

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 115/CR/Dec05

In the matter between:

The Competition Commission

Applicant

and

General Motors South Africa (Pty) Ltd

Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent.



N Manojm

22 December 2005
Date

Concurring: L Reyburn, M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Held at Pretoria

In the matter between:

The Competition Commission

and

General Motors South Africa (Pty) Ltd

CT Case No.:

CC Case No.:2004Apr951

2005-12-07

Applicant

Respondent

**AGREEMENT
BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENT ON
THE TERMS OF AN APPROPRIATE CONSENT ORDER
in terms of section 49D of the Competition Act, 1998
(Act No. 89 of 1998), as amended**

The Competition Commission ("Commission") and General Motors South Africa (Pty) Ltd ("GMSA"), being the Respondent in Competition Commission Case No. 2004Apr951 hereby agree that application be made by the Commission to the Competition Tribunal ("Tribunal") for a consent order in terms of section 49D of the Competition Act No. 89 of 1998, as amended, on the terms set out below.

1. DEFINITIONS

For the purposes of this agreement and any consent order pursuant hereto, the following definitions shall apply unless otherwise stated or the context otherwise requires:

- 1.1 "Act" means the Competition Act, 1998 (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 "*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 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.4 "*Complaint*" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2004Apr951;
- 1.5 "*Consent Order Agreement*" means this agreement duly signed and concluded between the Commission and the Respondent;
- 1.6 "*Respondent*" means General Motors South Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its main place of business at Kempston Road, Port Elizabeth.

2. BACKGROUND

- 2.1 During April 2004, following an investigation by the Commission in respect of alleged resale price maintenance, Toyota South African

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Motors (Pty) Ltd ("Toyota") and the Commission concluded a consent order agreement whereby Toyota, *inter alia*, agreed to pay an administrative penalty of R12 million.

- 2.2 Thereafter and during April 2004, the Commission commenced an industry-wide investigation in the motor industry to ascertain whether certain prohibited practices were taking place. The Commission summonsed GMSA and certain of its dealers to provide it with certain documentation and to appear in person.
- 2.3 The Commission's investigation encompassed the following:
 - 2.3.1 The fixing of prices and/or trading conditions by Manufacturers / Importers and/or Dealers, a contravention of Section 4(1)(b) of the Act;
 - 2.3.2 Agreements between Manufacturers / Importers and their Dealers containing restrictions that have the effect of substantially lessening or preventing competition in the market, a contravention of Section 5 (1) of the Act;
 - 2.3.3 Minimum resale price maintenance imposed by Manufacturers / Importers on Dealers, alternatively minimum resale price maintenance by agreement between the Manufacturers / Importers and their Dealers, a contravention of Section 5 (2) of the Act; and
 - 2.3.4 Excessive pricing by Manufacturers / Importers which are dominant in their respective markets, a contravention of Section 8 (a) of the Act.



3. COMMISSION'S INVESTIGATION

Pursuant to its investigation the Commission arrived at the following conclusions:

- 3.1 GMSA sells its new motor vehicles through a network of approximately 161-franchised dealerships countrywide.
- 3.2 A vertical relationship as contemplated in section 1 of the Act exists between GMSA and its dealerships.
- 3.3 The relationship between GMSA and its dealers is governed by, amongst others, agreements in terms of which GMSA grants individual dealers a non-exclusive franchise to conduct a GMSA dealership within a geographical territory.
- 3.4 The Dealer Agreements are amended and/or supplemented, from time to time, by policies and procedures that are invoked by GMSA, which may provide measurable requirements, against which dealers are awarded rebates and/or financial support.
- 3.5 GMSA introduced a trading policy, which was circulated amongst its dealers and which came into effect on 1 June 2002.
- 3.6 The trading policy specified that dealers were to retain a minimum margin of 8% on all sales of certain new Opel and Isuzu motor vehicles.
- 3.7 The trading policy prescribed to GMSA's dealers different discounts to be given to customers in respect of different vehicles models.
- 3.8 The authorised dealers of GMSA belonged to dealer bodies at which the authorised dealers discussed and agreed on the maximum discounts that authorised dealers were permitted to offer

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RB
The block contains a handwritten signature, the number '4', and the initials 'RB'. To the right of the signature is a circular logo for GMSA, which features a scale of justice and the letters 'GMSA' below it.

on Opel and Isuzu motor vehicles in terms of GMSA's trading policy.

3.9 Adherence to the price list and the limits on discounting was monitored by GMSA and members of the dealership network and authorised dealers were induced to comply with this maintenance of minimum resale prices by threat of sanction by GMSA for non-compliance in that:

3.9.1 GMSA threatened dealers who did not comply with the trading policy, mostly via e-mails, with disciplinary action, which included being banned from the Vehicle Mixing Pool for a certain period and being called upon to explain the transgression, which could ultimately lead to a review of the dealership's franchise.

3.9.2 GMSA addressed letters to its dealership network stating that any dealer found transgressing on the maximum discounts allowed, would be called, at own cost, to Delta Park in Johannesburg, to explain their conduct.

4. RELEVANT PROVISIONS OF THE ACT

Section 5(2) prohibits the practice of minimum resale price maintenance. Section 5 of the Act states:

"5. Restrictive Vertical Practices Prohibited:

(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or

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other pro-competitive, gain resulting from that agreement outweighs that effect.

- (2) The practice of resale price maintenance is prohibited.*
- (3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
 - (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding;*
 - and*
 - (b) if the product has its price stated on it, the words “recommended price” appear next to the stated price”*

5. COMMISSION'S FINDINGS

5.1 The Commission is of the view that conduct referred to in paragraph 3 above amounts to minimum resale price maintenance prohibited by section 5(2) of the Act in that:

5.1.1. there was an understanding regarding the price(s) at which GMSA dealers would on-sell certain vehicles;

5.1.2. the understanding was monitored by GMSA and the dealership network; and

5.1.3. the understanding was enforced by threat of sanction by GMSA for non-compliance.

5.2 The Commission is further of the view that various restrictions by GMSA on its dealership network, contained in its franchise

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agreements, constitute prohibited vertical restrictive practices in contravention of section 5(1) of the Act. The Commission has however decided not to refer this alleged contravention to the Tribunal as it was agreed that the compliance programme that GMSA will institute in terms of this agreement would address this.

- 5.3 In regard to the other possible contraventions of the Act which were the subject of investigation, the Commission has decided not to proceed with any referral to the Tribunal.

6. AGREEMENT CONCERNING CONDUCT

It is recorded that GMSA does not admit that the Commission's conclusions described in paragraph 3 above are correct nor having contravened the Act. Nevertheless, GMSA has taken steps to bring to an end the conduct regarded by the Commission as a contravention or possible contravention of the Act.

The Commission and GMSA agree that GMSA shall:

- 6.1 not impose a maximum discount structure in respect of GMSA's products.
- 6.2 take all reasonable steps to procure that GMSA dealers terminate their part in implementing the alleged anti-competitive conduct as set out in paragraph 3.
- 6.3 not itself or through any officer or employee of GMSA or any person authorised to act on behalf of GMSA notify to dealers, or otherwise publish in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of any GMSA products, and shall not recommend any

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minimum resale price for such products other than as expressly provided for in section 5(3) of the Act.

- 6.4 refrain in the future from engaging in any of the alleged unlawful conduct with its dealers.
- 6.5 circulate to all its dealers within one month from the date of this agreement being confirmed as a consent order by the Tribunal, a statement conveying the substance of the consent order and advising them:
 - 6.5.1 that they are free to sell and display for sale goods supplied by GMSA at whatever price they may choose;
 - 6.5.2 that GMSA does not in any way condone and positively discourages agreement between dealers as to the prices to be charged or quoted for goods supplied by GMSA;
 - 6.5.3 that GMSA will not be party to, or in any way support agreement between dealers as to the prices to be charged or quoted by the dealers for goods supplied by GMSA.
- 6.6 provide copies of this consent order to each of its present directors and during the five-year period following the confirmation of the order provide a copy to any future director on his or her appointment and in each case draw the attention of the director to the content of the order.
- 6.7 institute, within twelve months from the date of this order, a compliance programme designed to ensure that employees and dealers are informed about GMSA's obligations under competition law and the existence and substance of this consent order.
- 6.8 submit its compliance programme to the Commission, which programme will include, but not be limited to, a review of GMSA's

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franchise agreements and establishing a mechanism for dealers and/or consumers to report any contraventions of the Act.

6.9 require its employees to comply with the substance of this consent order and take appropriate disciplinary action against any employee who fails to do so.

7. ADMINISTRATIVE PENALTY

7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, GMSA has agreed to pay an administrative penalty in the amount of R12 000 000, 00 (TWELVE MILLION RANDS) in settlement of the alleged contravention of Section 5 (2) of the Act, in relation to the period from 1 September 1999 to date of signature hereof. The amount does not exceed 10% of its annual turnover during the preceding financial year.

7.2 The administrative penalty will be paid not later than thirty (30) business days after the confirmation of this agreement as a Consent Order by the Tribunal.

7.3 The penalty amount is to be paid directly to the Commission whose banking details are as follows:

Bank: ABSA

Name of Account: The Competition Commission Fees

Branch Name: Pretoria

Branch Code: 323345

Account Number: 4050778576

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Handwritten initials



7.4 The Commission will pay over the penalty amount to the National Revenue Fund, referred to in Section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This Agreement, upon confirmation by the Competition Tribunal, concludes all proceedings between the Commission, GMSA and GMSA's Dealers under Case Number 2004Apr951.

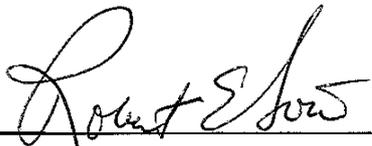
9. EFFECT

GMSA records that nothing in this consent order agreement amounts to an admission of liability on its part or on the part of its dealers.

10. VARIATION

No contract varying, adding to, deleting from or canceling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

Dated and signed at *PORT ELIZABETH* on the *5TH* day of *December* ~~November~~ 2005.



Robert E Socia
Managing Director
General Motors South Africa (Pty) Ltd



Dated and signed at Pretoria on the 7th day of ~~November~~ ^{December} 2005.



Shan Ramburuth
Acting Commissioner
Competition Commission