



26 January, 2018

Consent agreement involving the sale of ammonia does not get Tribunal consent

The Competition Tribunal refused to confirm a consent agreement entered into between the Competition Commission and AECI Ltd, Foskor (Pty) Ltd, Omnia Fertilizers Ltd and Sasol South Africa (Pty) Ltd on the basis of irrationality. The Tribunal said it was not clear from the agreement what section of the Act the respondents contravened and said the Commission neglected to establish a proper theory of harm.

The respondents are equal partners in an ammonia terminal facility (RAMM facility) located in Richards Bay, KwaZulu-Natal. The RAMM facility exists to enable the respondents to store ammonia for the purpose of the importation or exportation of ammonia. They had entered into a partnership agreement to regulate their relationship in relation to the facility.

The Competition Commission launched a complaint on 9 July 2012 alleging that the respondents agreed to fix a price at which they sell ammonia to each other. The respondents agreed on a formula (contained in clause 12 of their partnership agreement) to be used to determine the price at which they would sell ammonia to each other should they be unable to agree on a purchase price on a bilateral basis.

The Commission's investigation revealed that the respondents entered into a partnership agreement for the importation, storage and inter-party purchasing of ammonia stored at the respondents' RAMM facility. Furthermore, the Commission found that clause 12 of the partnership agreement had the *potential* effect of substantially preventing or lessening competition in the ammonia market. The Commission further found that there are cost-saving benefits to the respondents jointly storing their ammonia stock at the RAMM facility as it was the only ammonia storage facility in Richards Bay.

The parties had undertaken to remove clause 12 of the agreement and instead agreed that should the parties be unable to reach a bilateral agreement on the purchase price of ammonia, the requesting party shall be entitled to withdraw the requisite amount of ammonia from the RAMM facility on a loan basis, provided that the same amount of ammonia is returned to the facility by the requesting party in a period specified in the agreement.

The Tribunal said the consent agreement established no coherent theory of harm as the Commission neglected to allege a prohibited practice perpetrated by the respondents.

“How would any party later be able to rely on such a settlement to claim civil damages where alleging which section of the Act had been contravened... neither would it be clear in the event of any subsequent enforcement action against that respondent what prohibited practice had been settled,” said the Tribunal.

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