COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016691

In the matter between:

The Competition Commission	Applicant
and	
Primkop Airport Management (Pty) Ltd	Respondent

Panel:	N Manoim (Presiding Member), M Mazwai (Tribunal Member) and A Ndoni (Tribunal Member)
Heard on:	05 June 2013
Decided on:	07 June 2013

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A" and the addendum thereto marked "B".

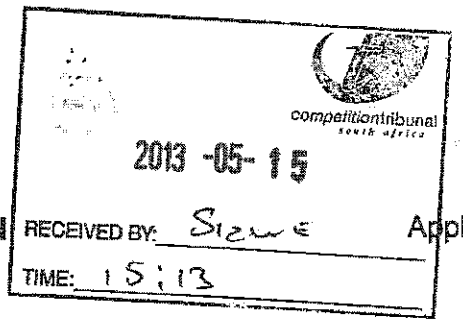
Presiding Member
N Manoim

Concurring: M Mazwai and N Ndoni

'A'

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

CT CASE NO.:
CC CASE NO: 2010SEP5367



In the matter between:

THE COMPETITION COMMISSION Applicant

and

PRIMKOP AIRPORT MANAGEMENT (PTY) LTD Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND PRIMKOP AIRPORT MANAGEMENT (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED

The Competition Commission and Primkop Airport Management (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of sections 58 (1)(a)(iii) and 59(1) (a) of the Competition Act 89 of 1998, as amended, on the terms set out below.

1. DEFINITIONS

For the purposes of this Consent 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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;

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

1.4 **"CLP"** means the Commission's Corporate Leniency Policy issued in terms of Government Gazette 31064 under Notice 628 of 2008.

1.5 **"SanParks"** means South African National Parks, a statutory organisation governed by the National Environmental Management Protected Areas Act No. 57 of 2003, with its principal place of business at 643 Leyds Street, Muckleneuk, Pretoria, South Africa;

1.6 **"Consent Agreement"** means this consent agreement duly signed and concluded between the Commission and PAM;

1.7 **"KMIA"** means Kruger Mpumalanga International Airport, which was commonly known by its developer, during its development, as Primkop Airport;

1.8 **"MOU"** means the Memorandum of Understanding concluded between SanParks and PAM on 21 April 2001;

1.9 **"Parties"** means the Commission and PAM;

1.10 **"PAM"** means Primkop Airport Management (Pty) Ltd, a private company registered in accordance with company laws of the Republic of South Africa, with its registered office, alternatively principal place of business at R538 Karina Road, Nelspruit, South Africa;

1.11 **"Skukuza Airport"** means the Skukuza Airport located at Skukuza in the Kruger National Park, which is controlled by SanParks; and

1.12 **"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 Building C, Mulayo Building. DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa.

2. COMPLAINT INVESTIGATION AND COMMISSION'S FINDINGS

2.1 On 23 June 2010, SanParks applied for a marker in terms of clause 2 of the Commission's CLP concerning the MOU, in terms of which SanParks agreed to refrain from competing with PAM in the market for certain public commercial airport services in Mpumalanga. In return for so doing, SanParks would receive monetary compensation from PAM. The marker was followed by a leniency application submitted to the Commission on 10 August 2010, which, upon compliance with the provisions of the CLP, resulted in granting of conditional immunity from prosecution to SanParks.

2.2 Following receipt of SanParks' leniency application, the Commissioner initiated an investigation into the alleged cartel conduct under case number 2010Sept5367.

2.3 The Commission's investigations revealed that:

2.3.1 The MOU provided for an undertaking from SANParks to not compete with PAM in the market for certain public commercial airport services, with a corresponding obligation of PAM to compensate SanParks by way of a payment of R5 million to mitigate any loss of income occasioned by the downgrade of the Skukuza.

2.3.2 Prior to conclusion of the MOU, SanParks was the operator of Skukuza Airport and PAM was involved in the construction of the KMIA near Nelspruit in the Mpumalanga Province as a public commercial airport for the entire Mpumalanga Province.

2.3.3 Approximately ten (10) months prior to the MOU's execution, SanParks had closed Skukuza, as a result of flood damage that had occurred at Skukuza in 2000. As a consequence of the damage and the resultant closure, Skukuza Airport had a significant negative financial impact on SanParks, and, therefore, SanParks independently closed Skukuza Airport. Furthermore, on 16 January 2001, the Civil Aviation Authority terminated Skukuza's commercial licence due to non-compliance with the Licence Conditions.

2.3.4 Subsequently, in March 2001, representatives of ABB Equity Ventures B.V. ("**EV**"), a Dutch company that established PAM as a special purpose vehicle for purposes of building and operating KMIA, approached representatives of SanParks with a proposal to ensure the viability of KMIA by not having Skukuza Airport reopen to a certain category of public commercial air traffic.

2.3.5 These discussions between SanParks and EV culminated in the conclusion of the arrangements as set out in the MOU.

2.3.6 In terms of the MOU, SanParks and PAM agreed that SanParks would cease to provide a certain category of public commercial air traffic services. In order to do so, SanParks agreed to downgrade Skukuza Airport from a public to a private airport when KMIA became operational. Clause 1, which is the relevant clause of the MOU, reads as follows:

"*The parties have reached an understanding that:*

1. SANParks shall downgrade Skukuza Airport [i.e. Skukuza] from a public to a private airport as envisaged below with the result that Skukuza Airport will be closed to certain categories of commercial air traffic when the Primkop Airport [i.e. KMIA] becomes operational. This is expected to occur in September 2002."

2.3.7 SanParks and PAM further agreed that SanParks would be compensated for the reduction in revenues that it would experience as a result of the downgrade of Skukuza to a private airport. In terms of Clause 3 of the MOU PAM agreed to pay the SanParks a sum of R5 million. The relevant clause reads as follows:

3. *The Parties acknowledge that the closing of Skukuza Airport for certain categories of commercial air traffic as envisaged herein, and the development and operation of Primkop Airport, will have a financial impact on the operations of SANParks. To mitigate the possible negative financial impacts on SANParks during the initial phase of operating Primkop Airport, PAM shall make payments to SANParks as described below.*

3.1 PAM irrevocably agrees and undertakes, subject to the closure of the Skukuza Airport as envisaged above, to pay SANParks the following:

3.1.1 R1 000 000, 00 (one Million Rand) on 12 May 2001.

3.1.2 R2 000 000, 00 (two Million Rand) by 15 July 2001; and

3.1.2 R2 000 000, 00 (two Million Rand) by 15 January 2002."

3.2 Based on the above, the Commission found that SanParks and PAM had agreed, as set out in the MOU, to divide markets by allocating services in contravention of section 4(1) (b) (ii) of the Act

3.3 Furthermore, the Commission also found that, the establishment of KMIA by PAM was supported by both the National and Mpumalanga Provincial governments.

4. ADMISSION

PAM admits only that it was a party to the MOU.

5. ADMINISTRATIVE PENALTY

5.1 Having regard to the provisions of section 58(1) (a) (iii), read with sections 59(1) (a), 59(2) and (3) of the Act, PAM agrees to pay an administrative penalty.

5.2 The parties have agreed that PAM will pay an administrative penalty in the sum of R2 million rands being 4% of PAM's total turnover in the 2009 financial year.

5.3 PAM will pay the penalty amount to the Commission within 30 days of confirmation of this Settlement Agreement as an order of the Tribunal into the following account:

NAME:	**COMPETITION COMMISSION FEE ACCOUNT**
BANK:	**ABSA BANK, PRETORIA**
ACCOUNT NO:	**405 077 8576**
BRANCH CODE:	**323 345**

5.4 The Commission will pay these sums to the National Revenue Fund in terms of section 59 (4) of the Act.

6 FULL AND FINAL RESOLUTION

This Consent Agreement is entered into in full and final settlement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and PAM relating to any alleged contraventions by PAM (or its shareholders), and any of its subsidiaries and/or divisions to an alleged contravention of section 4 (1)(b) of the Act that are the subject of the Commission's investigation under case number 2010Sept5367.

Dated at NELSPRUIT on this the 10TH day of MAY 2013

Marius Nel
Managing Director: Primkop Airport Management (Pty) Ltd

Dated at Pretoria on this the 6 day of May 2013

Shan Ramburuth
The Commissioner, Competition Commission

'B'

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

CT CASE NO.:016691
CC CASE NO: 2010SEP5367

competitiontribunal
south africa
2013 -06- 07
RECEIVED BY: Sieve
TIME: 15:30

In the matter between:

THE COMPETITION COMMISSION Applicant

and

PRIMKOP AIRPORTS MANAGEMENT (PTY) LTD Respondent

ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND PRIMKOP AIRPORTS MANAGEMENT (PTY) LTD IN RESPECT OF ALLEGED CONTRAVENTIONS OF SECTION 4 (1)(ii) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED

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1. **PARTIES**

1.1. The Parties to this Addendum are –

1.1.1 The Competition Commission of South Africa ("the Commission"); and

1.1.2. Primkop Airport Management Proprietary Limited ("PAM").

1.2. The Parties agree as set out below.

2. **INTERPRETATION**

In this Addendum –

2.1. words and phrases defined in the Consent Agreement will bear the same meanings herein;

2.2. "**Addendum**" means this addendum to the Consent Agreement;

2.3. "**Consent Agreement**" means the Consent Agreement entered into between the Commission and Primkop Airport Management, dated 10 May 2013, in respect of alleged contraventions of sections of the Competition Act No 89 of 1998, as amended;

2.4. "**MOU**" means the Memorandum of Understanding concluded between South African National Parks and PAM on 21 April 2001;

2.5. "**Parties**" means the parties to this Addendum; and

2.6. "**Signature Date**" means 10 May 2013, being the date of signature of the Consent Agreement by the Parties.

3. **RECORDAL**

3.1. During the course of the hearing for the confirmation of the Consent Agreement as a Consent Order on 5 June 2013, the Tribunal requested the Parties to address one further issue in the Consent Agreement by way of an addendum to the Consent Agreement. Accordingly, the Parties have entered into this Addendum to address the query raised by the Tribunal.

4. **ADDENDUM TO THE AGREEMENT**

PAM hereby confirms that –

4.1 The MOU is of no further force and effect.

4.2 South African National Parks has further confirmed on oath that it is of the view that the MOU lapsed in 2003.

Dated at NELSPRUIT on this the 7TH day of JUNE 2013

Marius Nel

Managing Director: Primkop Airport Management (Pty) Ltd

Dated at Pretoria on this the 7 day of June 2013

Shan Ramburuth

The Commissioner, Competition Commission