



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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WINDHOEK - 22 November 2019

No. 7060

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 486

2019

NOTICE OF CONSENT AGREEMENT TO BE SUBMITTED TO COURT:
BOKOMO NAMIBIA (PTY) LTD // NAMIB MILLS (PTY) LTD
(CASE NUMBER: 2013JULY0005COMP)

COMPETITION ACT, 2003
(Section 41, Rule 20(1))

1. The Namibian Competition Commission (“the Commission”) on 31 July 2013 received a complaint against the above-named Respondent, Namib Mills (Pty) Ltd (“Namib Mills”) from Bokomo Namibia (Pty) Ltd (“Bokomo”). Pursuant to Bokomo’s complaint, and in terms of section 33(1) of the Competition Act, 2003 (Act No. 2 of 2003) (“the Act”). The Commission took a decision to investigate the complaint and duly issued a Form 4 Notice (a notice of proposed investigation) to the Respondent on 8 October 2013.
2. On 5 June 2014, a Form 6 Notice (a notice of proposed decision of Commission in relation to the investigation) was issued to Namib Mills and other affected parties in compliance with the requirements of the Act and as an outcome of the investigation conducted. In terms of this notice the Commission’s findings were that the conduct of Namib Mills in which it induces bakeries to only purchase wheaten flour from it constitutes an infringement of section 26(1) read with sections 26(2)(b) and 26(2)(d) of the Competition Act.

3. On 30 June 2016, the Commission issued a Form 7 Notice advising Namib Mills that it planned to take action in terms of section 38 of the Act and providing reasons for the Commission's decision. The Form 7 Notice was published in the Government Gazette on 15 July 2016.
4. In settlement of the investigation by the Commission, the Commission and Namib Mills on 5 November 2019 entered into a Consent Agreement in terms of section 40 of the Act. The Commission accordingly gives notice that it intends to submit the attached Consent Agreement with Namib Mills to the High Court of Namibia for confirmation as an order of the Court as contemplated in section 40(1) of the Act.
5. The nature of the conduct that is the subject of the Consent Agreement is:
 - 5.1 that Namib Mills has contravened section 26(1) read together with sections 26(2)(b) and 26(2)(d) of the Act by concluding loan contracts in terms of which affected bakeries were compelled to only purchase wheaten flour from Namib Mills.
 - 5.2 Namib Mills accepts that its conduct constitutes a contravention of section 26 of the Act.
6. The Commission and Namib Mills have therefore agreed to settle the matter on the terms and conditions herein in full and final settlement.

V. NDALIKOKULE
SECRETARY TO THE COMMISSION
NAMIBIAN COMPETITION COMMISSION

Windhoek, 11 November 2019

IN THE HIGH COURT OF NAMIBIA (MAIN DIVISION)

In the matter between:

NAMIBIAN COMPETITION COMMISSION

Applicant

and

NAMIB MILLS (PTY) LTD

Respondent

**CONSENT AGREEMENT BETWEEN THE APPLICANT ON THE ONE HAND AND
THE RESPONDENT ON THE OTHER HAND IN RESPECT OF AN INVESTIGATION
PERTAINING TO A CONTRAVENTION OF SECTION 26(1) AND 26(2) OF THE
COMPETITION ACT NO. 2 OF 2003**

WHEREAS the Commission received a complaint and started an investigation into the conduct of the Respondent for an alleged contravention of section 26(1) read together with sections 26(2)(a), 26(2)(b) and 26(2)(d) of the Act.

AND WHEREAS the Respondent and the Commission, in settlement of the investigation by the Commission under case number: 2013JULY0005COMP, and the matters pending in the High Court and the Supreme Court of Namibia have decided to enter into a Consent Agreement as contemplated in section 40(1) of the Act.

NOW THEREFORE the Commission and the Respondent hereby agree that an application be made to the High Court of Namibia for confirmation of this Consent Agreement as an order of the High Court of Namibia in terms of section 40 read with section 52 of the Act in the terms set out below:

1. DEFINITIONS

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

- 1.1 **“Act”** means the Competition Act, 2003 (Act No. 2 of 2003);
- 1.2 **“Commission”** means the Namibian Competition Commission, a juristic person as established in terms of section 4 of the Act;
- 1.3 **“Complaint”** means the complaint received by the Commission under case number 2013JULY0005COMP, in terms of Rule 15 of the Rules made under the Act as promulgated in Government Notice No. 54 of 2008, General Notice No. 41;
- 1.4 **“Consent Agreement”** means this Consent Agreement, duly signed and concluded between the Commission and the Respondent, as contemplated in section 40(1) of the Act;
- 1.5 **“Day(s)”** means calendar days.
- 1.6 **“Downstream Market”** means the market in which bakeries operate and compete with one another;
- 1.7 **“Investigation”** means the investigation into the Complaint received by the Commission in terms of section 33(1) of the Act;

- 1.8 **“Loan Contracts”** means the loan agreements entered into between Namib Mills (Pty) Limited and various bakeries from 2001 to 2014; and
- 1.9 **“Respondent”** means **Namib Mills (Pty) Limited**, a company duly incorporated in accordance with the laws of the Republic of Namibia.

2. CONDUCT

- 2.1 The Commission’s Investigation concluded that the conduct related to the Loan Contracts, particularly clause 19.1 thereof which compelled all affected bakeries to only purchase wheaten flour from the Respondent, contravened section 26(1) read with section 26(2)(b) and 26(2)(d) of the Act.
- 2.2 The Respondent contends that the Loan Contracts were entered into with only a small percentage of the bakeries in Namibia and that clause 19.1 thereof was never enforced and had pro-competitive effects in the Downstream Market.
- 2.3 Notwithstanding, the Commission and the Respondent have agreed to settle the matter on the terms and conditions herein in full and final settlement.

3. ADMISSION OF LIABILITY

- 3.1 The Respondent accepts that the Loan Contracts in particular clause 19.1 thereof, constitutes a contravention of section 26(1) and section 26(2) of the Act.

4. CESSATION OF THE CONDUCT

- 4.1 The Respondent records that it has already ceased with the Conduct on 4 March 2014 by deleting clause 19.1 from all existing Loan Contracts and concluded new contracts with affected bakeries, and shall take all steps to ensure that cessation of the Conduct remains in place in future.

5. COMPLIANCE PROGRAMME

- 5.1 In addition to the above, the Respondent will develop and implement a compliance programme on competition law in Namibia to ensure that its employees, management and directors do not engage in any conduct that is prohibited in terms of the Act;
- 5.2 A copy of the compliance programme shall be supplied to the Commission within sixty (60) days of the date of confirmation of the Consent Agreement as an order of Court;
- 5.3 The Respondent shall produce a compliance programme progress report six (6) months after date of confirmation of the Consent Agreement as an order of Court, and subsequently at any future date if and when requested to do so by the Commission.

6. AGREEMENT CONCERNING FUTURE CONDUCT

- 6.1 The Respondent will prepare a statement summarising the content of the Consent Agreement to its employees who are in management within thirty (30) days of the date of the confirmation of this Consent Agreement as an order of the Court and shall provide the Commission with a copy thereof within (40) days of the date of the confirmation of this Consent Agreement as an order of the Court.

- 6.2 The Respondent shall act in accordance with the terms of this Consent Agreement and shall implement the following measures:
- 6.2.1 Review its policies, practices and operations by way of internal audits to ensure competition law compliance;
- 6.2.2 Invest in the education of its staff on an ongoing basis on matters pertaining to competition law compliance in Namibia;
- 6.2.3 Actively engage the Commission by obtaining advisory opinions to assist in identifying and implementing best practices;
- 6.2.4 Implement a zero-tolerance policy towards anti-competitive behaviour by its staff.

7. PENALTY

- 7.1 The Respondent agrees to pay a total settlement amount of **N\$4 500 000.00 (Four million, five hundred thousand Namibian dollars)** comprised as follows:
- 7.1.1 A pecuniary penalty of **N\$2 500 000.00 (Two million, five hundred thousand Namibian dollars)**; and
- 7.1.2 An additional amount of **N\$2 000 000.00 (Two million Namibian dollars)** for purposes of covering part of the Commission's costs arising from its Investigation.
- 7.2 The above amounts become payable upon confirmation of this Consent Agreement as an order of the Court.
- 7.3 The Respondent shall remit payment of the penalty into the following bank account:
- | | |
|--------------------------------|--|
| Name of Account holder: | NAMIBIAN COMPETITION COMMISSION |
| Bank Name: | BANK WINDHOEK |
| Account Number: | 8001663543 |
| Branch: | Main Branch |
| Branch code: | 481972 |
| Reference: | 2013JULY0005COMP |
- 7.4 The pecuniary penalty will be paid over by the Commission into the State Revenue Fund in accordance with the provisions of section 53(5) of the Act.

8. COURT ORDER

- 8.1 The Consent Agreement is conditional upon it being confirmed as an order of the Court. Should the Court not confirm the Consent Agreement, all terms of the Consent Agreement shall lapse and have no force and effect and will not be used as evidence against the Respondent in any proceeding whatsoever.
- 8.2 Each party will carry its own costs of the application to the Court for confirmation of the Consent Agreement.
- 8.3 Notwithstanding the above, the Respondent shall carry the Commission's costs if the Respondent for whatever reason repudiates the Consent Agreement or opposes the Commission's application for confirmation of the Consent Agreement by Court.

9. FULL AND FINAL SETTLEMENT

9.1 The Consent Agreement, upon confirmation as an order of the Court:

9.1.1 Shall be in full and final settlement of the Investigation under case number: **2013JULY0005COMP** and shall conclude all pending court proceedings in respect hereof.

9.1.2 Both parties shall immediately withdraw their respective litigation proceedings in both the High Court and the Supreme Court of Namibia and no further claims shall arise therefrom or lie between the parties in respect thereof.

SIGNED at Windhoek on 5 November 2019.
