



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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WINDHOEK - 8 March 2024

No. 8322

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 100

2024

NOTICE IN TERMS OF SECTION 41 OF THE COMPETITION ACT, 2003

The Namibian Competition Commission (“the Commission”), in terms of section 41 of the Competition Act, 2003 (Act No. 2 of 2003) (“the Act”), herewith gives notice that it intends to submit to the High Court of Namibia (“the Court”) for confirmation as an order of the Court, a consent agreement entered into with Puma Energy (Namibia) (Pty) Ltd (“Puma”) on 22 February 2024.

Section 40 of the Act mandates the Commission to enter into settlement agreements with an undertaking or undertakings concerned, setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court.

The Consent Agreement, upon confirmation as an order of the Court, shall be in full and final settlement of the Investigation under case numbers 2016MAR0005COMP and 2020SEP0016COMP.

V. NDALIKOKULE
CHIEF EXECUTIVE OFFICER AND
SECRETARY TO THE COMMISSION
NAMIBIAN COMPETITION COMMISSION

Windhoek, 23 February 2024

NOTICE OF CONSENT AGREEMENT TO BE SUBMITTED TO COURT:
NAMIBIAN COMPETITION COMMISSION // PUMA ENERGY (NAMIBIA) (PTY) LIMITED
(CASE NUMBER: 2016MAR0005COMP/2020SEP0016COMP)

Competition Act, 2003 (Act No. 2 of 2003)
(Section 41, Rule 18(1))

1. The Commission during 6 September 2016 and 14 September 2020 initiated an investigation against:
 - 1.1 Puma Energy (Namibia)(Pty) Ltd (“Puma”).
2. The Commission on or about 6 September 2016 initiated an investigation against Puma under case number 2016MAR0005COMP (“the first investigation”). On 14 September 2016, the Commission obtained a search warrant issued by the High Court of Namibia (“the Court”) in terms of section 34 of the Competition Act, 2003 (Act No. 2 of 2003) (“the Act”) and from 15 to 17 September 2016, the Commission executed a search and seizure operation at the Respondent’s head office located in Windhoek and the Puma’s offices located at Eros Airport.
3. Puma challenged the issuance and execution of the search warrant and on 8 November 2018 the Court set aside the search warrant issued on 14 September 2016. The Commission subsequently launched appeal proceedings. On 8 September 2020 the Supreme Court of Namibia dismissed the Commission’s appeal against the Court’s order issued on 8 November 2018 setting aside the search warrant.
4. On or about 14 September 2020 the Commission initiated another investigation against Puma under case number 2020SEP0016COMP (“the second investigation”). On 13 October 2020 the Commission issued a Form 5 summons in relation to the second investigation which Puma is in non-compliance of by failing to appear.
5. The Commission and Puma during 2023 engaged in settlement negotiations and it was agreed by the Parties that the alleged non-compliance with the Form 5 summons be stayed pending the outcome of the settlement discussions. On **22 February 2024** the Commission and Puma entered into a consent agreement.
6. The Commission accordingly gives notice that it intends to submit the attached consent agreement with Puma to the High Court of Namibia for confirmation as an order of the Court as contemplated in section 40(1) of the Act.
7. The nature of the conduct that is the subject of the consent agreement is:
 - 7.1. The Commission’s first investigation that is as a result of a complaint, is based on the allegation that Puma has contravened section 26(1) read with section 26(2)(a) of the Act by abusing its dominant position by charging excessive prices for aviation fuel at the Eros and Ondangwa Airports. The second investigation is based on the possible price discrimination engaged in by Puma at Eros, Ondangwa and Hosea Kutako International Airport in contravention of section 26(1) read with section 26(2)(c) of the Act. The Commission initiated the second investigation under its own initiative.
 - 7.2. The Parties agree that there will be no obligation on the part of Puma to admit liability as the Commission is yet to make a proposed decision pursuant to section 36 or a final decision pursuant to section 38 of the Act with regards to the first investigation and the second investigation.

**V. NDALIKOKULE
SECRETARY TO THE COMMISSION
NAMIBIAN COMPETITION COMMISSION**

**IN THE HIGH COURT OF NAMIBIA
(Main Division)**

In the matter between:

NAMIBIAN COMPETITION COMMISSION

APPLICANT

and

PUMA ENERGY (NAMIBIA) (PTY)LTD

RESPONDENT

**CONSENT AGREEMENT BETWEEN THE PLAINTIFF ON THE ONE HAND AND
THE RESPONDENT ON THE OTHER HAND IN RESPECT OF AN INVESTIGATIONS
PERTAINING TO ALLEGED CONTRAVENTION OF SECTION 26(1) AS READ WITH
SECTION 26(2)(a), 26(2)(b) AND 26(2)(c) OF THE COMPETITION ACT NO. OF 2003**

WHEREAS the Commission upon the receipt of information decided to initiate an investigation into the conduct of the Respondent for an alleged contravention of section 26(1) read with sections 26(2)(a), 26(2)(b) and 26(2)(c) of the Act.

AND WHEREAS the Respondent has decided to enter into a Consent Agreement as contemplated in section 40(1) of the Act in settlement of the Investigations by the Commission under case numbers: 2016MAR0005COMP and 2020SEP0016COMP.

NOW THEREFORE the Commission and the Respondent hereby agree that an application be made to the Court for confirmation of this Consent Agreement as an order of the Court 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 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 **“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.
- 1.4 **“Court”** means the High Court of Namibia.
- 1.5 **“Day(s)”** means calendar days.
- 1.6 **“Investigations”** means the investigations initiated against the Respondent by the Commission in terms of section 33(1) of the Act under case numbers 2016MAR0005COMP and 2020SEP0016COMP.
- 1.7 **“Parties”** means the Commission and the Respondent.

- 1.8 **“Respondent”** means Puma Energy Namibia (Pty) Ltd, a company duly incorporated in accordance with the laws of the Republic of Namibia.

2. BACKGROUND AND CONTEXT

- 2.1 On 24 March 2016, the Commission received a complaint from the Aircraft Owners and Pilots Association of Namibia (“AOPA”) alleging that the Respondent was abusing its dominant position by charging excessive prices for aviation fuel at the Eros and Ondangwa airports, in contravention of section 26(2)(a) of the Act. AOPA’s complaint resulted in the Commission initiating an investigation under a Form 4 on 6 September 2016 under case number 2016MAR0005COMP (“the first investigation”).
- 2.2 On 14 September 2016, the Commission obtained a search warrant issued by the Court in terms of section 34 of the Act and from 15 to 17 September 2016, the Commission executed a search and seizure operation at the Respondent’s head office located in Windhoek and the Respondent’s offices located at Eros Airport.
- 2.3 The Respondent challenged the issuance and execution of the search warrant and on 8 November 2018 the Court set aside the search warrant issued on 14 September 2016. The Commission subsequently launched appeal proceedings. On 8 September 2020 the Supreme Court dismissed the Commission’s appeal against the Court’s order issued on 8 November 2018 setting aside the search warrant.
- 2.4 On 14 September 2020, the Commission initiated the “second investigation” under case number 2020SEP0016COMP. The second investigation related to possible price discrimination engaged in by the Respondent at Eros, Ondangwa and Hosea Kutako International Airport in contravention of section 26(2)(c) of the Act. The second investigation relating to price discrimination was initiated on the Commission’s own initiative.
- 2.5 On 13 October 2020 the Commission issued a Form 5 summons in relation to the second investigation and required Mr Gallo Diack, at the time the Managing Director of the Respondent (“Mr Diack”), to appear at the Commission’s premises and produce a list of documents specified in Annexure A to the Form 5 summons. The Commission formed the view that the Respondent did not comply with the Form 5 summons and the Respondent engaged with and set forth reasons to the Commission on why Mr Diack did not appear at the Commission’s premises and why the specified documents were not produced.
- 2.6 Subsequently, the Respondent invoked section 40 of the Act, and initiated settlement discussions with the Commission. It was then agreed between the Parties that the alleged non-compliance with the Form 5 be stayed pending the outcome of the settlement discussions.
- 2.7 Following settlement negotiations, the Parties have now reached agreement in full and final settlement of the first investigation and the second investigation on the terms and conditions set out in herein.
- 2.8 For purposes of settlement, the Respondent has agreed to pay a settlement fee as provided for in paragraph 6.1 herein.

3. ADMISSION OF LIABILITY

- 3.1 The Parties agree that there will be no obligation on the part of the Respondent to admit liability as the Commission is yet to make a proposed decision pursuant to section 36 or a final decision pursuant to section 38 of the Act with regard to the first investigation and the second investigation.

4. COMPLIANCE PROGRAMME

- 4.1 The Respondent will develop and implement a compliance programme on competition law in Namibia to ensure that its employees, management, directors or any other party acting on its behalf does not engage in any conduct that is prohibited in terms of the Act.
- 4.2 A copy of the compliance programme will be supplied to the Commission within ninety (90) days of the date of confirmation of the Consent Agreement as an order of Court.
- 4.3 The Respondent undertakes to continue to act lawfully in conducting its business operations.

5. AGREEMENT CONCERNING FUTURE CONDUCT

- 5.1 The Respondent will prepare a statement summarising the content of the Consent Agreement to its employees who are in management within 40 (forty) days of the date of confirmation of this Consent Agreement as an order of the Court and shall provide the Commission with a copy thereof within 60 (sixty) days of the date of confirmation of this Consent Agreement as an order of the Court.
- 5.2 The Respondent shall act in accordance with the terms of this Consent Agreement and shall implement the following measures:
- 5.2.1 Review all its policies, practices and operations by way of internal audits;
- 5.2.2 Invest in the education of its staff on an ongoing basis on matters pertaining to competition law compliance in Namibia;
- 5.2.3 Actively engage the Commission by obtaining advisory opinions to assist in identifying and implementing best practices; and
- 5.2.4 Implement a zero-tolerance policy towards anti-competitive behaviour by its staff.

6. PECUNIARY PENALTY AND FORMS 4 AND 5

- 6.1 The Respondent agrees to pay a settlement fee in the amount of N\$4 000 000.00 (Four Million Namibian dollars), consisting of:
- 6.1.1 A pecuniary penalty of N\$3 000 000.00 (Three Million Namibian dollars); and
- 6.1.2 An additional amount of N\$1 000 000.00 (One Million Namibian dollars) for purposes of covering part of the Commission's costs arising from its investigation.

- 6.2 The payment of the fee is made to secure full and final settlement of the first investigation and the second investigation. Payment of the fee shall not be construed as any admission of liability.
- 6.3 The above amount shall be paid by the Respondent no later than 30 (thirty) days of the date of confirmation of this Consent Agreement as an order of the Court.
- 6.4 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: 2016MAR0005COMP/2020SEP0016COMP

- 6.5 The pecuniary penalty will be paid over by the Commission into State Revenue Fund in accordance with the provisions of section 53(5) of the Act.
- 6.6 The Commission will withdraw all the Forms 4 and 5 issued pursuant to the first investigation and the second investigation on the date of confirmation of this Consent Agreement as an order of the Court.

7. COURT ORDER

- 7.1 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 proceedings whatsoever.
- 7.2 Each Party will carry its own costs incurred in relation to the proceedings for confirmation of the Consent Agreement as an order of the Court.

8. FULL AND FINAL SETTLEMENT

- 8.1 The Consent Agreement, upon confirmation as an order of the Court, shall be in full and final settlement of the first investigation and the second investigation.
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