



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:
CR142Oct22/SA043Jun24

In the matter between:

The Competition Commission of South Africa

Applicant

And

Vita Gas (Pty) Ltd

Respondent

Panel	:	L Mncube (Presiding Member)
	:	T Vilakazi (Tribunal Member)
	:	G Budlender (Tribunal Member)
Heard on	:	23 July 2024
Decided on	:	24 July 2024

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Vita Gas (Pty) Ltd annexed hereto.

Presiding Member
Professor Liberty Mncube

24 July 2024
Date

Concurring: Professor Thando Vilakazi and Advocate Geoff Budlender SC

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

CT CASE NUMBER: CR142Oct22

CC CASE NUMBER: 2020JUN0021

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

VITA GAS (PTY) LTD

Respondent

SETTLEMENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iii) AND 58(1)(b) OF THE COMPETITION ACT, 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND VITA GAS IN RESPECT OF ALLEGED CONTRAVENTIONS OF SECTION 8(1)(d)(i), ALTERNATIVELY SECTION 8(1)(c), OF THE COMPETITION ACT, 1998, AS AMENDED.


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PREAMBLE

The Competition Commission ("Commission") and Vita Gas Proprietary Limited ("Vita Gas") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, No. 89 of 1998, as amended, ("the Act") in respect of alleged contraventions of section 8(1)(d)(i), alternatively section 8(1)(c) of the Act on the terms set out below.

1. DEFINITIONS

For the purposes of this Settlement Agreement, the following definitions shall apply:

- 1.1. **"Act"** means the Competition Act, No. 89 of 1998, as amended;
- 1.2. **"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;
- 1.3. **"Commissioner"** means the Commissioner of the Commission, appointed in terms of section 22 of the Act;

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- 1.4. **“Complaint”** means the complaint submitted by Sunrise Energy to the Commission in terms of section 49B(2)(b) of the Act under case number 2020Jun0021;
- 1.5. **“Complaint Referral”** means the application filed with the Tribunal, by the Commission, in terms of section 50(2)(a) of the Act read with rule 14(1)(a) of the Rules for the Conduct of Proceedings in the Tribunal under case number: CR142Oct22;
- 1.6. **“LPG”** means Liquid Petroleum Gas;
- 1.7. **“LPG Terminal”** means the import and storage facility located in the Port of Saldanha Bay in the Western Cape Province, owned and operated by Sunrise Energy;
- 1.8. **“Respondent”** means Vita Gas Proprietary Limited;
- 1.9. **“Settlement Agreement”** means this agreement duly signed and concluded between the Commission and Vita Gas;
- 1.10. **“Sunrise Energy”** means Sunrise Energy Proprietary Limited, a company incorporated under the company laws of South Africa, with its principal place of business at Off MR559, Industrial Area, Saldanha, 7395, Western Cape;

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- 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;
- 1.12. **“Throughput Agreement”** means the LPG Handling and Throughput Agreement concluded between Sunrise Energy and Vita Gas on 16 March 2018; and
- 1.13. **“Vita Gas”** means Vita Gas Proprietary Limited, a company incorporated under the company laws of South Africa, with its principal place of business at 1st Floor, Hudson Building, 28 Hudson Street, Cape Town, Western Cape.

2. COMMISSION’S INVESTIGATION AND FINDINGS

- 2.1. On 9 June 2020, the Commission received a complaint from Sunrise Energy wherein it alleged *inter alia* that clauses 4 and 12 of the Throughput Agreement, concluded between itself and Vita Gas, were exclusive, onerous, restrictive, and favoured Vita Gas. The complaint was received in terms of section 49B(2) of the Act.
- 2.2. Sunrise alleged that these clauses allowed Vita Gas to engage in exclusionary conduct that prevented Sunrise from entering into an agreement with other LPG aggregators.

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- 2.3. Sunrise specifically alleged that clause 12.2.3 of the Throughput Agreement granted Vita Gas rights to use 5500 MT of the LPG Terminal, while it restricted third parties or LPG aggregators wishing to use the LPG Terminal to only use 1100 MT capacity. It further alleged that even if Vita Gas had left one or more bullets empty, the maximum of 1100 MT assigned to the incoming customer (LPG aggregators) was small and uneconomical to import. According to Sunrise, this restriction effectively insulated Vita Gas from competing with potential importers. Sunrise alleged that these provisions contravened, either collectively or cumulatively, section 5(1), section 8(b), section 8(c) and section 8(d)(i) of the Act.
- 2.4. Vita Gas made submissions to the Commission in which it addressed the 'take or pay' nature of the Throughput Agreement and denied that the provisions of the Throughput Agreement contravened the Act. Vita Gas also asserted that the Throughput Agreement had pro-competitive benefits.
- 2.5. The investigation was extended to 31 October 2022 by agreement with Sunrise Energy.
- 2.6. The Commission found that the Throughput Agreement had, *inter alia*, the following anti-competitive terms and features:
- 2.6.1. In terms of the Throughput Agreement, Vita Gas was entitled to use all five bullets at the LPG Terminal with a storage capacity of 5500 MT,

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provided that when Vita Gas was not using all five bullets, the unused bullet, with a storage capacity of 1100 MT, would be made available to other LPG importers or aggregators in certain circumstances. The Commission further found that the amount of 1100 MT is not economically viable and this together with the terms of use rendered the allocation meaningless.¹

2.6.2. In terms of the Throughput Agreement, commingling with the product of Vita Gas was not permitted unless Vita Gas has provided its prior written consent thereto. As a result, third party customers of Sunrise Energy could only utilise the storage facility if there was at least one bullet available with no Vita Gas product. In other words, even in circumstances where Vita Gas was taking up only ten percent of the storage capacity in a particular bullet, the remaining 90% capacity would not be available to a third party due to the restriction on commingling. The Commission concluded that the restriction on commingling was not justified in the circumstances.²

2.6.3. In terms of the Throughput Agreement the incoming customer clauses imposed liability (such as demurrage) on Sunrise Energy in instances where third party customers of Sunrise Energy did not remove their stored LPG after the lapse of dwell time of ten days³. As a result,

¹ Clauses 12.1, 12.3.2 12.8.2

² Clause 7.4

³ Clause 12

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Sunrise Energy only afforded third party customers or LPG Aggregators a ten-day dwell time which further contributed to the capacity available to third party LPG importers or LPG Aggregators being meaningless and insufficient.

2.6.4. The duration of the Throughput Agreement was for a period of five years, but Sunrise Energy granted to Vita Gas the right to extend the duration on the same terms and conditions for up to a maximum of three additional periods, each of 5 (five) calendar years. The maximum duration of the agreement was accordingly 20 years and six months⁴.

2.7. This near-exclusive Throughput Agreement covered almost all of the available LPG import terminal services and facilities in the Western Cape from March 2018 until the date of the Complaint referral, 28 October 2022, as Sunrise Energy was the principal LPG terminal operator in the Western Cape at the time. The Commission found that the remaining throughput capacity at the LPG Terminal which was available to third parties or LPG Aggregators was rendered meaningless by the terms of the Throughput Agreement.

2.8. The Commission considered that the effect of the Throughput Agreement was that at any given point in time, competitors (including potential competitors) of Vita Gas were unable to import LPG through the LPG Terminal in quantities and at prices that would afford them sufficient scale to enter into, participate in,

⁴ See clause 2 read with clauses 4.

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or expand in the market for the supply of LPG from import terminals and refineries in the Western Cape.

- 2.9. The Commission found that the provisions of the Throughput Agreement created, enhanced, and preserved Vita Gas' dominance in the market for the supply of LPG in the Western Cape and was likely to significantly foreclose its competitors and was likely to result in consumer harm.
- 2.10. The Commission found that the above alleged conduct by Vita Gas constituted anti-competitive conduct in contravention of section 8(d)(i) and 8(1)(d)(i), alternatively 8(c) and 8(1)(c) of the Act. Vita Gas consistently denied that the Throughput Agreement contravened the Act and maintained that the Throughput Agreement was pro-competitive.
- 2.11. The alleged conduct by Vita Gas covered the period beginning March 2018 to the date of the Complaint Referral, being 28 October 2022. Given the Commission's conclusions, it considered that the Complaint ought to be referred to the Tribunal for determination. The matter was referred to the Tribunal on 28 October 2022 and pleadings have closed.

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3. TERMINATION OF LPG HANDLING AND THROUGHPUT AGREEMENT

- 3.1. On 19 June 2023, Vita Gas informed the Commission that it had terminated the Throughput Agreement concluded with Sunrise Energy in respect of the LPG Terminal with effect from 15 June 2023.

4. ADMISSION

- 4.1. Vita Gas does not admit that it contravened sections 8(d)(i) and 8(1)(d)(i), alternatively 8(c) and 8(1)(c) of the Act.

5. FUTURE CONDUCT

- 5.1. Vita Gas agrees to:

- 5.1.1. prepare and circulate a statement summarizing the contents of this Settlement Agreement to all relevant employees, managers, and directors within fourteen (14) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal;
- 5.1.2. refrain from engaging in conduct in contravention of section 8(1)(d)(i) or 8(1)(c) of the Act; and

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- 5.1.3. undertake training on its competition law compliance policy, which is designed to ensure that its employees are informed about and understand Vita Gas' competition law obligations and that they do not engage in contraventions of the Act.
- 5.2. Vita Gas also agrees that, for a period of 5 (five) years from the date of this Settlement Agreement being confirmed as an order of the Tribunal, it will not enter any long-term, exclusive use agreements for the use of the LPG Terminal.

6. COMPLIANCE

- 6.1. All compliance reports and other documents relating to this matter shall be forwarded to the Commission at ccsa@compcom.co.za with the case number of this matter i.e. 2020Jun0021 as the reference.

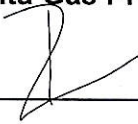
7. FULL AND FINAL SETTLEMENT

- 7.1. This Settlement Agreement is entered into in full and final settlement of the conduct set out in the Complaint Referral and upon confirmation as an order of the Tribunal, concludes all proceeding between the Commission and Vita Gas in respect of this conduct in relation to the referral under case number: **CR142Oct22.**

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Dated and signed at Green Point on the 23 day of May 2024

For **Vita Gas Proprietary Limited**

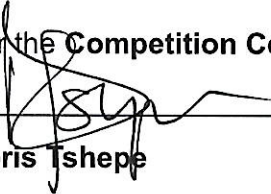


Name in Full: Richard Moorhouse

Position: Managing Director

Dated and signed at Pretoria on the 6th day of June 2024

For the **Competition Commission**



Doris Tshepe
Commissioner