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## **Memorandum of Agreement**

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Entered into by and between

**The Ports Regulator of South Africa**

(hereinafter referred to as "PRSA")

a juristic person established in terms of S29 of the National Ports Act 12 of 2005, herein represented by Mr Thaba Mufamadi in his capacity as Chairman of the Ports Regulator

And

**The Competition Commission**

(hereinafter referred to as "the Commission")

A juristic person established in terms of Section 19 of the Competition Act 89 of 1998, herein represented by Mr Thembinkosi Bonakele in his capacity as the Commissioner of the Competition Commission

(Hereinafter referred to as "the Parties")

**WHEREAS -**

The PRSA was established in terms of Section 29 of the National Ports Act 12 of 2005 ("the Ports Act") in order to *inter alia*, exercise economic regulation of the ports system and hear complaints and appeals contemplated therein.

**WHEREAS -**

The Competition Commission is established in terms of Section 19 of the Competition Act 89 of 1998 ("the Competition Act") in order to *inter alia*, investigate, control, and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, and to promote the efficiency, adaptability and development of the South African economy.

**WHEREAS -**

The Commission, in terms of the provisions of Section 21(1)(h) read with Sections 3(1A)(b) and 82 (1), 81(2) and 81(3) of the Competition Act, has a responsibility to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act.

**WHEREAS -**

PRSA, in terms of Section 30(2)(b) of the Ports Act, is required to negotiate and conclude an agreement with the Competition Commission to co-ordinate and harmonise the exercise of jurisdiction over competition matters, as well as to ensure consistent application of the principles of the Ports Act.

**AND WHEREAS -**

The Parties record that their respective areas of jurisdiction and /or concurrent jurisdiction is likely to be impacted upon by complaints and/or appeals lodged either/or by the same person/s, against the same person/s, based on the same course of action, and lodged and/or dealt with simultaneously by either of them.

**NOW THEREFORE -**

The Parties now agree to conclude this Agreement as follows:

**1. BASIS OF THIS AGREEMENT**

- 1.1 This Agreement is entered into in order to establish the manner in which the Parties will interact with each other in respect of the investigation and/ or complaints or appeals involving port users and any other persons subject to regulation and control of the PRSA.
- 1.2 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and in no way affects the independence of the two regulatory bodies hereto.

## **2. COMPLAINTS**

**2.1** Where a complaint/ appeal is lodged regarding a practice in respect of which the Commission and PRSA have concurrent jurisdiction, the following process shall be followed:

**2.1.1** The regulator that receives the complaint/ appeal (“the Recipient Regulator”) shall ensure that the said complaint/ appeal is made available to the other regulator;

**2.1.2** The Recipient Regulator shall inform the complainant(s)/ appellant(s) that the matter will be discussed jointly by the Commission and the PRSA in terms of this Agreement;

**2.1.3** The Commission and the PRSA shall consult with each other and evaluate the complaint/ appeal in order to establish how the matter should be managed in terms of this Agreement;

**2.1.4** In evaluating how the complaint/appeal may be managed, the parties must have regard to the principle that-

**2.1.4.1** the Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act; and

**2.1.4.2** PRSA has primary authority to exercises powers assigned to it by the Ports Act.

**2.1.5** The Recipient Regulator shall advise the complainant(s)/ appellant(s) within a period of sixty (60) days or such further period as may be agreed upon between the parties of the decision of the joint discussion between the Commission and the PRSA;

**2.1.6** The Recipient Regulator shall give the complainant(s)/ appellant(s) further directions regarding the prosecution of the complaint/ appeal in question;

**2.1.7** In the event that the matter is dealt with by the Commission, representatives from the PRSA may participate in the matter through inter-alia attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary.

**2.1.8** In the event that the matter is dealt with by the PRSA, representatives from the Commission may participate in the matter through inter alia attending meetings, providing inputs during the case investigation and making representations at PRSA proceedings if necessary

**2.2** If it is decided in the consultation process, contemplated in 2.1.3 above, that the PRSA will deal with the matter, the Commission may issue a notice of non-referral, in terms of Section 50(2)(b) of the Competition Act, and in instances where the Commission received the initial complaint, the complainant(s) shall not be precluded from pursuing the matter with the Competition Tribunal (established in terms of Section 26 of the Competition Act).

- 2.3 Nothing in the procedures, contemplated in paragraph 2, shall detract from the jurisdiction of the Commission or the jurisdiction of the PRSA to receive and deal with complaints/ appeals in terms of their enabling statutes, or preclude the public from lodging complaints with both the Commission and the PRSA concurrently.
- 2.4 Where a complaint relates to a matter where either the Commission or the PRSA has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:
- 2.4.1 The complaint/ appeal must be lodged with the regulator that has jurisdiction;
- 2.4.2 If upon receiving a complaint/ appeal, the Regulator is of a view that it does not have jurisdiction over the matter, the Regulator with whom the complaint is lodged shall advise the complainant(s)/ appellant(s) accordingly and recommend that the complainant(s)/ appellant(s) refer the complaint/ appeal to the relevant regulator;
- 2.4.3 If the PRSA is the Regulator that has jurisdiction, it shall, if it is legally competent under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so-as to ensure the consistent application of competition principles to the complaint/ appeal in question;
- 2.4.4 The Commission shall be entitled to do likewise when it is the Regulator with jurisdiction, and be entitled to consult with the PRSA on the regulatory aspects, subject to the PRSA's jurisdiction, in order to obtain the PRSA's input on regulatory issues pertaining to the complaint; and
- 2.4.5 The Commission and the PRSA may, upon request from each other, participate in each other's proceedings in their advisory capacity.
- 2.5 In the circumstances contemplated in 2.4 above, the decision by the regulator exercising jurisdiction over the complaint/ appeal to consult the other regulator shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.
- 2.6 When the Commission and the PRSA consult each other, as contemplated in 2.4.3 and 2.4.4 above, they shall do so at no cost to each other.
- 2.7 In either of the circumstances contemplated in 2.4.3 and 2.4.4 above, the Commission and the PRSA shall act as expeditiously as circumstances permit and shall ensure that the parties involved receive a timely response.

### **3. ESTABLISHMENT OF A JOINT WORKING COMMITTEE**

3.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the PRSA, as nominated by the respective regulators, shall be established pursuant to this Agreement and shall function on an on-going basis.

3.2 The functions of the Committee shall be:

3.2.1 To manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;

3.2.2 To propose, when necessary, any amendment of or supplementation to this Agreement;

3.2.3 To advise management of both the Commission and the PRSA on issues affecting competition in the Ports sector, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to the following:

3.2.3.1 Types of conduct or transactions affected by both the Competition Act and the National Ports Act in respect of which concurrent jurisdiction is to be exercised by the two regulators;

3.2.3.2 International approach to issues of jurisdictional overlap between a Competition Authority and a Ports Authority and / Ports Regulator, as the case may be;

3.2.3.3 Amendments to the relevant or applicable statutes that may be necessary from time to time; and

3.2.3.4 Any other related matter.

### **4. SHARING OF RESOURCES**

The Commission and the PRSA may, under certain circumstances, share each other's available resources in order to bring the provisions of this Agreement into full effect; provided such a process is reasonable, shall not compromise the respective independence of the two institutions and does not contravene any statute with which the two regulators must conform.

### **5. EXCHANGE OF INFORMATION**

Subject to paragraph 6 below, the Commission and the PRSA may exchange such information as may be necessary to give effect to this Agreement.

### **6. CONFIDENTIALITY**

6.1 Any information shared by the Commission and the PRSA pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.

- 6.2 Where confidential information has been submitted by the parties to a complaint/ appeal to the PRSA, the PRSA shall obtain permission from the party which submitted such confidential information with it, prior to such confidential information being disclosed to the Commission. The Commission shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 6.3 Where information has been submitted by the parties to a complaint to the Commission, the Commission shall obtain permission from the party which submitted such confidential information to it, prior to such confidential information being disclosed to PRSA. The PRSA shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 6.4 To the extent permitted by law, the Commission and the PRSA shall hold confidential all information, including the information contemplated in 6.2 and 6.3 above, received from each other pursuant to this Agreement and shall not otherwise disclose such information than is necessary to carry out their regulatory or statutory responsibilities or otherwise in accordance with national law.
- 6.5 The Commission and the PRSA shall, prior to disclosing such confidential information or a part thereof, consult each other for direction and advice on such disclosure.
- 6.6 The sharing of confidential information, in accordance with this Agreement, relies on the assurances given in 6.1, 6.2 and 6.3 above and shall not constitute a waiver of any legally recognizable privilege by any person other than the Parties to this Agreement.
- 6.7 The Commission and the PRSA, in providing confidential written material pursuant to this Agreement, shall mark every page of the material provided with the following words: "CONFIDENTIAL – PROVIDED PURSUANT TO THE COMPETITION COMMISSION / PORTS REGULATOR AGREEMENT".
- 6.8 Where confidential information is made available by either the Commission or the PRSA in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.

## **7. GENERAL PROVISIONS**

- 7.1 The provision of, or request for, information under this Agreement may be denied:
- 7.1.1 Where compliance would require the Commission or the PRSA to act in a manner that would violate the applicable law;
- 7.1.2 Under circumstances where there is an imminent risk to national security; or
- 7.1.3 Where compliance with a request or provision of information would interfere with an ongoing investigation, in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

7.2 No provision of this Agreement shall give rise to any person, entity or government authority other than the Commission or the PRSA, directly or indirectly, to obtain any information or to challenge the execution of a request for information.

7.3 The two regulators shall consult each other before either of them issues a media statement concerning a transaction or complaint covered by this Agreement.

#### **8. VARIATION OF THE AGREEMENT**

Any variation of this Agreement shall have no legal effect and shall not be binding on the Parties unless reduced to writing and signed by persons authorized to act on behalf of both Parties.

#### **9. EFFECTIVE DATE OF THE AGREEMENT**

This Agreement shall come into effect on the date on which it is signed by persons authorized to act on behalf of both Parties.

#### **10. DURATION OF THIS AGREEMENT**

This Agreement shall remain in force until it is changed or repealed in writing by both Parties hereto, acting jointly.

#### **11. DISPUTE RESOLUTION**

- Should any dispute or difference arise between the Parties with regards to interpretation and/ or implementation of any one or more of the provisions of this Agreement, such dispute or difference must be resolved in a manner other than through judicial proceedings.

#### **12. DOMICILIUM CITANDI ET EXECUTANDI**

The Parties choose the following addresses as their respective *domicilium citandi et executandi* for purposes of this Agreement:

THE COMPETITION COMMISSION  
DTI BUILDING  
MEINTJIES STREET  
SUNNYSIDE  
PRETORIA  
CONTACT PERSON: MR MZIWODUMO RUBUSHE

And



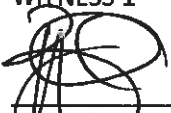
THE PORTS REGULATOR OF SOUTH AFRICA  
11<sup>TH</sup> FLOOR, THE MARINE  
22 DOROTHY NYEMBE STREET  
DURBAN  
CONTACT PERSON: MS HELEN DUBE

**13. PUBLICATION**

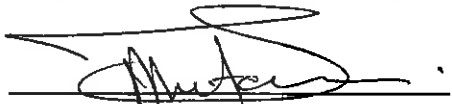
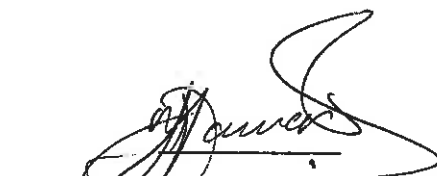

This Agreement shall be published in the Gazette for public information as soon as it has been signed.

Signed at PRETORIA on this 19 day of NOVEMBER 2015 by Mr

Thembinkosi Bonakele, the duly authorized representative of the Competition Commission.

  
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COMPETITION COMMISSION  
\_\_\_\_\_  
WITNESS 1  
  
\_\_\_\_\_  
WITNESS 2

Signed at DURBAN on this 17<sup>th</sup> day of NOVEMBER 2015 by Mr. Thaba Mufamadi, the duly authorized representative of the Ports Regulator of South Africa.

  
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PORTS REGULATOR OF SOUTH AFRICA  
\_\_\_\_\_  
WITNESS 1  
  
\_\_\_\_\_  
WITNESS 2