



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CO069Aug17

In re the consent agreement entered into between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD

Respondent

Panel : Andreas Wessels (Presiding Member)
: Enver Daniels (Tribunal Member)
: Anton Roskam (Tribunal Member)
Heard on : 26 July 2017
Last submission received on : 08 August 2017
Order Issued on : 26 October 2017
Reasons Issued on : 26 October 2017

ORDER AND REASONS

Introduction

- [1] On 01 August 2016 the Competition Commission ("Commission") filed a consent agreement with the Competition Tribunal ("Tribunal") that it entered into with SBS Household Appliances t/a SMEG (Pty) Ltd ("SMEG") for confirmation in terms of section 49D read with sections 58(1)(b) and 59(1)(a) of the Competition Act 89 of 1998, as amended ("the Act").
- [2] SMEG is the exclusive distributor of SMEG branded products in South Africa. It supplies a variety of home appliance products, including gas stoves, to wholesalers and retailers.

- [3] In the consent agreement SMEG admits to contravening section 5(2) of the Act. The Act in section 5 under ***Restrictive vertical practices prohibited*** provides: “(2) *The practice of minimum resale price maintenance is prohibited*”.
- [4] The Tribunal initially set the matter down for hearing on 24 August 2016. However, on 19 August 2016, the complainants in the matter, Save Hardware Wholesalers CC and Save Wholesalers Cash and Carry CC (collectively “the complainants” or “Save”), submitted a letter to us in which they indicated that they had not been notified of the consent agreement and wished to participate in the proceedings.¹ The Tribunal ultimately set the matter down for hearing on 26 July 2017 after the complainants withdrew their interlocutory applications.
- [5] The complainants form part of the Save Group, which is active in the retail sale of various categories of products, including appliances such as televisions, general merchandise as well as other items.
- [6] In this case we depart from our normal practice not to provide reasons in the event of the confirmation of a consent agreement. We do this to address a number of statements made by the Commission at the hearing about the nature and gravity of minimum resale price maintenance, as well as to enhance the general awareness of minimum resale price maintenance as a *per se* prohibition in terms of section 5(2) of the Act.

Background to the consent agreement

- [7] On 08 June 2015, the Commission received a complaint from the complainants in which it was alleged that SMEG engaged in the practice of minimum resale price maintenance in contravention of section 5(2) of the Act. The complainants alleged that SMEG refused to supply them with products because they failed to

¹ The Tribunal postponed the matter to allow the complainants to participate and provide written submissions on the matter. The complainants then, on 25 October 2016, filed a review application of the Commission’s decision to enter into a consent agreement and on 11 November 2016 filed an application to stay the consent agreement proceedings until such time as the review application had been heard. At a pre-hearing conference held on 19 April 2017, a timetable was set for the further conduct of proceedings in all the matters.

resell a certain gas stove² at a price above the minimum recommended price set by SMEG.

- [8] The Commission explained that, as part of its investigation, it engaged with SMEG, Save as well as other retailers of SMEG's products and established that the pricelist that SMEG sends to its retailers has the words 'recommended price' appearing next to each price.
- [9] The Commission further found that in 2014 the complainants sold the specific SMEG gas stove at R14 999 whilst Hirsch, a retailer and also a SMEG customer, sold the same gas stove at R17 999. The Commission explained that a disappointed Hirsch customer complained to Hirsch about its pricing of the specific gas cooker given that Save sold the same model at a price that was R3 000 lower. Hirsch then requested SMEG's intervention. The above eventually culminated in SMEG terminating the supply of all of its products to Save as a sanction for Save's refusal to succumb to SMEG's request to increase its price in respect of the product, as explained next.³
- [10] On the Commission's finding, when the large difference in resale prices came to the attention of SMEG, it instructed the complainants not to sell the gas stove at R14 999 failing which SMEG would stop supplying the complainants with any products. When Save refused to adhere to SMEG's instruction, SMEG terminated the supply of all its products to the complainants.⁴
- [11] The Commission concluded that SMEG's conduct contravenes section 5(2) of the Act.
- [12] In terms of duration, the Commission found that SMEG's conduct commenced from October 2014 and continued until January 2016 i.e. the termination of supply of products by SMEG to Save endured for a period of about 15 months.

² Specifically named SAA91MFX 90 cm Gas Electric Cooker.

³ Commission's letter dated 02 August 2017, paragraph 6.

⁴ The Commission submitted that in August or September 2014 SMEG refused to honour at least five orders that the complainants placed with SMEG; see Transcript page 2.

- [13] SMEG admits in the consent agreement that it has engaged in the practice of minimum resale price maintenance in contravention of section 5(2) of the Act.⁵
- [14] We however note that the Commission, based on a price analysis exercise, found that SMEG's conduct was not widespread. It found that most of the retailers of SMEG's products do not necessarily sell the SMEG branded products at SMEG's recommended price. Following a question from the Tribunal at the hearing counsel for SMEG confirmed that it was SMEG's current practice "*to recommend retail prices, but those were not enforced.*"⁶
- [15] In terms of the consent agreement SMEG undertakes to implement a number of behavioral remedies, including a supply commitment to Save under normal trade conditions, and further undertakes to pay an administrative penalty of R100 000 (one hundred thousand Rand).
- [16] The Tribunal at the hearing enquired after the calculation of the administrative penalty. The parties could however not satisfactorily answer all questions and the matter stood down to allow for further written submissions. Subsequent to the hearing both SMEG⁷ and the Commission⁸ submitted further details on the computation of the administrative penalty, based on the unique features of this case, and further, on 08 August 2017, filed an agreed addendum relating to the affected turnover used for calculating the penalty. The Commission submitted that the affected turnover should be determined on a case-by-case basis. We agree that this is a case specific issue.
- [17] Although the administrative penalty of R100 000 appears to be on the low side given the aggregating refusal by SMEG to supply the complainants with any product for a considerable period of time, we take no issue with the overall rationality of the penalty given that SMEG's conduct was limited to Save based in Pietermaritzburg in KwaZulu-Natal, i.e. the conduct is retailer-specific and thus limited in scope. As stated above, the Commission found no evidence that

⁵ Consent Agreement, paragraph 3.1.

⁶ Transcript, page 15 lines 15 to 21.

⁷ Letter from the Commission dated 02 August 2017.

⁸ Letter from C de Villiers Attorneys, acting for SMEG, dated 28 July 2017.

SMEG's conduct extended to any other retail customer or that it was common in its retailer network.⁹

[18] We further note that the confirmation of the consent agreement by the Tribunal makes it possible for the complainants to pursue any potential civil damages claims against SMEG for losses that they may have suffered during the 15 month period of termination of supply.¹⁰

Nature and severity of minimum resale price maintenance

[19] As stated above, the purposes of providing reasons in this matter relate to certain general comments made by the Commission in relation to the nature and potential effects of minimum resale price maintenance, as well as to enhance the awareness of the fact that minimum resale price maintenance is *per se* prohibited in South Africa. We deal with this next.

[20] The Commission in motivation of the consent agreement at the hearing stated the following: *"An additional factor that we also took into account [in arriving at the administrative penalty] is that resale price maintenance is not a very active area of investigation or enforcement. Apart from this case, we only have one case on the Tribunal roll relating to resale price maintenance. So, it's not really an active area of enforcement and ... it does not seem to be a widespread problem."*¹¹

[21] The Commission went on to say *"In any event, other jurisdictions such as the US, are now treating this contravention as a rule of reason rather than a per se contravention, but nonetheless, in terms of our current regime, it still [is] a per se contravention";*¹² and *"... that is an indication of the fact that from an economic perspective there is a shift in terms of the impact of resale price maintenance on competition. So, that I would say is an indicator of the changing circumstances as well as the impact of resale price maintenance on competition."*¹³

⁹ See Transcript *inter alia* page 10 lines 3 to 14.

¹⁰ Also see Transcript page 4 line 22 to page 5 line 6.

¹¹ Transcript, page 6 lines 6 to 11.

¹² Transcript, page 6 lines 11 to 14.

¹³ Transcript, page 8 lines 7 to 11.

[22] In relation to minimum resale price maintenance being a *per se* contravention in South Africa we note that there is no intention to change South African competition legislation in relation to the *per se* nature of this conduct.¹⁴ The Tribunal further cautioned against adopting American antitrust pricing practices in South Africa.¹⁵ The USA in general has a very different competitive landscape than South Africa and different priorities. The notion that other jurisdictions may be revisiting their stance on minimum resale price maintenance cannot be construed as a mitigating factor in the matter at hand.

[23] In relation to the Commission's general statement that minimum resale price maintenance is not a very active area of investigation or enforcement, we find it difficult to see how that affects the calculation of an appropriate penalty since the issue of penalty must be determined on a case-by-case basis on its own unique facts. Furthermore, resellers / retailers may not be aware that minimum resale price maintenance is prohibited in South Africa or may be reluctant to report minimum resale price maintenance to the competition authorities because of fear of losing their source of supply of the products. As this case illustrates, SMEG did not shy away from terminating all supply to the complainants when they refused to remove the discount that they gave on the applicable gas appliance.

[24] This case also clearly illustrates the significant impact that the prevention by suppliers of the ability of resellers / retailers to discount suppliers' products has on final consumers, i.e. Save provided a discount of R3 000 on the appliance in question. Consumers clearly benefitted from this discounting.

[25] Both the Tribunal and the Competition Appeal Court ("CAC") have in the past had the opportunity to rule on cases of minimum resale price maintenance. The Tribunal has consistently held that minimum resale price maintenance, as a species of price fixing, is a serious competition offence, stressing its *per se*

¹⁴ Also see Transcript page 7 line 18 to page 8 line 6.

¹⁵ See Transcript, page 15 line 21 to page 16 line 11.

treatment in the Act. For example, in the Federal Mogul case¹⁶, the Tribunal indicated that:

"Contraventions of Section 5(2) constitute a species of price fixing, the vertical variant of that set of contraventions generally construed as the most anti-competitive of business practices. It is for this reason that resale price maintenance is prohibited per se, why, in other words, it permits of no pro-competitive defence. And it is for that reason that the Act provides for the imposition of administrative penalties on first-time Section 5(2) offenders, a level of deterrence reserved for a mere handful of other transgressions.

We interpret the legislature's intention in designating a particularly powerful sanction for this class of contraventions as, firstly, a manifestation of the serious nature of the contravention, of its unequivocally deleterious impact on competition. Secondly, we understand the particular treatment of these contraventions to manifest the degree of 'nakedness', as it were, of the restraint in question, of the widespread appreciation and understanding in the business and general community that Section 5(2) contraventions offend the fundamental and most widely understood tenets of competition law and economics. As such, they are to be distinguished from a range of other potential contraventions which must be subjected to a 'rule of reason' analysis, that is, to a complex legal and economic analysis, that may or may not establish a contravention."

[26] In the same matter on appeal, the CAC indicated that:

*"The drafters of the Act clearly regarded resale price maintenance as an egregiously anticompetitive activity and wished to state so in terse and clear terms. The wording of the section indicates that to establish a contravention thereof, it suffices to produce evidence which shows that a supplier has imposed on its distributors a price at which its goods are to be resold and the distributors are thereby induced to comply with this minimum price on pain of a sanction for noncompliance. There is no justification for the application of foreign dicta that not only may be at odds with an express purpose of the Act but the result of which would lead to support for an interpretation which is at war with the express words of the section."*¹⁷

¹⁶ See Tribunal's Reasons for Decision for imposing an administrative penalty in *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others*, Tribunal case no: 08/CR/Mar01; paragraphs 158 and 159.

¹⁷ *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another* 2005 (6) BCLR 613 (CAC), page 618.

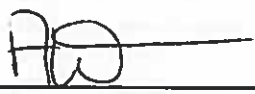
[27] The complainants in this matter acted correctly in standing up to SMEG - despite threats that they would lose all supply of product by SMEG if they continue discounting the gas appliance in question - and should be commended for that. Their actions have helped society at large to acquaint themselves with the provisions of the Act which afford them protection against such practices. The Commission pointed out: *"So, it was a form of strategy [by SMEG] to exert pressure on the complainant to change its price and the complainant [Save] refused. The pressure [by SMEG] didn't work."*¹⁸

[28] One of the aims of providing these reasons is to enhance awareness that the practice of minimum resale price maintenance by suppliers / manufacturers / distributors is *per se* prohibited in South Africa. If resellers / retailers are prevented by their suppliers from discounting products (off a recommended price) they should take up the issue with the Commission since such conduct may amount to minimum resale price maintenance which is *per se* prohibited in South Africa.

[29] However, as explained, the above does not prevent us from confirming the consent agreement as agreed between the Commission and SMEG.

Order

[30] The Tribunal confirms the consent agreement as agreed to and proposed by the Commission and SMEG, annexed hereto marked "A", read with the addendum to the agreement annexed hereto marked "B".



Mr AW Wessels

26 October 2017
Date

Mr E Daniels and Mr A Roskam concurring

Tribunal Case Manager: Alistair Dey-van Heerden

For the Commission: Mr B Majenge

For the Respondent: Adv. N Luthuli instructed by C de Villiers Attorneys

¹⁸ Transcript, page 9 lines 13 to 15.

"Annexure A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA (HELD IN PRETORIA)

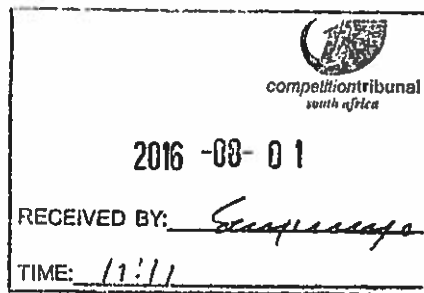
CT Case No.

CC Case No. 2015Jun0303

In the matter between

COMPETITION COMMISSION

and



Applicant

SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD

Respondent

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SBS
HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD FOR CONTRAVENTION OF SECTION
5(2) OF THE COMPETITION ACT NO.89 OF 1998, AS AMENDED.**

Preamble

The Competition Commission ("the Commission") and SBS Household Appliances t/a Smeg (Pty) Ltd hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D read with section 58(1)(b) and 59(1)(a) of the Competition Act (Act No.89 of 1998), as amended, ("the Act") in respect of a contravention of section 5(2) of the Act in the terms set out below:

1. DEFINITIONS

For the purposes of this *Consent Agreement* the following definitions shall apply:

- 1.1 **"Act"** means the Competition Act No. 89 of 1998, as amended;
- 1.2 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.3 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.4 **"Complaints"** means the complaints lodged by Save Hardware Wholesalers CC and Save Wholesalers Cash and Carry CC in terms of section 49B(2) of the Act under case number 2015Jun0303;
- 1.5 **"Complainants"** means Save Hardware Wholesalers CC, a close corporation duly incorporated in terms of the laws of South Africa with its principal place of business at 372 West street, Central Durban, KwaZulu-Natal; and Save Wholesalers Cash and Carry CC, a close corporation duly incorporated in terms of the laws of South Africa with its principal place of business at 362 Victoria Road, Pietermaritzburg, KwaZulu-Natal¹;
- 1.6 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Smeg;
- 1.7 **"Gas Stove"** means a product produced by Smeg, specifically named SAA91MFX 90 cm Gas Electric Cooker;

¹ The member's interest in both Save Hardware Wholesalers CC and Save Wholesalers Cash and Carry CC is held by Mr Noorgat Mohammed.

1.8 "Parties" means the Commission and Smeg;

1.9 "Smeg" means SBS Household Appliances t/a Smeg (Pty) Ltd, a company duly incorporated with limited liability in accordance with the laws of South Africa with its principal place of business at 2nd floor, Melrose Boulevard, Melrose Arch, Johannesburg; and

1.10 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Mentjies Street, Sunnyside Pretoria, Gauteng.

2. COMPLAINTS AND THE COMMISSION'S FINDINGS

2.1 On 8 June 2015, the Commission received Complaints against Smeg from the Complainants. In their Complaint, the Complainants alleged that Smeg is engaged in the practice of minimum resale price maintenance in contravention of section 5(2) of the Act. The Complainants alleged that Smeg refused to supply them with its products for failure to resell the Gas Stove at a price above the minimum recommended price set by Smeg.

2.2 Smeg supplies home appliance products such as Coffee Machines, Hobs, Barbecues, Stoves/ Cookers, Hoods, Sinks, Refrigerators, Freezers, Wine Coolers, Dishwashers, Laundry and Accessories to retailers and wholesalers including the Complainants.

2.3 The Commission conducted an investigation into Smeg's alleged conduct and found the following:

2.3.1 In 2014 the Complainants set the resale price of the Gas Stove supplied by Smeg at R14 999. Hirsch, another retailer customer of Smeg set its resale price of the same Gas Stove at R17 999;

2.3.2 The discrepancy in the resale prices of the Complainants and Hirsch came to the attention of Smeg. Smeg instructed the Complainants not to sell the Gas Stove at R14 999, failing which Smeg would stop supplying the Complainants with its products;

2.3.3 When the Complainants refused to adhere to Smeg's instruction, Smeg terminated the

supply of all its products to the Complainants;

2.3.4 The above conduct constitutes the practice of minimum price maintenance in contravention of section 5(2) of the Act; and

2.3.5 The Commission's investigation revealed that this conduct commenced from October 2014 to January 2016.

3. ADMISSION

3.1 Smeg admits that it has engaged in the practice of minimum price maintenance in contravention of section 5(2) of the Act as set out in paragraph 2 above.

4. AGREEMENT CONCERNING THE SMEG'S FUTURE CONDUCT

4.1 Smeg agrees to:

4.1.1 Continue to supply products to the Complainant to the Applicant, subject to the availability thereof, in accordance with Smeg's standard terms and conditions, which terms and conditions may change from time ;

4.1.2 Desist from the conduct described above;

4.1.3 Develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, members and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act;

4.1.4 To submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

4.1.5 To circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Smeg within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

5. ADMINISTRATIVE PENALTY

5.1 Having regard to the provisions of sections 58(1)(a)(iii) read with sections 59(1)(a), 59(2) and 59(3) of the Act, Smeg accepts that it is liable to pay an administrative penalty. The parties have agreed that Smeg will pay an administrative penalty in the amount of R100 000.00 (One Hundred Thousand Rand, only); representing % of the affected turnover.

5.2 This amount does not exceed 10% of Smeg's total annual income in the Republic and its exports from the Republic for its 2013 financial year.

5.3 Smeg will pay the amount set out in paragraph 5.1 above to the Commission within 2 months from the date of confirmation of this Consent Agreement by the Tribunal.

5.4 The penalty must be paid into the Commission's bank account which is as follows:

NAME: THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER: 4050778576

BRANCH CODE: 323 345

PAYMENT REF: 2015Jun0303

5.5 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

6. FULL AND FINAL SETTLEMENT

This Consent Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Smeg relating to the alleged contravention of section 5(2) the Act that was the subject of the Commission's investigation under Commission Case No. 2015Jun0303.

Dated and signed at Raymond on the 19th day of July 2016

For SBS Household Appliances t/a Smeg (Pty) Ltd



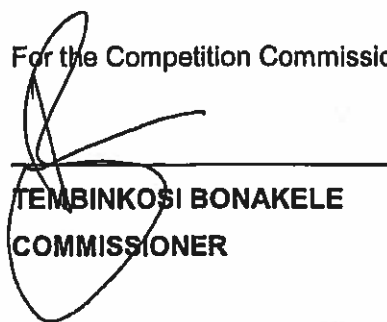
Duly authorised representative of

SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD

Full Names STEPHEN BROWN

Dated and signed at PRETORIA on the 28th day of JULY 2016

For the Competition Commission



TEMBINKOSI BONAKELE
COMMISSIONER

"ANNEXURE B"

NON-CONFIDENTIAL VERSION

ADDENDUM

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: C0069Aug16

CC CASE NO: 2015Jun0303

In the matter between:

COMPETITION COMMISSION

Applicant

and

SBS HOUSEHOLD APPLIANCES (PTY) LTD T/A SMEG

Respondent

ADDENDUM TO CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD FOR A CONTRAVENTION OF SECTION 5(2) OF THE COMPETITION ACT, ACT 89 OF 1998, AS AMENDED

1. INTRODUCTION

- 1.1 This is an addendum to the Consent Agreement concluded between the Competition Commission ("Commission") and SBS Household Appliances t/a Smeg (Pty) Ltd (collectively referred to as "the parties"), on 28 July 2016 in respect of a contravention in terms of section 5(2) of the Competition Act, Act 89 of 1998, as amended ("the Act").

2. RECORDAL

- 2.1. The parties have identified that clause 5.1 of the consent agreement erroneously refers to the penalty as representing "██████ of the affected turnover", whereas the penalty in fact represents ██████ of the relevant turnover, being the turnover affected by the prohibited practice.

3. CLAUSE 5.1 OF THE CONSENT AGREEMENT

- 3.1. Accordingly, the parties have agreed to this addendum as follows:

NON-CONFIDENTIAL VERSION

3.1.1. In respect of clause 5.1 the parties have agreed that the percentage of affected turnover stated therein should be amended to reflect [REDACTED].

3.1.2. In this regard, clause 5.1 is hereby replaced with the following wording: *"Having regard to the provisions of sections 58(1)(a)(iii) read with section 59(1)(a), 59(2) and 59(3) of the Act, Smeg accepts that it is liable to pay an administrative penalty. The parties have agreed that Smeg will pay an administrative penalty in the amount of R 100 000.00 (One Hundred Thousand Rand, only); representing [REDACTED] of the affected turnover."*

FOR SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD:

Dated and signed at _____ on the _____ day of _____ 2017.

STEPHEN BROOKES
MANAGING DIRECTOR OF
SBS HOUSEHOLD APPLIANCES T/A SMEG (PTY) LTD

FOR THE COMPETITION COMMISSION

Dated and signed at _____ on the _____ day of _____ 2017.

TEMBINKOSI BONAKELE
COMMISSIONER OF
THE COMPETITION COMMISSION OF SOUTH AFRICA