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COMPETITION ENFORCEMENT

# Contested Terrain

## Tribunal gears up for polypropylene excessive-pricing hearing

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**STORY HIGHLIGHTS**

>> The matter arose in 2007 after the Department of Trade and Industry requested the commission to investigate companies operating in the polymer industry.

>> The commission is seeking an order stipulating that Sasol refrains from selling propylene and polypropylene at prices that discriminate on the basis of the buyer's location.

The Competition Tribunal will begin hearings on May 13 into an excessive-pricing referral made by the Competition Commission in 2010 against Sasol regarding the sale of propylene and polypropylene to domestic plastic converters between 2004 and the end of 2007. It is understood that four weeks have been set aside for the hearings.

Spokesperson **Nandi Mokoena** confirmed to *Engineering News* that it would be the third excessive-pricing referral to be heard by a tribunal panel – previous hearings were convened to hear excessive-pricing complaints against ArcelorMittal South Africa and Telkom.

The matter arose in 2007 after the Department of Trade and Industry (DTI) requested the commission to investigate companies operating in the polymer industry, as it felt they were charging relatively high prices to domestic consumers.

The DTI had identified plastics as one of the specific sectors that should receive priority attention under its Industrial Policy Action Plan, or Ipap, which is now in its fifth iteration.

In fact, Ipap 2013/14 includes polymers, along with three resources subsectors (ferrous minerals and metals, platinum-group metals, and titanium and pigments) in a value-chain strategy study, which will seek to map downstream opportunities and point out constraints to the development of those prospects. The study should be completed by year-end.

Polypropylene has a variety of plastic packaging and textile applications, while propylene, which is a by-product of the oil-refining process, is the key feedstock for the production of polypropylene.

**EXCESS CAPACITY**
Sasol's Project Turbo led to an increase in South Africa's polypropylene capacity

Following its investigation, the commission found that Sasol, as the dominant producer of propylene and polypropylene in South Africa, had exerted its market power to charge prices to domestic consumers that were higher than, and bore no reasonable relation to, the economic value of either product.

As with the Mittal flat-steel case, the commission found that Sasol was deriving its domestic selling prices from an import-parity price calculation, which meant that local consumers were paying prices that were higher than Sasol's export prices.

In addition, the commission found that the formula developed to calculate the price of propylene charged to Safripol, which uses it as a feedstock to produce polypropylene at its own facilities in Sasolburg, resulted, directly or indirectly, in the fixing of polypropylene selling prices.

Safripol and Sasol concluded settlement agreements with the commission in 2010 and 2011 respectively with regard to the pricing formula, which initially arose when Sasol and AECI merged portions of their chemicals businesses to form Polifin.

The agreement was found to contravene the Competition Act. As a consequence, Safripol paid an administrative penalty of R16.5-million, which represented 1.5% of its 2009 turnover derived from polypropylene products, while Sasol paid a fine of nearly R112-million, which translated into 3% of Sasol Polymer's turnover for 2009.

Sasol agreed to amend the supply agreement, while Safripol agreed to cooperate with the commission in its ongoing investigations related to the excessive-pricing issue.

However, the excessive-pricing referral remained intact and was now poised to become the subject of contested proceedings, which would take place at the tribunal's offices in Pretoria.

The commission was seeking an order stipulating that Sasol refrain from selling propylene and polypropylene at prices that discriminate on the basis of the buyer's location. It also wants an order that includes a fine equivalent to 10% of Sasol's turnover inside South Africa, as well its exports from South Africa for the 2009 financial year.

Sasol would seek to show that its pricing was not excessive and that the pricing formula it employed could be justified.

The company would argue that the production of polypropylene volumes that were beyond that which the domestic market could absorb was the consequence of a business optimisation decision taken to mitigate the negative financial effects that were expected to arise as result of the upgrade of its refineries to produce unleaded fuel.

This optimisation was undertaken under the banner of Project Turbo, which resulted in the reduction of petrol volumes and an increase in polypropylene output.

The net result was that, while the domestic market for polypropylene stood at around 280 000 t/y, Sasol and Safripol together had the capacity to produce about 650 000 t/y, with the surplus sold in markets outside South Africa.

Nevertheless, Sasol would argue that the decision to build a second polypropylene facility was not based on a view that export prices reflected economic value, but rather that it was less destructive of shareholder value than the production of unleaded petrol.

It would also argue that South Africa was an open market and that its next-best-price approach was, therefore, acceptable – polypropylene had enjoyed low levels of protection during the period under review, which had subsequently been entirely eliminated.

The group would also contest the proposition that its domestic selling prices were as much as 30% higher than those found in other markets.

Excessive pricing cases are notoriously complex, particularly given the difficulties in defining economic value.

However, this time around, the tribunal had the benefit of a Competition Appeal Court ruling, which arose from the 2006 Mittal case, which was eventually settled. Both sides were expected to lean heavily on that 90-page ruling, which was delivered by Judge **Dennis Davis** in 2009.