

## TRIBUNAL IMPOSES PENALTY OF R195 MILLION ON PIONEER

### SUMMARY

The Competition Tribunal has, today 3 February 2010, imposed a penalty of R195 718 614, on Pioneer for its role in a bread cartel and has ordered Pioneer to desist from such conduct forthwith. The cartel involved the four primary bakeries Tiger (Albany), Premier (Blue Ribbon), Foodcorp (Sunbake) and Pioneer which owns Sasko and Duens bakeries. Together the four bakeries enjoy a market share of between 50-60% of the domestic bread market in South Africa.

The case concerns two complaint referrals brought against Pioneer of a bread cartel operating in the Western Cape (the Western Cape complaint) and a bread cartel operating in inland region (referred to as the Inland/National complaint).

During 2007 Premier Foods sought leniency from the Commission for its role in the cartel. Tiger Consumer Brands and Foodcorp subsequently negotiated agreements with the Competition Commission (consent order agreements) in which they agreed to pay fines and desist from the conduct. Pioneer opted to fight the case before the Tribunal and remained as the single respondent in the matter.

The administrative penalty of R195m amounts to 10% of Sasko's (Pioneer's bread baking division) national 2006 bread turnover. The Competition Commission asked the Tribunal to impose a penalty of 10% of Pioneer's total group turnover, not only on its baking division for each complaint. In effect the Commission was seeking a penalty of between R1.5bn to R396m. Pioneer on the other hand asked the Tribunal to adopt a piece-meal approach and to impose a penalty upon it only in relation to the Western Cape referral arguing that this should not exceed 2.25% of Sasko's (bread division) 2006 turnover for the Western Cape. Had the Tribunal followed the latter approach, Pioneer would be facing a maximum penalty of 10% in respect of *each occasion* when it was found to be in contravention of the Act – in this case this would amount to **fourteen contraventions** - seven in the Western Cape and seven in the inland region.

The Tribunal says, in its decision, that hard core cartel activities are considered to be the most egregious offences under the Competition Act and, absent mitigating factors, deserve the maximum penalty provided for in the Act.

However the Tribunal decided against adopting the Commission's proposal of a penalty calculated on Pioneer's group turnover. Nor did it adopt the piece meal approach presented to us by Pioneer.

In considering mitigating factors the Tribunal finds that Pioneer had not made out a case for any leniency whatsoever. In fact, the Tribunal finds that Pioneer's entire defence has been mounted on the basis of manifest falsehoods. The Tribunal has no hesitation in accepting the Commission's contention that Pioneer's main and, eventually, only factual witness - General Manager of Sasko Bakeries at Pioneer Foods, Andries Charl Goosen's testimony was false. The Tribunal says that Goosen not only lied to the Tribunal and misled it, but admitted to lying under oath.

The Tribunal also notes that even after the Commission's initiation of the complaint, Pioneer did not conduct a full enquiry or investigation in order to root out this behaviour in its company or to bring to book any of the individuals involved. Up to the date of the hearing no action had been taken against any of the employees implicated in this conduct. When it eventually did conduct an investigation it concealed the outcome of this by cloaking it in the claim of litigation privilege.

The Tribunal accepted that the agreement in the Western Cape was for a shorter duration than that in the national/inland region. Accordingly for the Western Cape contravention it imposed a penalty of 9.5% on Sasko's (bread and baking) Western Cape turnover for 2006 being R46 019 954 and for the national./inland contraventions, the Tribunal imposed a penalty of 10% on Sasko's 2006 turnover (less Western Cape) being R149 698 660. The Tribunal has the discretion to impose a penalty of up to 10% of the firm's annual turnover in the Republic and its exports from the Republic and to date this is the highest penalty it is entitled to levy. The total penalty in respect of both complaints is R195m

In terms of the Western Cape complaint the Tribunal says that it has no hesitation in finding that the bread division of Pioneer (Sasko and Duens) has been involved in a conspiracy to fix the increase of the price of a standard loaf of bread in the Western Cape (Western Cape Complaint) as well as the timing of this increase. This – in addition to Pioneer's concession made regarding the fixing of the agents' commissions and those concessions made with respect to the various market allocations – amounts to a comprehensive contravention of Section 4(1)(b)(i) and (ii) of the Competition Act.

In terms of the Inland/National complaint the Tribunal has also no hesitation in finding that Pioneer had contravened sections 4(1)(b)(i) and (ii) in the inland region or in that part of the country excluding the Western Cape, over a period of time from as far back as 1999 to date.

The Tribunal finds that Pioneer, Tiger Brands, Premier and Foodcorp had acted in contravention of section 4(1)(b)(i) and (ii). In the first instance they had done so by agreeing to a division of markets during 1999-2001, which in its view still persists. This agreement extended to at least the Southern Gauteng, Free State, and North West. On the basis of the evidence put before us we find that the agreement had also extended into the Mpumalanga/Limpopo region.

As for the price increases in 2004, Pioneer's own documents show its clear intention to increase its bread prices in 2004 in co-ordination with its competitors. In July 2006, Pioneer agreed with its competitors not to compete on price (discounts) in the Vanderbijlpark area. In 2006 Pioneer also agreed to increase its bread prices at the same time and at more or less the same magnitude in co-ordination with its competitors in the Gauteng region. It also agreed to customer allocation with its competitors.

While the evidence of price fixing and customer allocation agreements was limited to the Gauteng and North West regions, given the history of co-operation among the respondents the likelihood that such co-ordination was taking place in other regions such as the Free State, Limpopo and Mpumalanga from time to time was very high. Even though Pioneer's employees were not present in all the meetings referred to by witnesses and may not have been present in all the discussions, there was clearly an overall agreement or understanding among Pioneer, Tiger, Premier and Foodcorp in relation to the bread industry in the inland region which led to agreements on price increases, territorial divisions, customer allocation and other trading conditions in contravention of section 4(1)(b)

## **Background**

Following a preliminary investigation the Commission initiated a complaint against Premier Foods (whose bread brand is Blue Ribbon), Tiger Brands (whose bread brand is Albany) and Pioneer Foods (whose bread brands are Sasko and Duens), all of whom allegedly had been involved in a bread cartel.

During the Commission's investigation into the Western Cape complaint Premier Foods applied for leniency indicating to the Commission its willingness to fully co-operate with the Commission on its role in the bread cartel. It disclosed to the Commission that Premier Foods ('Premier' or 'Blue Ribbon'), Tiger Brands ('Tiger' or 'Albany') and Pioneer Foods ('Pioneer' or 'Sasko') had been operating a bread cartel in the Western Cape by fixing selling prices and other trading conditions. Premier also revealed that a bread cartel had also operated in other parts of the country and that they had also entered into agreements which involved the division of markets by allocating territories.

Based on this information the Commission proceeded to initiate a second investigation into the allegation that a bread cartel operated in other parts of the country, referred to as the National/Inland complaint. On 14<sup>th</sup> February 2007 the Competition Commission referred the Western Cape complaint against Tiger Food Brands t/a Albany Bakeries and Pioneer Foods t/a Sasko and Duens Bakeries to the Tribunal.

The national complaint against Pioneer Foods and Foodcorp was referred to the Tribunal on 6<sup>th</sup> May 2008. Tiger then approached the Commission with a view to negotiate a consent order agreement. In doing so it not only provided the Commission with evidence on the bread cartel but also conducted its own internal investigation into the allegations, which it found to be true. On 28<sup>th</sup> November 2007 the Tribunal imposed a fine of R 98 874 869.90 on Tiger Brands for its role in the bread cartel. Pioneer however denies that it was involved in a Western Cape cartel and therefore remains as the only respondent in the Western Cape referral.

Foodcorp, cited as second respondent in the national complaint, also entered into consent order agreement with the Commission. On the 6<sup>th</sup> January 2009 the Tribunal confirmed the consent order between the Commission and Foodcorp and imposed a fine of R45 406 359, 82 on Foodcorp. Pioneer also denied its involvement in this complaint and thus remained as the only respondent in the national complaint. On 6<sup>th</sup> January 2009 the Tribunal, on application by the Commission, consolidated the two complaints for purposes of a hearing.

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