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COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 019976

In the matter between:

The Competition Commission	**Applicant**
And	
African Oxygen Limited	**Respondent**

Panel	:	N Manoim (Presiding Member) Y Carrim (Tribunal Member) A Wessels (Tribunal Member)
Heard on	:	28 January 2015
Latest amendment received on	:	22 April 2015
Decided on	:	22 April 2015

Order

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and African Oxygen Limited and the amendments to the consent agreement, annexed hereto marked "A", "B" and "C" respectively.

Presiding Member **Mr. N Manoim**	**22 April 2015** **Date**

Concurring: Ms. Y Carrim and Mr. A Wessels

ANNEXURE "A"

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CC CASE NO: 2011Apr5739
CT CASE NO: 67/CR/Jun12

In the matter between:

THE COMPETITION COMMISSION	Applicant
and	
AFRICAN OXYGEN LIMITED	First Respondent
AIR PRODUCTS (PTY) LTD	Second Respondent

CC CASE NO: 2009Oct4734
CT CASE NO: 019976

And in the matter between:

THE COMPETITION COMMISSION	Applicant
and	
AFRICAN OXYGEN LIMITED	First Respondent
SASOL CHEMICAL INDUSTRIES (PTY) LTD	Second Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND AFRICAN OXYGEN LIMITED IN REGARD TO THE ALLEGED CONTRAVENTION OF SECTIONS 4(1)(b)(ii) AND 5(1) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED

The Competition Commission and African Oxygen Limited hereby agree that application be made to the Competition Tribunal ("the Tribunal") for an order confirming this Settlement Agreement as an Order of the Tribunal in terms of section 49D read with section 58(1)(a)(iii) and section 58(1)(b) as well as section 59(1)(a) of the Competition Act No. 89 of 1998 as amended, on the terms set out below.

1. **Definitions and Interpretation**

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

1.1.1 "**Act**" means the Competition Act 89 of 1998, as amended;

1.1.2 "**Afrox**" means African Oxygen 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 23 Webber Street, Selby, Johannesburg;

1.1.3 "**Air Products**" means Air Products (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 4 Spencer Road, Kempton Park, Johannesburg;

1.1.4 "**Air Products Agreements**" means the 1998 Agreement and the 2000 Agreement;

1.1.5 "**Air Products Complaint**" means the complaint initiated by the Commissioner on 20 April 2011, in terms of section 49B(1) of the Act, against Afrox and Air Products for an alleged contravention of section 4(1)(b)(ii) of the Act under case number 2011Apr5739;

1.1.6 "**Air Products Complaint Referral**" means the complaint referral instituted by the Commission in terms of section 49B of the Act on 22 June 2012 against Afrox and Air Products under case number 67/CR/Jun12;

1.1.7 "**Central Region**" means Gauteng Province, Free State Province, Limpopo Province, Mpumalanga Province, Northern Cape Province and the North West Province;

1.1.8 "**CLP**" means the Corporate Leniency Policy issued by the Commission in terms of the Act to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Act as published in the Government Gazette Notice 628 of 2008;

1.1.9 "**CO2**" means carbon dioxide;

1.1.10 "**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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;

1.1.11 "**Commissioner**" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.1.12 "**Natref**" means National Refineries of South Africa (Pty) Ltd;

1.1.13 "**Natref Refinery**" means Natref's refinery at Sasolburg;

1.1.14 "**SCI**" means Sasol Chemical Industrial 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 15 Baker Street, Rosebank, Johannesburg;

1.1.15 "**SCI Agreement**" means the agreement concluded between SCI and Afrox on 18 July 1994, in relation to the sale and purchase of raw CO2, as amended on 2 August 1996 and 7 December 2004;

1.1.16 "**SCI Complaint**" means the complaint initiated by the Commissioner on 27 October 2009, in terms of section 49B(1) of the Act, against Afrox and SCI for an alleged contravention of sections 4(1)(b)(ii) and 5(1) of the Act under case number 2009Oct4734;

1.1.17 **"SCI Complaint Referral"** means the complaint referral instituted by the Commission in terms of section 49B of the Act on 27 March 2013 against Afrox and SCI, under case number _________;

1.1.18 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and Afrox;

1.1.19 **"the 1998 Agreement"** means the agreement between Afrox and Air Products arising out of the email agreement concluded between Afrox and Air Products on 23 September 1998 which relates, *inter alia*, to the supply of raw CO2 produced by the Natref Refinery;

1.1.20 **"the 2000 Agreement"** means the agreement between Afrox and Air Products arising out of the heads of agreement concluded between Afrox and Air Products on 20 November 2000, which relates, *inter alia*, to the supply of raw CO2 produced by the Natref Refinery, as amended on 25 April 2001;

1.1.21 **"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.

1.2. Clause headings are for convenience purposes only, shall not be used in the interpretation of the Settlement Agreement and shall not be construed as being statements of fact.

A. SCI COMPLAINT

2. **The Complaint Investigation**

2.1. On 01 June 2009, SCI was granted conditional immunity by the Commission in terms of the CLP for its role in concluding and implementing the SCI Agreement. On 27 October 2009, the Commissioner, acting in terms of section 49(B)1 of the Act, initiated the SCI Complaint against Afrox and SCI for an alleged contravention of sections 4(1)(b)(ii) and 5(1) of the Act.

2.2. The Commission's investigation established that on 18 July 1994, Afrox and SCI concluded the SCI Agreement in terms of which SCI undertook, on an exclusive basis, to supply Afrox with raw CO2. Afrox and SCI agreed that SCI would supply the raw CO2 streams emanating from its ammonia plant at its factory at Sasolburg and from the hydrogen plant at the Natref Refinery, to Afrox. The Commission found that although the SCI Agreement is a supply agreement which is vertical in nature, the agreement contains horizontal restraints which effectively divide the market for CO2 and urea.

2.3. The material terms of the SCI Agreement relevant to the complaint read as follows:

*"1. **SALE AND PURCHASE***

SASOLCHEM shall sell to AFROX and AFROX shall purchase from SASOLCHEM raw carbon dioxide streams emanating at atmospheric pressure from the top of the carbon dioxide desorber at the Ammonia plant at the Sasol Chemical Industries (Pty) Ltd factory (Sasolburg) and from the top of the MEA *carbon dioxide stripper column situated at the hydrogen plant at the Natref refinery (Sasolburg) in terms of the Agreement.*

SASOLCHEM hereby also warrants that it is the sole agent within the Sasol group of companies for the sale of carbon dioxide…

Clause 4.1

SASOLCHEM shall subject to clause 4.2 not sell the raw carbon dioxide streams described in clause 1 of this Agreement or any part of these streams or any other carbon dioxide streams that are available to Sasol in Sasolburg or will become available to Sasol in Sasolburg or any liquid carbon dioxide manufactured from these streams or part thereof to any other gas company or any other end-user than AFROX.

Clause 4.3

Notwithstanding the provisions of clause 4.1 above any company or division within the Sasol group of companies shall be entitled to utilize those quantities of pure carbon dioxide contained in raw carbon dioxide streams described in clause 1 of this Agreement that are in excess of the quantities set out under the heading "Optimistic forecast of requirement" in clause 6.3 of this Agreement for internal use and or the manufacture of urea by Sasol or a third party.

Clause 6.4

SASOLCHEM expect that the requirement of pure CO2 for internal use or manufacture of urea will not exceed 268 185 tons per annum. SASOLCHEM shall give AFROX at least one years' (sic) written notice of any intention to utilize pure carbon dioxide for internal use in terms of clause 4.3 of this Agreement."

2.4. The Commission duly investigated the complaint and found that the SCI Agreement results in the division of markets by allocating specific types of goods and services in contravention of section 4(1)(b)(ii) of the Act on the basis of, *inter alia*, the following –

2.4.1. clause 4.1 of the SCI Agreement provides that SCI shall sell the raw CO2 streams emanating from its ammonia plant at its factory at Sasolburg and from the hydrogen plant at the Natref Refinery, only to Afrox; and

2.4.2. clause 4.3 of the SCI Agreement restricts SCI to using raw CO2 from the plants referred to in 2.4.1 above for internal use or for the manufacture of urea by SCI or a third party.

2.4.3. The Commission therefore found that the SCI Agreement -

2.4.3.1. precludes SCI from entering the downstream market for the production and supply of gaseous CO2 and liquid CO2, in competition with Afrox; and

2.4.3.2. restrains SCI's use of raw CO2 to internal supply and/or the production of urea by Sasol or a third party.

2.5. In addition, the Commission found that the exclusivity provisions in the SCI Agreement result in input foreclosure of actual and potential competitors of Afrox in the market for the production and supply of gaseous CO2 and liquid CO2 by precluding them from accessing the raw CO2 streams that are produced by

Sasol in the Central Region. The Commission further found that there are no alternative viable sources of raw CO2 streams in the Central Region, and that sourcing raw CO2 streams from outside the Central Region is costly. Consequently, the Commission found that the exclusivity provisions in the SCI Agreement result in the substantial prevention and lessening competition in the CO2 market in contravention of section 5(1) of the Act.

2.6 Whilst not in agreement with the Commission's findings, Afrox accepts that the restraints in question amount to contraventions of section 4(1)(b)(ii) and section 5(1) of the Act.

B. AIR PRODUCTS COMPLAINT

3. The Complaint Investigation

3.1. On 4 February 2011, Air Products was granted conditional immunity in terms of the CLP, for its involvement in concluding and implementing the Air Products Agreements. On 20 April 2011, the Commissioner initiated the Air Products Complaint in terms of section 49B(1) of the Act against Afrox and Air Products, for an alleged contravention of section 4(1)(b)(ii) of the Act by concluding the Air Products Agreements.

3.2. In 1994, Air Products was awarded a tender to supply Rand Water with 84 tonnes per day ("TPD") of gaseous CO2 from 1996 ramping up to a maximum of 222.8 TPD by 2015. One of Air Products' sources of CO2 is the Natref Refinery. Natref is jointly owned by Total South Africa ("TSA") and SCI. This refinery emits a total of 350 tonnes of raw CO2 per day. The quantities of raw CO2 emissions to which TSA and SCI are entitled at the Natref Refinery are in proportion to the shares that each firm holds in Natref. SCI holds a 63.6% interest in Natref while the remaining 36.4% is owned by TSA. Consequently, TSA is entitled to 130 TPD ("TSA allocation") while SCI is entitled to the other 220 TPD ("SCI allocation").

3.3. On 01 October 1996, Air Products entered into an agreement with TSA in terms which Air Products was entitled to extract raw CO2 streams in an amount equivalent to the TSA allocation from the Natref Refinery i.e. 36,4%. In terms of the SCI Agreement, Afrox was entitled to extract raw CO2 streams in an amount equivalent to the SCI allocation from the Natref Refinery i.e. 63.6%.

3.4. Afrox and Air Products concluded the 1998 Agreement in terms of which, *inter alia*, Afrox granted Air Products the right to a large portion of its (Afrox) share of the CO2 produced at the Natref Refinery, which CO2 would be used by Air Products solely to fulfill its commitment to supply CO2 to Rand Water. The 1998 Agreement, *inter alia*, further provided that Air Products would supply Afrox all its spare liquid CO2 that it did not require to supply its merchant customers. The relevant terms of the 1998 Agreement read as follows:

"1. Afrox hereby grants Air Products an entitlement to 75tpd of Afrox's 63.64% share of the CO2 produced at Natref. This product will be used by Air Products solely to fulfil Air Products' contractual commitment to supply future increased volumes of gaseous CO2 via pipeline to Rand Water's water treatment plant...

2.In return for 1 above, Air Products hereby grants Afrox the sole industrial gas company to all of the spare LCO2 produced by Air Products' LCO2 plant at Natref (of currently between 10tpd and 20tpd- that is not required by Air Products for supply of its portfolio of merchant [i.e. non-industrial gas company] customers)."

3.4. The Commission found that the 1998 Agreement contained a restraint which resulted in market division by allocating the liquid CO2 market to Afrox and the gaseous CO2 market to Air Products in contravention of section 4(1)(b)(ii) of the Act. The Commission also formed the view that the restraint is not an essential term of supply.

3.5. On 20 November 2000, Afrox and Air Products concluded the 2000 Agreement, in terms of which it was agreed that Afrox would supply stipulated tonnages of gaseous CO2 to Air Products, and Air Products would only use the gaseous CO2 sourced from Afrox to supply gaseous CO2 to Rand Water and to produce liquid CO2 for supply to Afrox. The relevant terms of the 2000 Agreement read as follows:

"3. SUPPLY AND USE OF CARBON DIOXIDE

3.1. *Air Products requires 250 (two hundred and fifty) tons of gaseous Carbon dioxide per day in order to fulfil its supply obligations to Rand Water.*

3.2...

3.3. *Air Products will utilise the 130 (one hundred and thirty) tons per day [of] gaseous Carbon Dioxide made available to it in terms of the TSA Agreement to supply Rand Water and Air Products Liquefaction Plant.*

3.4. *The additional 155 (one hundred and fifty-five) tons per day of gaseous Carbon Dioxide required by AIR PRODUCTS in excess of that available in terms of the TSA Agreement will be purchased from AFROX.*

3.5. *Afrox shall sell AIR PRODUCTS the gaseous Carbon Dioxide referred to in clause 3.4 above, which is produced at Natref and purchased from SCI in terms of its agreement with SCI after AFROX's requirements for liquid Carbon Dioxide are satisfied.*

3.6. *Such gaseous Carbon Dioxide purchased from AFROX shall be used exclusively by AIR PRODUCTS to supply Rand Water and for the production of Liquid Carbon Dioxide to be supplied to AFROX in terms hereof.*

3.7...

3.8...

3.9. *AIR PRODUCTS will supply all the Liquid Carbon Dioxide produced from the AIR PRODUCTS Liquefaction plant to AFROX."*

3.6. The Commission found that by concluding the 1998 Agreement and the 2000 Agreement, Afrox and Air Products agreed not to compete with each other in respect of liquid CO2 and gaseous CO2. The Commission thus found that, in terms of the 2000 Agreement, Afrox and Air Products allocated the liquid CO2 market to Afrox and the gaseous CO2 market to Air Products in contravention of section 4(1)(b)(ii) of the Act. The Commission also found that the restraint was not an essential term of supply.

4. Admission in respect of the SCI Complaint

Afrox confirms that although the SCI Agreement is a vertical agreement between SCI and Afrox, the restraints referred to above amount to a contravention of section 4(1)(b)(ii) and section 5(1) of the Act respectively.

5 Admission in respect of the Air Products Complaint

Afrox confirms that, although the Air Products Agreements are vertical mutual supply agreements, the restraints referred to above amount to a contravention of section 4(1)(b)(ii) of the Act.

6 Agreement concerning future conduct

6.1. Afrox tenders to agree to the amendment of the 2000 Agreement by the deletion of clauses 3.3 and 3.6 thereof.

6.2. Afroxtenders to agree to the amendment of the SCI Agreement by the deletion of –

6.2.1. clauses 4.1 and 4.2 thereof; and

6.2.2. the words "Notwithstanding the provisions of clause 4.1 above" from clause 4.3 thereof.

6.3. Afrox agrees to circulate a statement summarising the content of this Consent Agreement to all Afrox's employees who are middle managers and above within 30 days of the date of confirmation of this Consent Agreement as an order of the Tribunal.

7 **Administrative penalty**

7.1. Having regard to the provisions of section 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Afrox has agreed to pay an administrative penalty in the sum of R3 269 865 (three million two hundred and sixty nine thousand eight hundred and sixty five rand), which represents –

7.1.1. 3% of Afrox's turnover from its plant at the Natref Refinery for its 2008 financial year, being the affected turnover for purposes of the Air Products Complaint; and

7.1.2. 2.5% of Afrox's turnover from its plant at the Sasol Ammonia Plant for its 2012 financial year, being the affected turnover for purposes of the SCI Complaint.

8 **Terms of payment**

8.1. Afrox shall pay the amount set out in paragraph 7 above to the Commission within 30 days from the date of confirmation of this Consent Agreement by the Tribunal.

8.2. This payment shall be made into the Commission's bank account, the details of which are as follows:

Bank name: Absa bank

Branch name: Pretoria

Account Holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

Reference: 2009Oct4734/2011Apr5739/Afrox

8.3. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

9 **Full and final settlement**

This Settlement Agreement is entered into in full and final settlement of the SCI Complaint and the Air Products Complaint, and upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Afrox, relating to alleged contraventions of sections 4(1)(b)(ii) and 5(1) of the Act, that are the subject of the Commission's investigations under Commission Case No. 2011Apr5739 and Commission Case No. 2009Oct4734.

For African Oxygen Limited

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BRETT KIMBER

Authorised signatory for African Oxygen Limited

Dated and signed SELBY on the 31 day of OCTOBER 2014.

For the Commission

Dated and signed PRETORIA on the 11 day of November 2014.

____

Tembinkosi Bonakele

Competition Commissioner