



COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: CR152Dec14/SA014May24;
CR150Oct13/SA015May24**

In the matter between:

The Competition Commission

Applicant

And

Kalkor (Pty) Ltd

Respondent

Panel : L Mncube (Presiding Member)
: A Ndoni (Tribunal Member)
: G Budlender (Tribunal Member)

Heard on : 21 June 2024
Decided on : 21 June 2024

Settlement Agreement

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

**Presiding Member
Professor Liberty Mncube**

**21 June 2024
Date**

Concurring: Ms Andiswa Ndoni and Advocate Geoff Budlender

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

CC Case No: 2009Dec4847 and 2008AUG3929

CT Case No: 020230/CR152Dec14 and

In the matter between

THE COMPETITION COMMISSION

Applicant

and

KALKOR (PTY) LTD

Respondent

**SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
KALKOR (PTY) LTD IN TERMS OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF
1998), AS AMENDED**

1. PREAMBLE

The Competition Commission and Kalkor (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms section 27(1)(d) read with section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended, on the terms set out below:

2. DEFINITIONS

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

- 2.1. **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 2.2. **"Aglime"** means a soil additive produced from pulverised limestone or chalk, and includes calcitic agricultural lime ("CAL") and dolomitic agricultural lime ("DAL");
- 2.3. **"Amended Referral"** means the notice of motion and supplementary referral affidavit, together with annexures, filed by the Commission on 26 March 2018 under case number 020230/CR152Dec14;
- 2.4. **"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;
- 2.5. **"Commissioner"** means the Commissioner of the Commission, as appointed by the Minister of Trade and Industry and Competition in terms of section 22(1) of the Act;
- 2.6. **"FSSA Complaint"** means the complaint initiated by the Commissioner in terms of section 49B(1) of the Act on 21 December 2009 under case number 2009DEC4847, as amended;



- 2.7. **"Days"** means business days, being any day, which is not a Saturday, Sunday or public holiday gazetted in the Republic of South Africa from time to time;
- 2.8. **"Enviro Lime Complaint"** means the complaint submitted by Enviro Lime (Pty) on 20 August 2008 in terms of section 49B(2)(b) of the Act and investigated by the Commission under CC case number: 2008Aug3929;
- 2.9. **"FSSA"** means the Fertiliser Society of South Africa;
- 2.10. **"Investigation"** means the Commission's investigation of the Complaint, including all amendments thereto;
- 2.11. **"Kalkor"** means Kalkor (Pty) Ltd, a company duly registered in accordance with the laws of the Republic of South Africa, with its principal place of business at Unit 1 Verona Office Park, Hans Strijdom Drive, Robindale, Randburg, Gauteng;
- 2.12. **"Parties"** means the Commission and Kalkor;
- 2.13. **"Respondents"** means
- 2.13.1. the following firms as cited in the Commission's FSSA Complaint Referral on 4 December 2014 in Case No: 2009DEC4847 and Supplementary Referral Affidavit of 26 March 2018: The trustees of the Hendrik Pistorius Trust (Hendrik Wilhelm Carl Pistorius N.O., Leo

Constantin Pistorius N.O., Hermine Pistorius N.O., Arnoldus Kurt Pistorius N.O., Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O.), Kalkor, CML Taljaard & Son (Pty) Ltd, PBD Boeredienste (Pty) Ltd, Grasland Ondernemings (Pty) Ltd and FSSA;

- 2.13.2. the following firms as cited in the Commission's Enviro Lime Complaint Referral on 20 August 2008 in terms of section 49B(2)(b) of the Act and investigated by the Commission under CC case number: 2008Aug3929: The trustees of the Hendrik Pistorius Trust (Hendrik Wilhelm Carl Pistorius N.O., Leo Constantin Pistorius N.O., Hermine Pistorius N.O., Arnoldus Kurt Pistorius N.O., Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O.), Kalkor, Envirolime (Pty) Limited and SA Lime and Gypsum (Pty) Limited.
- 2.14. **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and Kalkor;
- 2.15. **"Settlement Amount"** means the amount agreed upon in full and final settlement of the abovementioned matter between the parties; and
- 2.16. **"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 on the 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.



3. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1. The Enviro Lime Complaint

3.1.1. On 20 August 2008, the Commission received a complaint in terms of section 49B(2)(b) of the Act from Enviro Lime (Pty) Ltd ("Enviro Lime"), a distributor of CAL. In the complaint, Enviro Lime alleged that H Pistorius & Co., a supplier of CAL, was engaged in restrictive vertical practices and abuse of dominance.

3.1.2. Enviro Lime, *inter alia*, alleged that H Pistorius & Co. was engaged in the practice of resale price maintenance of CAL in contravention of section 5(2) of the Competition Act. According to Enviro Lime, H Pistorius & Co. was imposing minimum resale prices at which the distributors of CAL were required to sell or market CAL that they purchased from it, and that distributors could not sell or market CAL below the price prescribed by H Pistorius & Co. As stated above, aglime is a soil additive produced from pulverised limestone or chalk and includes calcitic agricultural lime and dolomitic agricultural lime.

3.1.3. H Pistorius & Co. is vertically integrated. It operates in the upstream market as a manufacturer of aglime which it supplies to distributors, agents and farmers, and also operates in the downstream market as a distributor of aglime. H Pistorius & Co. competes with other distributors of CAL such as Kalkor (Pty) Ltd ("Kalkor"), Enviro Lime and SA Lime

and Gypsum (Pty) Ltd ("SA Lime & Gypsum").

3.1.4. The Commission investigated Enviro Lime's complaint and found information that suggested that H Pistorius & Co. imposed minimum resale prices at which the distributors of CAL were required to sell or market CAL. In particular, the Commission's investigation found that H Pistorius & Co., being suppliers and distributors of CAL, allegedly imposed minimum prices at which distributors of CAL were required to sell or market the CAL that H Pistorius & Co. supplied to the distributors. Distributors could not sell or market CAL below the price prescribed by H Pistorius & Co.

3.2. The Enviro Lime Complaint Referral

3.2.1. On 31 October 2013, the Commission referred the Enviro Lime complaint to the Tribunal against H Pistorius & Co (Pty) Ltd, Kalkor, Enviro Lime and SA Lime & Gypsum for alleged contravention of section 5(2) of the Act.

3.2.2. The Commission's complaint referral alleged that H Pistorius & Co (Pty) Ltd engaged in the practice of minimum resale price maintenance during the period 2004 to 2010 in that H Pistorius & Co (Pty) Ltd:

3.2.2.1. would publish its price and would require the distributors to sell or market CAL in accordance with the said pricelist;

3.2.2.2. would instruct distributors not to sell or market CAL supplied by H Pistorius & Co (Pty) Ltd at prices lower than those set out in H Pistorius & Co (Pty) Ltd price list. H Pistorius & Co (Pty) Ltd price list was compiled annually, usually around April when the price of CAL would increase; and

3.2.2.3. would, in order to monitor the distributors' compliance with this practice, request distributors to submit their price lists to H Pistorius & Co (Pty) Ltd on an *ad hoc* basis. These price lists set out the distributors' CAL prices.

3.2.3. In the complaint referral, the Commission only sought relief against H. Pistorius & Co (Pty) Ltd for alleged contravention of section 5(2) of the Act. The other respondents (Kalkor, Enviro Lime and SA Lime & Gypsum) were cited only for the interest they have in the matter. The Commission did not seek any relief against them.

3.3. The FSSA Complaint

3.3.1. During the Commission's investigation of the Enviro Lime Complaint, the Commission found information that suggested that the conduct by certain members of the FSSA lime committee could be in contravention of sections 4(1)(a) and (b)(i) and (ii) of the Act. On this basis, the Commission decided to initiate the complaint as set out below.

3.3.2. On 21 December 2009, the Commissioner initiated a complaint against certain members of the FSSA lime committee, including Kalkor, ("the 2009 Complaint"). The 2009 Complaint alleged, *inter alia*, that:

3.3.2.1. Certain members of the lime committee of the FSSA met quarterly at the offices of the FSSA to discuss matters that include *inter alia* quarterly sales of aglime, total provincial sales of aglime, net prices of the lime and transport components and gypsum sales for agricultural uses;

3.3.2.2. The members of the FSSA lime committee met to discuss the average prices and transport costs of calcitic lime, dolomitic lime, aglime and gypsum, in contravention of sections 4(1)(a), 4(1)(b)(i) and 4(1)(b)(ii) of the Act;

3.3.2.3. The members of the FSSA lime committee exchanged/submitted sales and pricing information by region, through the FSSA, and this served to increase transparency and allowed for the monitoring of price fixing or market allocation agreements or concerted practices between the members of the FSSA;

3.3.2.4. The above sales and pricing information distributed by the FSSA to the members of the FSSA lime committee was in

contravention of section 4(1)(a) of the Act.

- 3.3.3. On 10 August 2010, the Commissioner amended its 2009 Complaint to add Rozie Agencies CC, as a respondent in the Complaint.
- 3.3.4. On 18 November 2010, the Commission conducted a search and seizure operation ("dawn raid") at the premises of Kalkor, Grasland Ondernemings (Pty) Ltd ("Grasland"), PBD Boeredienste (Pty) Ltd ("PBD"), H. Pistorius & Co. and the FSSA. Subsequent to the dawn raid, on 20 December 2010, Grasland applied for leniency in terms of the Commission's Corporate Leniency Policy and was granted conditional immunity.
- 3.3.5. On 27 January 2012, following further investigation, the Commission amended its 2009 Complaint to include an allegation about the fixing of commission rates payable to fertilizer companies ("The 2012 Complaint"). The Commission amended the 2009 Complaint to expressly include the allegation that the Respondents, being members of the FSSA, agreed on the amount of or trading condition in respect of commissions that each would pay to fertilizer companies that employ agents who distribute aglime, in contravention of section 4(1)(b)(i) of the Act.

3.4. The FSSA Complaint Referral

3.4.1. On 4 December 2014, the Commission referred the Complaint to the Tribunal against four of the trustees of the Hendrik Pistorius Trust (Hendrik Wilhelm Carl Pistorius N.O., Leo Constantin Pistorius N.O., Hermine Pistorius N.O. and Arnoldus Kurt Pistorius N.O.), Kalkor, CML Taljaard & Son (Pty) Ltd, PBD, Grasland and FSSA; collectively referred to as the Respondents. The Referral was based on the Commission's findings during its Complaint investigation. The Commission's referral alleged that:

3.4.1.1. during the period between January 1995 and May 2008, the Respondents met annually and agreed to fix the rates of the agents' commission;

3.4.1.2. the meetings of the Respondents to agree on the rates of agents' commission were generally held prior to, during an adjournment of, or after the Annual General Meeting of the FSSA;

3.4.1.3. the meetings took place at the offices of the FSSA and other restaurants outside the premises of the FSSA;

3.4.1.4. the Respondents used FSSA as a platform for the above conduct; and

3.4.1.5. the agreements reached by the Respondents in respect of

agents' commissions were effective for a period of one year and were revised on an annual basis during the Annual General Meeting of the FSSA.

3.4.2. Accordingly, the allegations in the Referral were confined to the allegations in the Commission's amended Initiation of 27 January 2012, namely, an alleged contravention of section 4(1)(b)(i) of the Act.

3.5. Commission's supplementary referral

3.5.1. In May 2016, the Commission applied for leave to supplement or amend its referral affidavit of 2014. The Commission's Supplementary Referral Affidavit served two purposes;

3.5.1.1. To clarify in the Commission's complaint referral that the respondents' contravention of the Act endured until at least April 2009; and

3.5.1.2. To provide a formal citation of two additional trustees of the Hendrik Pistorius Trust namely, Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O. as the Tenth and Eleventh Respondents.

3.5.2. In August 2016, the Tribunal granted the Commission leave to file a supplementary Referral Affidavit. The Commission filed its

4. THE RESPONDENT'S POSITION

4.1. In respect of the FSSA Complaint, Kalkor denies the allegations of colluding with other respondents to fix agent commissions for the following reasons:

4.1.1. The agents working with fertilizer companies (suppliers of fertilizer such as Yara SA (Pty) Ltd, Sasol Nitro, a division of Sasol Chemical Industries Ltd and Omnia Fertilizer (Pty) Ltd) were not the respondents' employees. The fertilizer companies unilaterally demanded a commission increase for the agents, which the Respondents learned of through Grasland's CEO.

4.1.2. Kalkor never accepted or implemented the proposed commission rates demanded by the fertilizer companies. Kalkor had independent arrangements with the agents and adhered to them.

4.1.3. Kalkor had no incentive to manipulate agents' commissions, as the proposed increase would have raised Kalkor's costs.

5. STATEMENT OF CONDUCT

Kalkor does not admit that it has acted in contravention of sections 4(1)(b)(i), 5(2) or any other provision of the Act, as described in paragraph 3 above. However, the Parties

have agreed to enter into the Settlement Agreement without admission to a contravention of the Act.

6. ADMINISTRATIVE PENALTY

- 6.1. Kalkor agrees to make payment of the settlement amount in the amount of **R47 028.32 (forty-seven thousand and twenty-eight Rand and thirty-two cents).**
- 6.2. Kalkor shall pay the settlement amount to the Commission in 12 (twelve) equal instalments over a period of twelve (12) months. The first instalment shall be paid within thirty (30) days of the confirmation of this Settlement Agreement as an order by the Tribunal.
- 6.3. This amount does not exceed 10% of Kalkor's annual turnover in its most recent financial year.
- 6.4. The payment of the settlement amount is made to secure the finalization of the Complaint. Payment of the administrative penalty shall not be construed as any admission of liability.
- 6.5. The settlement amount shall be made into the Commission's bank account, details of which are as follows:

NAME : THE COMPETITION COMMISSION



BANK : **ABSA BANK BUSINESS BANK**
ACCOUNT NUMBER : **40-8764-1778**
BRANCH CODE : **632005**
PAYMENT REF : **2009Dec4847Kalkor**

6.6. The Commission shall pay the settlement amount over to the National Revenue Fund in accordance with section 59(4) of the Act.

7. AGREEMENT REGARDING FUTURE CONDUCT AND MONITORING

7.1. Kalkor undertakes to refrain from engaging in any anti-competitive conduct in contravention of the Act in future.

7.2. Kalkor will develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that all employees, management and other functionaries do not engage in contravention of the Act. In particular, such a compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contraventions of the Act.

7.3. Kalkor shall submit a copy of the compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order of the Tribunal.

7.4. Kalkor shall circulate a statement summarising the contents of this Settlement



Agreement to all employees, management and functionaries within 60 (sixty) days from the date of confirmation of the Settlement Agreement as an order of the Tribunal, and report to the Commission once this obligation has been complied with.

- 7.5. All reports in relation to the conditions set out in this Settlement Agreement, including but not limited to, the provision of the compliance programme and proof of payment of the administrative penalty contemplated in clause 6 shall be submitted to the Commission at Collections@compcom.co.za.

8. FULL AND FINAL SETTLEMENT

- 8.1. This Settlement Agreement is entered into in full and final settlement of the following:
- 8.1.1. Enviro Lime Referral under 2008AUG3929 and no compliance responsibilities will be attracted, involved or connected; and
- 8.1.2. FSSA Referral under 2009DEC4847
- 8.2. Upon confirmation as order of the Tribunal, concludes all proceedings between the Commission and Kalkor in respect of conduct contemplated under the Commission's Investigation and Referral under case numbers 2008AUG3929 and 2009DEC4847.




FOR KALKOR (PTY) LTD:

Duly authorised signatory


.....
Director (Christelle Janse van Vuuren)

DATED AND SIGNED AT ROBINDALE ON THE 16 DAY OF APRIL 2024.

FOR THE COMPETITION COMMISSION OF SOUTH AFRICA:


.....
DORIS TSHEPE

The Commissioner

DATED AND SIGNED AT Pretoria ON THE 30 DAY OF April 2024.