



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR213Mar14/SA066Jul16

In the matter between:

The Competition Commission

Applicant

and

South African Pelagic Fish Processors Association

Respondent

Panel : A Wessels (Presiding Member)
A Ndoni (Tribunal Member)
M Mokuena (Tribunal Member)

Heard on : 31 August 2016

Decided on : 31 August 2016

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and South African Pelagic Fish Processors Association annexed hereto marked "A".

**Presiding Member
Mr Andreas Wessels**

31 August 2016
Date

Concurring: Ms Andiswa Ndoni and Ms Medi Mokuena

ANNEXURE "A"

CR213Mar14/SA066Jul16

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No.: 018697

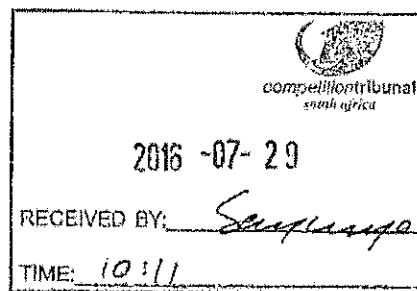
CC Case No.: 2008JUL3827

In the matter between:

COMPETITION COMMISSION

Applicant

and



SOUTH AFRICAN PELAGIC FISH PROCESSORS ASSOCIATION

Respondent

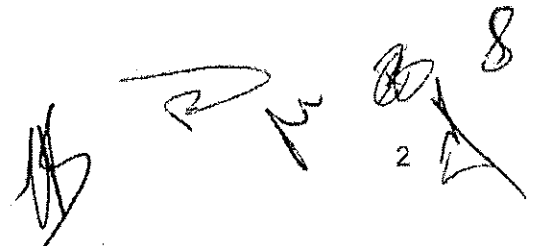
SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE SOUTH AFRICAN PELAGIC FISH PROCESSORS ASSOCIATION IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTIONS 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

The Competition Commission ("**Commission**") and the South African Pelagic Fish Processors Association ("**SAPFPA**") hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 27(1) read with section 59(1)(a) of the Competition Act 1998 (Act No. 89 of 1998), as amended, 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, 1998 (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 1st Floor, 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;
- 1.4 **"Complaint"** means the complaint initiated by the Commissioner in terms of section 49B of the Act under case number 2008Jul3827 (as extended);
- 1.5 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and SAPFPA;
- 1.6 **"Oceana Brands" or "Oceana Group"** means Oceana Group Limited and its wholly owned subsidiary, Oceana Brands Limited with their principal place of business at 7th Floor, Oceana House, 25 Jan Smuts Street Foreshore, Cape Town 8001;
- 1.7 **"Parties"** means the Commission and SAPFPA;
- 1.8 **"Respondents"** means the firms against whom an investigation was initiated, being Oceana Group, Foodcorp (Pty) Ltd ("Foodcorp"), Premier Fishing SA (Pty) Ltd ("Premier Fishing"), Gansbaai Marine (Pty) Ltd ("Gansbaai Marine"), the South African Pelagic Fish Processors Association ("SAPFPA") and the South African Pelagic Fishing Industry Association ("SAPFIA"), Pioneer Fishing (Pty) Ltd ("Pioneer Fishing"), Saldanha Bay Canning Co (Pty) Ltd ("Saldanha Bay Canning"), Saldanha Foods (Pty) Ltd, Westpoint Processors, Saldanha Fishing, SA Vismeelbemarkings Maatskappy (Pty) Ltd ("SAVM"), South African Deep Sea Trawling Association and Sea Harvest Corporation (Pty) Ltd ("Sea Harvest");
- 1.9 **"SAPFPA"** means the South African Pelagic Fish Processors Association.



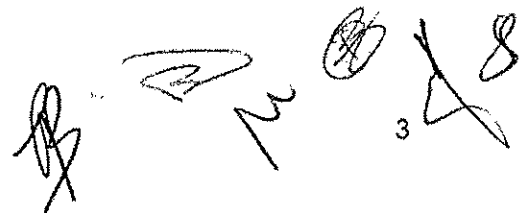
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2. The Complaint and Complaint Investigation

- 2.1 On 8 July 2008 the Commissioner initiated an investigation against Oceana Group, Foodcorp, Premier Fishing, Gansbaai Marine, SAPFPA and SAPFIA in respect of allegations that the above mentioned entities engaged in price fixing and/or the fixing of trading conditions and/or market allocation in contravention of section 4(1)(b) of the Act in respect of pelagic fish. Pelagic fish comprises three species of fish namely anchovy, pilchards and red eye.
- 2.2 On 19 January 2010, the Commission extended the Complaint to include additional respondents, namely Pioneer Fishing, Saldanha Bay Canning, SAVM, SA Deep Sea Trawling Industry Association and Sea Harvest. The Commission also supplemented its complaint with allegations that the Respondents had entered into exclusive supply agreements with trawlers for the supply of pelagic fish, in contravention of sections 5(1), 8(c) and 8(d)(i) of the Act as well as with an allegation of market allocation involving Oceana Group and Sea Harvest.
- 2.3 On 23 March 2012 the Commission extended the Complaint to include additional respondents, namely Saldanha Foods (Pty) Ltd, Westpoint Processors and Saldanha Fishing. At the conclusion of its investigation, the Commission found what is described in 2.4 below.

2.4 Raw fish price formula

- 2.4.1 There has been a longstanding and open practice within the small pelagic fish industry for factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) to agree an industry wide formula, linking the payment of boat owners, skippers and crew to an average annual fishmeal price achieved within the industry ("the raw fish price formula").
- 2.4.2 Oceana Brands, Foodcorp, Premier Fishing SA, Gansbaai Marine, Pioneer Fishing and Saldanha Bay Canning are all active in the market for

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processing pelagic fish into canned fish and/or fish meal and are therefore in a horizontal relationship in terms of the Act.

2.4.3 Oceana Brands, Foodcorp, Premier Fishing SA, Pioneer Fishing and Saldanha Bay Canning are vertically integrated and they also compete in the upstream market for catching pelagic fish.

2.4.4 The above firms are members of SAPFPA. During 1999 to 2010, in meetings of SAPFPA and through correspondence distributed by SAPFPA to its members, SAPFPA, through its members, took decisions to implement the historical raw fish price formula (as had been agreed with vessel owners / operators, skippers and crew) as payment for the service of catching raw pelagic fish as follows:

2.4.4.1 SAVM calculates the average fish meal price achieved during the preceding calendar year and circulates it annually to SAPFPA and its members.

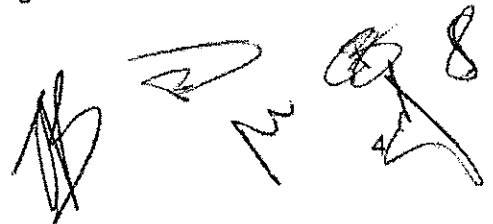
2.4.4.2 The raw fish price was calculated by SAVM and comprised an amount equal to 11% of the average fish meal price achieved during a calendar year and the result of the calculation was provided to SAPFPA and communicated to its members and to the representative bodies for vessel owners, skippers and crew.

2.4.4.3 This 11% formula comprises the following basic elements:

2.4.4.3.1 4.8825% for basic payment to the skipper and crew of a vessel and;

2.4.4.3.2 6.1175% for payment to boat owners.

2.4.5 A premium was paid based on a sliding scale according to yield, known as the canning premium, in respect of pilchards of canning quality. All the market participants used the 11% raw fish price formula in respect of payment for the service of catching pelagic fish during the period of 1999 to 2010 whether they attended the SAPFPA meetings or not.



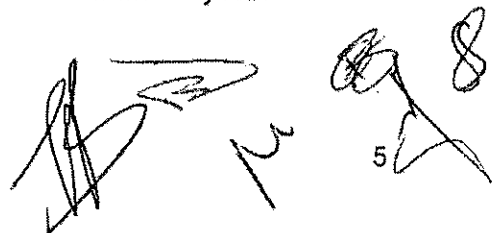
- 2.4.6 In addition to the fixing of the raw fish price formula, the factory owners, acting through SAPFPA also agreed to associated trading conditions, namely the so-called "voorskot" and "agterskot" payments. In effect these were agreements in respect of advance and catch up payments, (which were also published by SAPFPA) and that a canned fish bonus would be payable. The canned fish bonus, however, differed from processor to processor.
- 2.4.7 In the course of the SAPFPA meetings and negotiations with the representative bodies of vessel owners, skippers and crew, competitively sensitive information was exchanged. This facilitated agreement in respect of the raw fish price formula and its implementation.
- 2.4.8 The above conduct amounts to a contravention of section 4(1)(b)(i) in that the SAPFPA and its members agreed to fix the prices payable to vessel owners/ operators, skippers and crew for the services provided by each in the catching of pelagic fish. This was accomplished by continuing to implement the raw fish price formula as a basis for determining the amounts payable for the services rendered by the vessel owners/operators, skippers and crew.

3. Admissions by SAPFPA

SAPFPA admits that it was party to the conduct described in 2.4 above and that its involvement therein contravened section 4(1)(b)(i) of the Act. The SAPFPA resolution in this regard is attached as Annexure "A", which reflects that Gansbaai Marine did not approve the resolution.

4. Administrative penalty

- 4.1 SAPFPA is liable for and has agreed to pay an administrative penalty in terms of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, in the amount of R16 800.00 (Sixteen Thousand Eight Hundred Rands). The administrative penalty represents 8% of SAPFPA's affected turnover derived from subscriptions gathered from its members in the 2010 financial year.



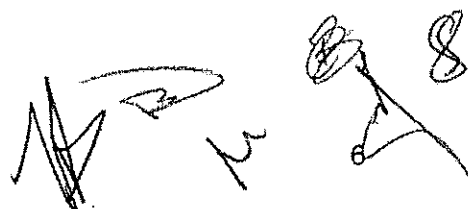
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- 4.2 SAPFPA will pay the amount set in paragraph 4.1 to the Commission within 1 month of the date of confirmation of this Consent Agreement as an order of the Tribunal.
- 4.3 This payment shall be made to the Commission's bank account, details of which are as follows:

BANK NAME: ABSA BANK
ACCOUNT HOLDER: THE COMPETITION COMMISSION
ACCOUNT NUMBER: 4087641778
ACCOUNT TYPE: CURRENT ACCOUNT
BRANCH CODE: 632005
REF: SAPFPA

5. Agreement concerning future conduct

- 5.1 SAPFPA agrees to fully cooperate with the Commission in relation to the prosecution of the Complaint upon referral. Without limiting the generality of the foregoing, SAPFPA specifically agrees to:
- 5.1.1 testify in the complaint referral in respect of alleged contraventions covered by this Settlement Agreement; and
- 5.1.2 provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Settlement Agreement; and
- 5.1.3 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement.
- 5.2 SAPFPA records that it has ceased its participation in the conduct as described herein and agrees that it will in future refrain from conduct that may give rise to a contravention of section 4(1)(b) of the Act.
- 5.3 For this purpose, SAPFPA shall develop and implement a comprehensive competition law compliance and training programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act.



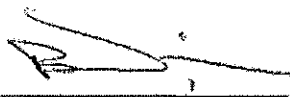
- 5.4 SAPFPA will submit a copy of its compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Consent Agreement by the Tribunal.

6. Full and Final Settlement

This Settlement Agreement, upon confirmation as an order of the Tribunal, is in full and final settlement of and concludes all proceedings between the Commission and SAPFPA relating to any alleged contravention of the Act by SAPFPA that is the subject of the Commission's investigation under case number 2008JUL3827 (as amended or extended) and being prosecuted under Tribunal Case Number 018697.

Dated and signed at Gereza on the 13th day of June 2016.

For SAPFPA



Chairman of SAPFPA

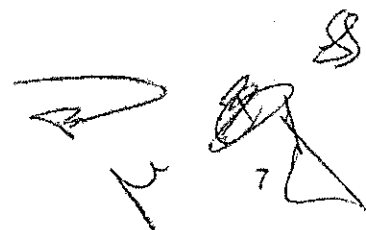
Dated and signed at PRETORIA on the 25th day of July 2016.

For the Commission



Tembinkosi Bonakele

Competition Commissioner



"A"

RESOLUTIONS OF THE MEMBERS OF
THE SOUTH AFRICAN PELAGIC FISH PROCESSORS ASSOCIATION
("SAPFPA")

RESOLUTIONS PASSED BY THE MEMBERS OF SAPFPA BY WAY OF A SIMPLE
MAJORITY

IT IS RESOLVED THAT:

1. The members of SAPFPA hereby resolve to enter into the consent agreement to be concluded between SAPFPA and the Competition Commission, in respect of an alleged contravention of section 4(1)(b)(i) of the Competition Act No. 89 of 1998 (Act), a copy of which is annexed hereto marked "1" (Agreement).
2. The members of SAPFPA further resolve not to oppose the application to be made to the Competition Tribunal (Tribunal) for confirmation of the Agreement, on the terms set out therein, as an order of the Tribunal in terms of section 27(1) read with section 59(1)(a) of the Act.

1. For and on behalf of Gansbaai Marine (Pty) Limited

Resolution 1 Yes ☐ No ☒ Abstain ☐

Resolution 2 Yes ☐ No ☒ Abstain ☐

Name: AT COETZEE

Date: 31-5-2016

Capacity: MANAGING DIRECTOR

Place: GANSBAAI

2. For and on behalf of West Point Processors (Pty) Limited

Resolution 1 Yes ☒ No ☐ Abstain ☐

Resolution 2 Yes ☒ No ☐ Abstain ☐

Name: W S VAN ZYL

Date: 27-05-2016

Capacity: MANAGING DIRECTOR

Place: CAPE TOWN

3. For and on behalf of Premier Fishing SA (Pty) Limited

Resolution 1 Yes ☒ No ☐ Abstain ☐

Resolution 2 Yes ☒ No ☐ Abstain ☐



Name: MS Selvan

Date: 30.5.2016

Capacity: Director

Place: CAPE TOWN

4. For and on behalf of Lucky Star Limited (formerly Oceana Brands Limited)

Resolution 1 Yes ☒ No ☐ Abstain ☐

Resolution 2 Yes ☒ No ☐ Abstain ☐



Name: M D COPELAND

Date: 27.05.16

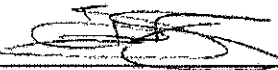
Capacity: STRATEGIC PROJECTS MANAGER

Place: CAPE TOWN

5. For and on behalf of Pioneer Fishing (Pty) Limited

Resolution 1 Yes ☒ No ☐ Abstain ☐

Resolution 2 Yes ☒ No ☐ Abstain ☐



Name: C. BOWERS

Date: 27/05/16

Capacity: GROUP COMMERCIAL MANAGER

Place: CAPE TOWN

CR213Mar14/SA066Jul16

"1"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No.: 018697

CC Case No.: 2008JUL3827

In the matter between:

COMPETITION COMMISSION

Applicant

and

SOUTH AFRICAN PELAGIC FISH PROCESSORS ASSOCIATION

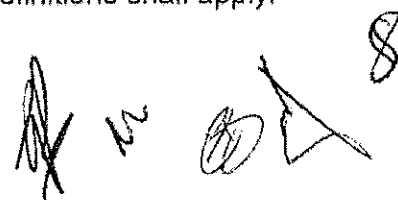
Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE SOUTH AFRICAN PELAGIC FISH PROCESSORS ASSOCIATION IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTIONS 4(1)(b)(i) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

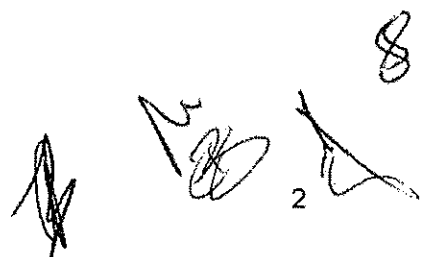
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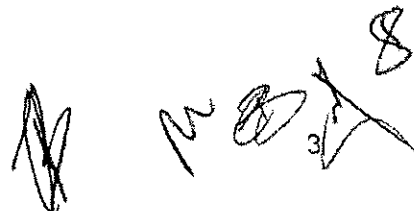
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2.4 Raw fish price formula

- 2.4.1 There has been a longstanding and open practice within the small pelagic fish industry for factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) to agree an industry wide formula, linking the payment of boat owners, skippers and crew to an average annual fishmeal price achieved within the industry ("the raw fish price formula").
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2.4.4.1 SAVM calculates the average fish meal price achieved during the preceding calendar year and circulates it annually to SAPFPA and its members.

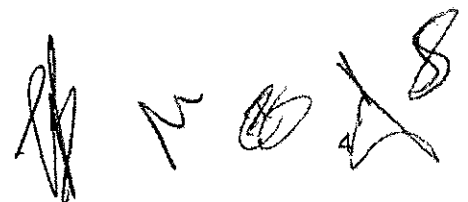
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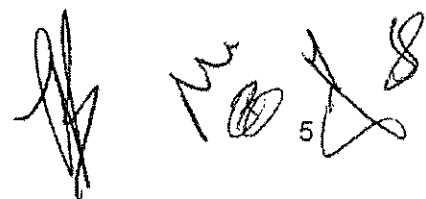
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- 2.4.7 In the course of the SAPFPA meetings and negotiations with the representative bodies of vessel owners, skippers and crew, competitively sensitive information was exchanged. This facilitated agreement in respect of the raw fish price formula and its implementation.
- 2.4.8 The above conduct amounts to a contravention of section 4(1)(b)(i) in that the SAPFPA and its members agreed to fix the prices payable to vessel owners/ operators, skippers and crew for the services provided by each in the catching of pelagic fish. This was accomplished by continuing to implement the raw fish price formula as a basis for determining the amounts payable for the services rendered by the vessel owners/operators, skippers and crew.

3. Admissions by SAPFPA

SAPFPA admits that it was party to the conduct described in 2.4 above and that its involvement therein contravened section 4(1)(b)(i) of the Act. The SAPFPA resolution in this regard is attached as Annexure "A", which reflects that Gansbaai Marine did not approve the resolution.

4. Administrative penalty

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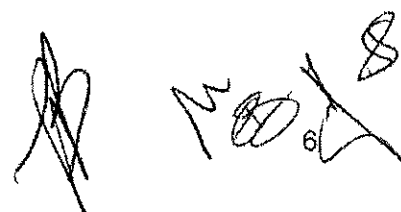


- 4.2 SAPFPA will pay the amount set in paragraph 4.1 to the Commission within 1 month of the date of confirmation of this Consent Agreement as an order of the Tribunal.
- 4.3 This payment shall be made to the Commission's bank account, details of which are as follows:

BANK NAME: ABSA BANK
ACCOUNT HOLDER: THE COMPETITION COMMISSION
ACCOUNT NUMBER: 4087641778
ACCOUNT TYPE: CURRENT ACCOUNT
BRANCH CODE: 632005
REF: SAPFPA

5. Agreement concerning future conduct

- 5.1 SAPFPA agrees to fully cooperate with the Commission in relation to the prosecution of the Complaint upon referral. Without limiting the generality of the foregoing, SAPFPA specifically agrees to:
- 5.1.1 testify in the complaint referral in respect of alleged contraventions covered by this Settlement Agreement; and
- 5.1.2 provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Settlement Agreement; and
- 5.1.3 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement.
- 5.2 SAPFPA records that it has ceased its participation in the conduct as described herein and agrees that it will in future refrain from conduct that may give rise to a contravention of section 4(1)(b) of the Act.
- 5.3 For this purpose, SAPFPA shall develop and implement a comprehensive competition law compliance and training programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act.



- 5.4 SAPFPA will submit a copy of its compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Consent Agreement by the Tribunal.

6. Full and Final Settlement

This Settlement Agreement, upon confirmation as an order of the Tribunal, is in full and final settlement of and concludes all proceedings between the Commission and SAPFPA relating to any alleged contravention of the Act by SAPFPA that is the subject of the Commission's investigation under case number 2008JUL3827 (as amended or extended) and being prosecuted under Tribunal Case Number 018697.

Dated and signed at _____ on the _____ day of _____ 2016.
For SAPFPA

Chairman of SAPFPA

Dated and signed at PRETORIA on the 25th day of JULY 2016.
For the Commission



Tembinkosi Bonakele

Competition Commissioner

