

**NOTICE 1641 OF 2005**

## COMPETITION COMMISSION

## REFUSAL TO GRANT EXEMPTION IN TERMS OF SECTION 10 OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

Notice was given in the Government Gazette (Notice 150, In Gazette No.25958 of 30 January 2004) that PetroSA (Pty) Ltd, a state owned private company, registered in terms of the Companies Act, 1973, has applied to the Competition Commission ("the Commission") for exemption from Chapter 2 of the Competition Act (as amended), certain clauses of the Memorandum of Understanding (MOU) entered into between PetroSA and nine oil companies, namely Afric Oil (Pty), BP Southern Africa (Pty) Limited, Caltex Oil SA (Pty) Limited, Engen Petroleum Limited, Excel Petroleum (Pty) Limited, Shell South Africa (Pty) Ltd, **Tepco (Pty) Limited**, Total South Africa (Pty) Limited and Zenex Oil (Pty) Limited. The exemption sought was in respect of certain clauses of the MOU with the oil companies.

In its application, PetroSA has relied on two grounds:

- designation of the industry by the Minister of Trade and Industry after consultation with the Minister of Minerals and Energy.
- the promotion of small businesses or firms controlled by historically disadvantaged persons to become competitive and

In our assessment of the terms of the MOU, it was evident that the MOU contains certain clauses that contravene sections 4 and 5 of the Act.

The Commission evaluated PetroSA's application, and based on the information at our disposal, decided not to grant the exemption. Reasons for the Commission's decision are as follows:

1. We were not in a position to make an evaluation based on PetroSA's reliance on industry designation because the latter had expired on 31 December 2003, a month after PetroSA made its exemption application.
2. Similarly, PetroSA did not meet the requirements of section 10(3)(b)(ii). The Act requires the applicant to prove that the agreement, or practice concerned, contribute to, amongst other things, the promotion of small businesses or firms controlled by historically disadvantaged persons to become competitive. The MOU between PetroSA's predecessor, **Mossgas** and the oil companies was entered into around 1998. A list of the projects which were supposed to have been attained as a result of the MOU only started in 2003. It was difficult to comprehend how the MOU might have contributed to the attainment of the objectives of section 10(3)(b)(ii) when

the projects identified by PetroSA were only implemented from approximately four years after the existence of the MOU. In addition, it is the Commission's view that these objectives could have still been attained in the ordinary course of PetroSA's business, in the absence of the MOU.

The Commission hereby gives Notice in terms of section 10(7) that the exemption has been refused. The exemption was sought in respect of a category of agreements or practices, which do not meet the requirements of section 10(3).

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