



**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: CO083Jul15**

In the matter between:

The Competition Commission

**Applicant**

and

Tosaco Commercial Services (Pty) Ltd (in liquidation)

**Respondent**

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Panel : Mr. N Manoim (Presiding Member)  
Ms. Yasmin Carrim (Tribunal Member)  
Ms. A Ndoni (Tribunal Member)

Heard on : 19 August 2015

Decided on : 19 August 2015

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**Order**

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

  
\_\_\_\_\_  
Tribunal Member  
Mr. N Manoim

**19 August 2015**  
Date

**Concurring: Ms. Y Carrim and Ms. A Ndoni**

CO083Jul15

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO:

CC CASE NO: 2012Aug0480

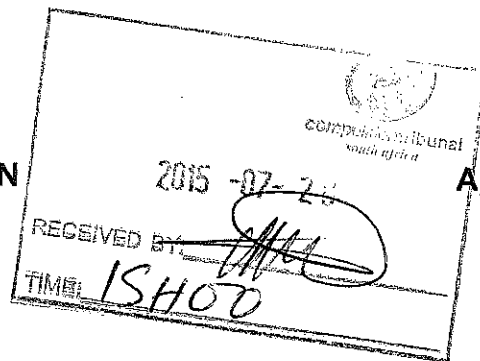
In the matter between

THE COMPETITION COMMISSION

And

TOSACO COMMERCIAL SERVICES (PTY) LTD

(IN LIQUIDATION)



Applicant

Respondent

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FILING SHEET

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BE PLEASED TO TAKE NOTICE that the applicant hereby files the settlement agreement concluded between the Competition Commission and Tosaco Commercial Services (Pty) Ltd

Signed at Pretoria on the 28 day of July 2015

Competition Commission

The Dti Campus, Building C, Mulayo

77 Meintjies Street

Tel: 012 394 3264

Fax: 012 394 4264

**Ref: Tshepo Ramoshaba/2012Aug0480**

**Email: TshepoR@compcom.co.za**

**TO: The Registrar**

**Competition Tribunal South Africa**

77 Meintjies Street

The Dti Campus, 3<sup>rd</sup> Floor

Block C, Mulayo Building

Sunnyside, Pretoria

**Ref: Ms Lerato Motaung**

**Email: Leratom@comptrib.co.za**

**AND TO: Knowles Husain Lindsay Inc Attorneys**

Respondent's Attorneys

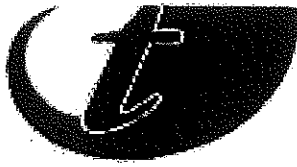
2 Maude Street

The Forum, 4th Floor

Sandton,

**Ref: Angelo Tzarevski**

**Email: AT@khl.co.za**



# competitiontribunal south africa

## Form CT1(1)

### About this Form

This form is prescribed in terms of section 27 (2) of the Competition Act 1998 (Act No. 89 of 1998).

This form is to be completed only by the Applicant and the Respondent.

Once the form is completed, it must be submitted to the Registrar of the Competition Tribunal, together with the relevant documents, within the prescribed time period.

## Referral of Complaint by Commission

**Date:** 28 JULY 2015

**To:** the Registrar of the Competition Tribunal, and:

(Name of respondent and [if applicable] other participants :)

TOSACO COMMERCIAL SERVICES (PTY) LTD

### Concerning:

(Complaint name and Commission file number:)

COMMISSION v TOSACO COMMERCIAL SERVICES AND ANOTHER

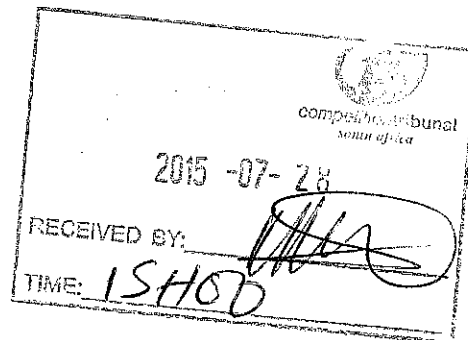
CASE NUMBER: 2012Aug0480

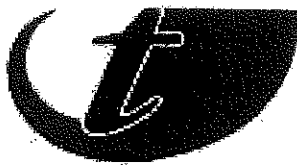
**From:** the Competition Commission

The Competition Commission alleges that the Respondent contravened the provisions of the Competition Act, section 4(1)(b)(i)(ii) & (iii) by engaging in the following prohibited conduct:

### (Concise statement of the alleged prohibited practice:)

Confirmation of the attached consent agreement between the Applicant and the Respondent, as an order of the Competition Tribunal in terms of section 49D, read with section 58(1)(a)(iii) and section 58(1)(b) of the Competition Act 1998 (Act 89 of 1998) as amended ("the Act") in respect of a contravention of section 4(1)(b) (i), (ii) & (iii) of the Act.





# competitiontribunal south africa

## Form CT1(1) Page 2 About this Form

This form is issued in terms of section 20 of the Competition Act.

This form may be used only for a referral to the Competition Commission.

Unless this is a consent proceeding, the Respondent must submit this referral to the Competition Commission with the following documents:

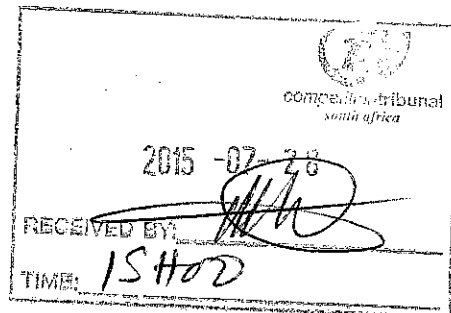
1. A copy of the consent agreement between the Applicant and the Respondent, as an order of the Competition Tribunal in terms of section 49D, read with section 58(1)(a)(iii) and section 58(1)(b) of the Competition Act 1998 (Act 89 of 1998) as amended ("the Act") in respect of a contravention of section 4 (1)(b)(i) (ii) & (iii) of the Act.

## Referral of Complaint by Commission

The Competition Commission seeks an order granting the following relief:

(Concise statement of the order or relief sought:)

Confirmation of the attached consent agreement between the Applicant and the Respondent, as an order of the Competition Tribunal in terms of section 49D, read with section 58(1)(a)(iii) and section 58(1)(b) of the Competition Act 1998 (Act 89 of 1998) as amended ("the Act") in respect of a contravention of section 4 (1)(b)(i) (ii) & (iii) of the Act.



☒ This referral is to proceed as a consent proceeding.

☐ This referral is to proceed as a contested proceeding. Attached is an affidavit setting out the grounds of this complaint, and a statement of the material facts and the points of law relevant to it, as required by Competition Tribunal Rule 15(2).

**Name and Title of person authorised to sign on behalf of the Competition Commission:**

Bukhosibakhe Majenge: Manager Legal Services Division

**Authorised Signature:**

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

**CT Case No:**

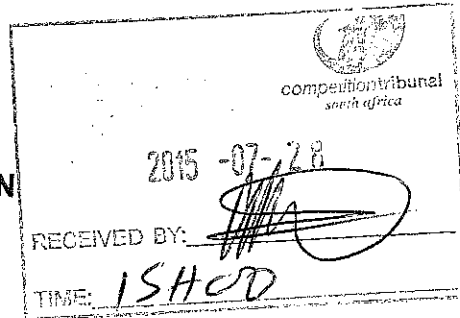
**CC Case No: 2012Aug0480**

In the matter between

**COMPETITION COMMISSION**

And

**TOSACO COMMERCIAL SERVICES (PTY) LTD  
(IN LIQUIDATION)**



**Applicant**

**Respondent**

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**SETTLEMENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iii) and 58(1) (b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND TOSACO COMMERCIAL SERVICE (PTY) LTD ("TOSACO"), IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(i) and (ii) OF THE COMPETITION ACT, 1998 AS AMENDED.**

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The Competition Commission ("the Commission") and Tosaco Commercial Services (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 Tribunal in terms of section 49D read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998 Act No. 89 of 1998, as amended on the terms set out below.

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## 1. DEFINITIONS

In this Settlement Agreement, unless the context indicates otherwise, the following definitions shall apply:

- 1.1 "**Act**" means the Competition Act, No. 89 of 1998, as amended.
- 1.2 "**Agreement**" means this consent and settlement agreement duly signed and concluded between the Commission and Tosaco:
- 1.3 "**BEE**" means Black Economic Empowerment.
- 1.4 "**Charter**" means the Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Liquid Fuels Industry.
- 1.5 "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act with its principal place of business at 1<sup>st</sup> Floor, Mulayo Building (Block C), the DTI campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.
- 1.6 "**Commissioner**" means the Competition Commissioner of South Africa, the Chief Executive Officer of the Commission appointed by the Minister of Trade and Industry in terms of section 22 of the Competition Act.
- 1.7 "**Complaint**" means the complaint against the Respondents initiated by the Commissioner on 13 August 2012 in terms of section 49B of the Competition Act under case number 2012Aug0480.
- 1.8 "**Days**" means calendar days.
- 1.9 "**Parties**" means collectively the Commission and Tosaco.



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1.10 "**Republic**" means the Republic of South Africa.

1.11 "**Tosaco**" means Tosaco Commercial Services (Proprietary) Limited, a private Company duly registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2002/020655/07.

1.12 "**TSA**" means Total South Africa (Proprietary) Limited, a private Company registered and incorporated in accordance with the laws of the Republic of South Africa.

1.13 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.


## 2. THE COMMISSION'S INVESTIGATION AND FINDINGS

- 2.1 On 13 August 2013, the Commissioner initiated the Complaint against TSA and Tosaco in respect of alleged prohibited practices in contravention of section 4(1)(b)(i),(ii) and (iii) of the Act. The Complaint was initiated following an application by TSA in terms of the Commission's Corporate Leniency Policy, in which TSA voluntarily brought the conduct described below to the attention of the Commission. TSA has been granted conditional immunity in terms of the Corporate Leniency Policy.
- 2.2 The conduct relates to TSA's 2003-2010 BEE transaction with Tosaco. During 2003 TSA, Tosaco and a number of other companies entered into a number of agreements to give effect to TSA's BEE transaction. The BEE transaction was designed to meet the requirements of the Charter. The primary objective of the BEE transaction was to transfer, upfront, 25% of TSA's equity to a consortium of historically disadvantaged South Africans, namely Tosaco.
- 2.3 As part of the implementation of the BEE transaction TSA and Tosaco entered into an agreement to divide a portion of the supply of petroleum products market by allocating petroleum products customers in South Africa amongst each other. In terms of the agreement Tosaco had a sole and



exclusive right to tender for government contracts for products supplied to it by TSA. As part of the agreement TSA agreed not bid for these contracts.

- 2.4 TSA and Tosaco also established a joint marketing committee whose function was to synchronise their respective bid strategies and allocate new tenders amongst each other. This committee also decided on the following:
- 2.4.1 New customers to approach;
  - 2.4.2 Allocation of tender volumes between TSA and Tosaco; and
  - 2.4.3 Rebate strategies.
- 2.5 The activities of the JMC, the allocation of customers, servicing of select customers and competitors of TSA and Tosaco amount to price fixing and division of markets in contravention of sections 4(1)(b)(i) and (ii) of the Act. The synchronisation of bid strategies between the Respondents and regulation of tendering processes amount to collusive tendering in contravention of section 4(1)(b)(iii) of the Act.
- 2.6 The aforesaid conduct was in place during the period February 2003 to 2010.
- 2.7 The conduct described above was brought to the attention of the Commission by TSA voluntarily, in terms of the Commission's Corporate Leniency Policy. The Commission has granted immunity to TSA in terms of the Corporate Leniency Policy.



### **3. ADMINISTRATIVE PENALTY**

- 3.1 In terms of section 58(1)(a)(iii) of the Competition Act read with sections 59(1)(a), 59(2) and (3) of the Competition Act, Tosaco agrees to pay an administrative penalty in the amount of R3 000 000 (three million rand).
- 3.2 The above amount does not exceed 10% of Tosaco's annual turnover for the 2010 financial year.
- 3.3 The administrative penalty shall be paid within 30 Days from the date of confirmation of this Agreement by the Tribunal.
- 3.4 The administrative penalty will be paid into the Commission's bank account. The Commission's banking details are as follows:

<b>Bank:</b>	<b>ABSA Bank</b>
<b>Name of Account:</b>	<b>The Competition Commission Fees Account</b>
<b>Branch Name:</b>	<b>Pretoria</b>
<b>Branch Code:</b>	<b>323345</b>
<b>Account Number:</b>	<b>4050778576</b>
<b>Reference:</b>	<b>2012Aug0480 (TOSACO)</b>

- 3.5 The Commission will pay the administrative penalty amount into the National Revenue Fund in compliance with section 59(4) of the Competition Act.
- 3.6 It is recorded by the parties that Tosaco is in voluntary liquidation. Its liquidators will procure the payment of the administrative penalty.

### **4. ADMISSION OF LIABILITY**

TCS admits that it contravened sections 4(1)(b)(i), (ii) and (iii) of the Act as set out in paragraph 2 above.



**5. AGREEMENT CONCERNING FUTURE CONDUCT**


There is no agreement concerning future conduct since Tosaco is in voluntary liquidation and will in due course be deregistered.

**6. FULL AND FINAL SETTLEMENT**

This Agreement, upon confirmation as a consent order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Tosaco relating to any alleged contraventions by Tosaco of the Act that are the subject of the Commission's investigation under case number 2012Aug0480.

**For Tosaco Commercial Services (Pty) Ltd**

Dated and signed at JOHANNESBURG on the 10<sup>th</sup> day of July 2015

  
A person duly authorised to sign on behalf of Tosaco Commercial Services (Pty) Ltd

Name: Deidre Marx

Capacity: Liquidator

**For the Commission**

Dated and signed at PRETORIA on the 23<sup>rd</sup> day of JULY 2015

For the Commission

  
Competition Commissioner