



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR152Dec14/SA104Sep22

In the matter between:

Competition Commission

Applicant

And

PBD Boeredienste (Pty) Ltd

Respondent

Panel: M Mondo (Presiding Member)
AW Wessels (Tribunal Member)
L Mncube (Tribunal Member)

Heard on: 29 November 2022
Order Issued on: 29 November 2022

SETTLEMENT AGREEMENT

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



Presiding Member
Ms Mondo Mazwai

29 November 2022
Date

Concurring: Mr Andreas Wessels and Professor Liberty Mncube

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By Themba Chauke at 5:03 pm, Sep 06, 2022

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

CC Case No: 2009Dec4847

CT Case No:

In the matter between

THE COMPETITION COMMISSION

Applicant

and

PBD BOEREDIENSTE (PTY) LTD

Respondent

**SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
PBD BOEREDIENSTE (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION
OF SECTION 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998),
AS AMENDED**

1. PREAMBLE

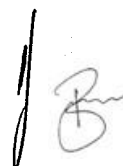
The Competition Commission and PBD Boeredienste (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms section 27(1)(d) read with section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended, in respect of a contravention of section 4(1)(b)(i).



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. **“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. **"FSSA"** means the Fertiliser Society of South Africa;
- 2.9. **"Investigation"** means the Commission's investigation of the Complaint, including all amendments thereto;
- 2.10. **"Parties"** means the Commission and PBD;
- 2.11. **"PBD"** means PBD Boeredienste (Pty) Ltd, a company duly registered in accordance with the laws of the Republic of South Africa, with its principal place of business at 2 Michelin Street, Vanderbijlpark, Gauteng;
- 2.12. **"Respondents"** means the following firms as cited in the Commission's Referral Affidavit of 4 December 2014 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 (Pty) Ltd ("Kalkor"), CML Taljaard & Son (Pty) Ltd, PBD, Grasland Ondernemings (Pty) Ltd ("Grasland") and FSSA;
- 2.13. **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and PBD; and



2.14. "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 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. COMPLAINT INITIATION AND INVESTIGATION

3.1 In 2008, the Commission received a complaint from Enviro Lime (Pty) Ltd ("Enviro Lime") wherein it alleged that H Pistorius & Co, a supplier of CAL, was engaged in restrictive vertical practices and abuse of dominance.

3.2 The Commission investigated Enviro Lime's complaint. During the investigation, the Commission found information that suggested that the conduct by certain members of the FSSA lime committee could be in contravention of section 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 On 21 December 2009, the Commissioner initiated a complaint against certain members of the FSSA lime committee, including PBD, ("the 2009 Complaint"). The 2009 Complaint alleged, *inter alia*, that:

3.3.1 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 The members of the FSSA lime committee met to discuss the average prices and transport costs of calcitic lime, dolomatic lime, aglime and gypsum, in contravention of sections 4(1)(a), 4(1)(b)(i) and 4(1)(b)(ii) of the Act;
- 3.3.3 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; and
- 3.3.4 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.
- 3.4 On 10 August 2010, the Commissioner amended its 2009 Complaint to add Rozie Agencies CC, as a respondent in the Complaint.
- 3.5 On 18 November 2010, the Commission conducted a search and seizure operation ("dawn raid") at the premises of Kalkor, Grasland, 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.
- 3.6 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 in order 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.

4. THE COMPLAINT REFERRAL

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 (Pty) Ltd ("Kalkor"), CML Taljaard & Son (Pty) Ltd, PBD, Grasland Ondernemings (Pty) Ltd ("Grasland") and Fertiliser Society of South Africa ("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:

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

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;

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

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

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.

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.

Commission's supplementary referral

4.3 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;

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

4.3.2 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.

4.4 In August 2016, the Tribunal granted the Commission leave to file a supplementary Referral Affidavit. The Commission filed its Supplementary Referral Affidavit on 26 March 2018.

5. STATEMENT OF CONDUCT

PBD does not admit that it has acted in contravention of section 4(1)(b)(i) or any other provision of the Act, as described in paragraph 4 above. The Parties have agreed to enter into the Settlement Agreement without an admission to a contravention of the Act.

6. ADMINISTRATIVE PENALTY

6.1 PBD agrees to make payment of an administrative penalty in the amount of R855 000.00 (Eight hundred and fifty-five thousand Rand) within 60 (sixty) days from the date of confirmation of this Settlement Agreement by the Tribunal.

6.2 This amount does not exceed 10% of PBD's annual turnover in its most recent financial year.

6.3 The payment of the administrative penalty is made to secure finalisation of the Complaint. Payment of the administrative penalty shall not be construed as any admission of liability.

6.4 The payment 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 : 2009Dec4847PBD

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

7. AGREEMENT REGARDING FUTURE CONDUCT AND MONITORING

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

7.2 PBD 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 compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contraventions of the Act.

7.3 PBD 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 PBD 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 Consent 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 Complaint, and upon confirmation as order of the Tribunal, concludes all proceedings between the Commission and PBD in respect of conduct contemplated under the Commission's Investigation and Referral under case number 2009DEC4847.

FOR PBD BOEREDIENSTE (PTY) LTD:



Duly authorised signatory

Pieter Janeke

Director



DATED AND SIGNED AT Vanderbijlpark ON THE 30th DAY OF August 2022.

FOR THE COMPETITION COMMISSION OF SOUTH AFRICA:



TEMBINKOSI BONAKELE

The Commissioner

DATED AND SIGNED AT Johannesburg ON THE 31 DAY OF August 2022.

