, including the addenda thereto, concluded between the Commission and Foskor (Pty) Ltd

and duly confirmed as an order of the Competition Tribunal on 26 January 2011;

- 1.7 **"Foskor"** means Foskor (Pty Ltd;
- 1.8 **"Main Application"** means the application by Foskor (Pty) Ltd in terms of section 66(1) for a Tribunal order amending and/ or varying of the conditions of the consent agreement;
- 1.9 **"Parties"** means the Commission and Foskor;
- 1.10 **"Respondents"** mean Omnia Group (Pty) Ltd and the complainants in case number: 2007Dec3382;
- 1.11 **"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 Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

BACKGROUND


2. This matter originates from complaints lodged in 2007 by animal feed producers including Omnia (Pty) Ltd ("Omnia") against Foskor. The Commission investigated the complaint and found, *inter alia*, that Foskor's pricing policy for phosphoric acid for local customers was based on a formula that included a notional freight cost to India. In particular, the Commission found that Foskor was charging local



customers a Free on Board Richards Bay price ("the FOB price") plus a 75% notional freight cost of shipping the product to India. The Commission and Foskor subsequently entered into a consent agreement which was confirmed as an order of the Tribunal on 28 January 2011; this is the main consent agreement, which was marked Annexure A to the Consent Order.

3. At the confirmation hearing, the Tribunal raised certain concerns relating to the remedies imposed by the Commission. In order to address the Tribunal's concerns, the Commission and Foskor prepared the following addenda as amendments to the consent agreement:
 - 3.1 The first addendum to the consent agreement, which the Commission and Foskor signed on 26 January 2011 and was marked Annexure B to the Consent Order;
 - 3.2 The second addendum to the consent agreement, which the Commission and Foskor signed on 23 February 2011 and was marked Annexure C to the Consent Order; and
 - 3.3 The third addendum, which was not signed ("the third unsigned addendum"). The Commission and Foskor prepared the third addendum in addition to the above addenda which was intended to form part of the Consent Agreement.
4. On 28 February 2011, the Tribunal confirmed the consent agreement as well as the first and second signed addenda as part of the consent agreement and order

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of the Tribunal. The third unsigned addenda was read into the record but not explicitly confirmed as part of the Tribunal order.

FOSKOR'S APPLICATION FOR AN ORDER AMENDING AND/ OR VARYING THE CONSENT AGREEMENT ("FOSKOR'S MAIN APPLICATION")

5. On 19 February 2016, Foskor filed an application to the Tribunal seeking an amendment and/ or variation of the Tribunal order. In this variation agreement, this application by Foskor shall be referred to as "Foskor's Main Application." Foskor sought the variation and/ or amendment of the Consent Order on the following terms:

5.1 By substituting clause 5.4 with the following:

"Foskor will henceforth be allowed to charge to its domestic customers a price that is reasonably related to the economic value of its goods as long as such pricing is in accordance with the provisions of the Competition Act"

5.2 A declaration that the third unsigned addendum is part of the Consent order as confirmed by the Tribunal.

6. In addition to the above, Foskor alleged that the effect of the third unsigned addendum was to limit the period of the agreement to three years; in other words, Foskor's pricing obligations were limited to a period of three years.

FOSKOR'S APPLICATION TO SUPPLEMENT THE FOUNDING AFFIDAVIT TO ITS MAIN APPLICATION

7. On 1 November 2016, Foskor filed a formal application to supplement the founding affidavit to its main application to amend and/ or vary the Consent Order. Foskor, *inter alia*, submitted that in line with its new pricing policy, which it adopted from August 2008, Foskor removed the freight charge adjustment from its phosphoric acid prices. The removal of the 75% of export freight costs has significantly brought down Foskor's prices of phosphoric acid charged to local customers.

FOSKOR'S CHANGED CIRCUMSTANCES

8. Foskor submitted that the international benchmark price for phosphoric acid is established by The Kingdom of Morocco, one of the big producers of phosphoric acid worldwide and the largest supplier of phosphoric acid to India. That price, upon acceptance by the Republic of India - being amongst the largest consumers of phosphoric acid in the world - then becomes the International Cost and Freight (CFR) price. The price, once set per the mechanism described above, is then broadcast in, amongst others, a publication entitled "FMB Fertilizer," which Foskor learns the prices from.
9. At the time of entering into the consent agreement, Foskor exported 95% of its production: of its 650 000 ton production capacity, 500 000 tons were exported.

There has been an ongoing shift in Foskor's sales pattern, such that the local market is now Foskor's primary sales market; presently the export market only accounts for 27% of Foskor's phosphates business.

THE COMMISSION'S FINDINGS

10. On the basis of additional information submitted by Foskor, the Commission subsequently conducted an investigation and made, *inter alia*, the following findings:
 - 10.1 The export price is derived from the international price, which is determined by a number of factors including the number of suppliers and the global demand;
 - 10.2 There is scope and economic reason for Foskor to charge a price that at least covers its average variable cost ("AVC");
 - 10.3 Since October 2008 until October 2013, AVC has been almost on the higher side compared to domestic price and export price;
 - 10.4 In the period from 2013 to 2016, Foskor was not making normal profits. Average prices per ton were approximately 20% less than costs per ton (average costs) and as a result, the allegation of excessive pricing could not be sustained; and

10.5 The market has changed significantly in terms of export prices that have direct impact on local prices; and in terms of Foskor's business model that exports less than 30% of its production of phosphoric acid.

11. Based on, *inter alia*, the above, the Commission is no longer opposing Foskor's application for a variation and/ or amendment of the Consent Order. The parties further agree that Foskor does not independently set the prices internationally. The phosphoric acid price is set internationally - the "benchmark price" for phosphoric acid to other exporting countries was negotiated between India (the largest purchaser) and Morocco (the largest seller), by virtue of the fact that it is the cheapest price. Foskor is therefore a price taker in the international market for phosphoric acid. The Commission however, found that in addition to the price at the Richards Bay terminal Free on Board price ("the FOB"), Foskor was charging local customers notional 75% freight cost for export. Foskor did not dispute that the notional 75% price should not be charged to local customers.

THE CONDITION TO BE VARIED

12. The Consent Order of the Tribunal of 26 January 2011; namely, the first addendum to the Main Consent Order, which was marked Annexure B to the Main Consent Agreement (marked Annexure NK2 hereto), reads as follows:

5.4 Foskor undertakes not to revert to its pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to

India. Henceforth, Foskor will charge a price based on the FOB Richards Bay Port in respect of phosphoric acid.

THE AMENDMENT

13. The following amendments is hereby made to the Consent Agreement; i.e. clause 5.4 of the Annexure B to the main consent agreement as follows:

13.1 by deleting the following words:

"Henceforth, Foskor will charge a price based on the FOB Richards Bay Port in respect of phosphoric acid."

14. The parties agree that clause 5.4 shall read as follows:

5.4 Foskor undertakes not to revert to its pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India.

UNDERTAKINGS BY FOSKOR

15. For avoidance of doubt, Foskor undertakes not to revert to its past pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India.

