

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 79/CR/Sep06

In the matter between:

The Competition Commission Applicant

and

Oakley Athletic (Pty) Ltd Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 11 October 2006

Decided on : 11 October 2006

Order

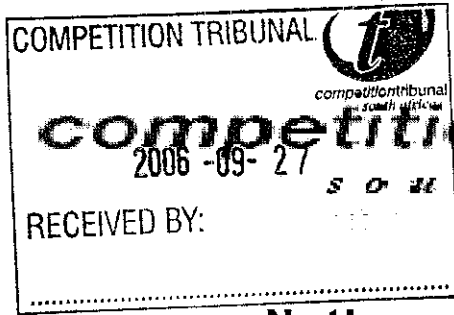
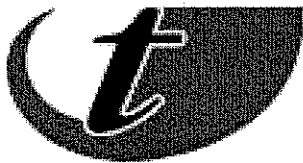
Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

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

D Lewis
Presiding Member

Concurring: N Manoim and Y Carrim

TA/CR/Sep06



competitiontribunal
south africa

Form CT 6

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag X28
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Notice of Motion

Date: 27-Sep-2006 **File #** _____

To: The registrar of the Competition Tribunal

Concerning the matter between:

The Competition Commission _____ (Applicant)

and Oakley Athletic (Pty) Ltd _____ (Respondent)

Take notice that the _____ Applicant
intends to apply to the Tribunal for the following order:

Confirmation of the Consent Agreement entered into between the Competition Commission and the Respondent as a Consent Order

Name and Title of person authorised to sign:

Mark Worsley : Chief Legal Counsel

Authorised Signature:

Date:

27-Sep-2006

For Office Use Only:

Tribunal file number: _____

Date filed: _____

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA**

Tribunal Case No:

CC Case No: 2005Sep1842

In the matter between:

The Competition Commission

Applicant

and

Oakley Athletic (Pty) Ltd

Respondent

**APPLICATION FOR THE CONFIRMATION OF A CONSENT AGREEMENT AS AN
ORDER OF THE COMPETITION TRIBUNAL**

KINDLY TAKE NOTICE THAT Applicant intends bringing an application in terms of section 49D(1) of the Competition Act 89 of 1998, as amended ("the Act"), read together with Rule 24 of the Rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal Rules") to this Honourable Competition Tribunal as soon as the matter may be heard for an order in the following terms:

1. The Consent Agreement entered into by and between Applicant and the Respondent, attached hereto marked "A" is hereby made a Consent Order.
2. Further and/or alternative relief as this Honourable Tribunal may order

Kindly place this matter on the roll for hearing.

Signed at PRETORIA on this the 27th day of September 2006



COMPETITION COMMISSION

1st Floor

Mulayo Building (Block C)

the dti Campus

77 Meintjie Street

Sunnyside

Pretoria

Ref. 2005Sep1842

TO:

The Registrar
COMPETITION TRIBUNAL
3rd Floor
Mulayo Building (Block C)
the dti Campus
77 Meintjie Street
Sunnyside
Pretoria

AND TO:

The Managing Director
OAKLEY ATHLETIC (PTY) LTD
Humerrail Business Centre
Oakworth Drive
Humewood
Port Elizabeth
Ref: Steven Adshade
Tel: (041) 501 0201
Fax: (041) 585 3481

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Held at Pretoria

**CT Case No.
CC Case No. 2005Sep1842**

In the matter between:

The Competition Commission

Applicant

and

Oakley Athletic (Pty) Ltd

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 Oakley Athletic (Pty) Ltd ("Oakley SA"), being a Respondent in Competition Commission Case No. 2005Sep1842 hereby agree that application be made by the Commission to the Competition 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 lodged by Mr Steven Jacobs in terms of section 49B of the Act under case number 2005Sep1842;
- 1.5 “*Consent Order Agreement*” means this agreement duly signed and concluded between the Commission and the Respondent;
- 1.6 “*Respondent*” means Oakley Athletic (Pty) Ltd, a company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa, with its principal place of business at Humerail Business Centre, Oakworth Drive, Humewood, Port Elizabeth.

2. BACKGROUND

- 2.1 During September 2005, the *Commission* received a *complaint* from a concerned consumer, Mr Steven Jacobs, alleging that *Oakley SA* might be engaged in a prohibited practice of minimum resale price maintenance in as far as the sale of Oakley sunglasses are concerned,

by prescribing minimum prices to its retail outlets. This allegation is based on the fact that Mr Jacobs wanted to buy a pair of Oakley sunglasses and while he was shopping around at retail outlets, he found that they were all charging the same price for the same type of Oakley sunglasses and that none of these outlets allowed any discount on the product. It is alleged that this is the result of *Oakley SA* directing its retail outlets not to give discounts off its retail price lists for its current range of sunglasses.

2.2 The *Commission's* investigation under case number 2005Sep1842 encompassed minimum resale price maintenance imposed by *Oakley SA* on its retail outlets [a contravention of section 5(2) of the *Act*].

2.3 As a result of the *Commission's* investigation, *Oakley SA* reviewed its trading practices and in December 2005, it sent notices to all of its retail outlets, advising them that its price list is to be used as a guide only and that retailers were entirely free to set their own retail prices. *Oakley SA* stated that it would be proactive in getting its sales agents to discuss this with Owners / Managers of its retail outlets and will be conducting independent mystery shopping to verify progress. This apparently was the end of *Oakley SA's* practice of minimum resale price maintenance.

3. COMMISSION'S INVESTIGATION

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

3.1 In South Africa, *Oakley SA* sells its sunglasses through a network of approximately 800 retail outlets countywide.

3.2 A vertical relationship as contemplated in section 1 of the *Act* exists between *Oakley SA* and its retail outlets.

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- 3.3 The relationship between *Oakley SA* and its retail outlets is governed by, amongst others, a Retail Sales Standards Agreement in terms of which *Oakley SA* sells products to various retail outlets in areas within the Republic of South Africa for resale.
- 3.4 The position regarding *Oakley's* brand image is clearly explained to retailers before being appointed as a stockist of *Oakley* sunglasses as part of the trading requirements. Retailers are warned that they might jeopardise future supply of *Oakley* products and/or forfeit their status as *Oakley* stockist should they in any way diminish the *Oakley* brand. This would include discounting and/or selling any of *Oakley SA's* current line of sunglasses below the minimum price as set by *Oakley SA*.
- 3.5 *Oakley SA* from time to time publishes and circulates to its retail outlets a "recommended retail price list" or price structure in relation to various models of *Oakley* sunglasses.
- 3.6 Some of the retail outlets are conducting business on a "just in time" stock system, where tagging and pricing of sunglasses are done by *Oakley SA* on request of the outlet in question.
- 3.7 *Oakley SA* conducted regular visits at randomly selected retail outlets. Discounting by outlets was noted in meetings with retail outlets, as well as *Oakley SA's* management review meetings.
- 3.8 *Oakley SA* stopped the above conduct during December 2005, as soon as it became aware that the *Commission* was of the view that its conduct contravened the Act.

4. RELEVANT PROVISIONS OF THE ACT

Section 5(2) of the *Act* 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 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 *Oakley SA* only allowed its retail outlets to discount on “out of season” and/or discontinued lines of *Oakley* sunglasses;

5.1.2 *Oakley SA* conducted visits to its network of retail outlets and monitored adherence to its minimum prescribed prices on its current range of sunglasses; and



5.1.3 Retailers are warned that they might jeopardise future supply of Oakley sunglasses and/or forfeit their status as Oakley stockist should they in any way diminish the Oakley brand. This would include discounting and/or selling any of *Oakley SA's* current line of sunglasses below the minimum price as set by *Oakley SA*.

6. AGREEMENT CONCERNING CONDUCT

The *Commission* and *Oakley SA* agree that *Oakley SA's* conduct constituted a contravention of section 5(2) of the *Act*. *Oakley SA* has already taken steps to bring to an end the prohibited practice, but the *Commission* and *Oakley SA* further agree that *Oakley SA* shall:

- 6.1 not impose a maximum discount structure in respect of sales of Oakley sunglasses;
- 6.2 take all reasonable steps to procure that the retail outlets of *Oakley SA* terminate their part in implementing the alleged anti-competitive conduct.
- 6.3 not itself or through any officer or employee of *Oakley SA* or any person authorised to act on behalf of *Oakley SA* 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 Oakley sunglasses, and shall not recommend any minimum resale price for such sunglasses 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 in its dealing with its retail outlets.
- 6.5 circulate to all its retail outlets 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 sunglasses supplied by *Oakley SA* at whatever price they may choose;
- 6.5.2 that *Oakley SA* does not in any way condone and positively discourages agreement between retail outlets as to the prices to be charged or quoted for sunglasses supplied by *Oakley SA*;
- 6.5.3 that *Oakley SA* will not be party to, or in any way support agreement between retail outlets as to the prices to be charged or quoted by the outlets for sunglasses supplied by *Oakley SA*.
- 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 all agents are informed about *Oakley SA*'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, 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*, *Oakley SA* has agreed to pay an administrative penalty in the amount of R212 100, 00 (TWO HUNDRED AND TWELVE THOUSAND ONE HUNDRED RANDS) in settlement of any contravention of Section 5 (2) of the *Act*, in relation to the period from 1 September 1999 to 31 December 2005. *Oakley SA* records that 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 said amount is payable to the *Commission*, whose banking details are as follows:

Bank: ABSA

Name of Account: The Competition Commission Fees

Branch Name: Pretoria

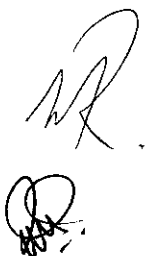
Branch Code: 323345

Account Number: 4050778576

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. DAMAGES

8.1 In terms of section 49D of the *Act*, read with Rule 18 of the Rules For The Conduct Of Proceedings In The Competition Commission, the complainant in Commission case number 2005Sep1842, Mr Steven

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Jacobs, has indicated that he is prepared to accept damages in the amount of R220-00 and *Oakley SA* has agreed to pay the claimed amount of damages.

- 8.2 The damages will be paid to Mr Steven Jacobs not later than thirty (30) business days after the confirmation of this agreement as a Consent Order by the *Tribunal*.
- 8.3 A Form CT 3 completed by Mr Steven Jacobs is annexed marked "A".

9. FULL AND FINAL SETTLEMENT

This Agreement, upon confirmation by the *Tribunal*, concludes proceedings between the *Commission* and *Oakley SA* under Commission Case Number 2005Sep1842.

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 both the parties.

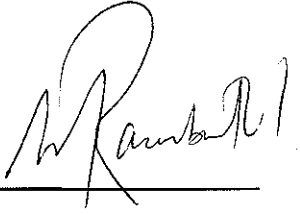
Dated and signed at *PORT ELIZABETH* on the *13th* day of September 2006.



Steven Adshade
Managing Director
Oakley Athletic (Pty) Ltd



Dated and signed at Pretoria on the 20th day of September 2006.



Shan Ramburuth
Commissioner
Competition Commission





competitiontribunal south africa

Form CT 3

About this Form

This Form is issued in terms of Competition Commission Rules 24 and 25.

This Form must be attached to all referrals to the Competition Tribunal together with a draft order and a Notice of Motion in Form CT 6.

Contacting the Tribunal

The Competition Tribunal
Private Bag 128
Lynwood Road
Pretoria 020
Republic of South Africa
Tel: 27 12 391 3300
Fax: 27 12 394 0165
E-mail: ctisa@comptrib.co.za

Consent to Include Damages in Consent Order

16-Aug-2006

Date:

To: The Competition Commission and the Competition Tribunal

From:

(Name of complainant:)

Steven Jacobs
8a 11th Street
Parkhurst
2120

Concerning:

(Name and file number of complaint:)

Steven Jacobs vs Oakley Athletic (Pty) Ltd
2005Sep1842

Statement of Claimant:

The complainant has suffered material damages as a result of the conduct that is the subject matter of this complaint, and agrees to having compensation for those damages, payable on the terms set out in the attached sheet, and in the amount of R 220.00, included in a consent order made by the Competition Tribunal in terms of section 49D of the Competition Act.

The complainant understands that if damages are awarded in a consent order as contemplated, any right of the complainant to damages in a civil action arising out of the same conduct is precluded in terms of section 49D(4), read with section 65(6)(a) of the Competition Act.

Name and Title of person authorised to sign:

Mr Steven Jacobs

Authorised Signature:

Date:

16-Aug-2006

For Office Use Only

Tribunal file number: _____ Date filed: _____

Steven Jacobs vs Oakley Athletic (Pty) Ltd
Case No: 2005Sep1842

The claimed damages in the amount of R220-00 will be paid in cash into the bank account of Steven Jacobs not later than thirty (30) business days after the confirmation of the consent agreement as a Consent Order by the Competition Tribunal

Account Details:

Steven Jacobs
Standard Bank
Staff Banking 005055
Account: 009236104



79 | CR | Sep 06

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Form CT1(1)

About this Form

This form is issued in terms of section 50 of the Competition Act and Rules.

This form is to be used only for a referral by the Competition Commission.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served with this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any other answer must be in affidavit form, setting out in numbered paragraphs:

- (a) a concise statement of the grounds on which the Complaint is opposed;
- (b) the material facts or points on which the respondent relies;
- (c) an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Form continues on Page 2.

Contacting the Tribunal

The Competition Tribunal
Private Bag X28
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Commission

Date: 27 September 2006

To: the Registrar of the Competition Tribunal, and:

(Name of respondent and [if applicable] other participants :)

Oakley Athletic (Pty) Ltd Respondent

Concerning:

(Complaint name and Commission file number:)

Steven Jacobs vs. Oakley Athletic (Pty) Ltd: Case Number 2006Sep1842

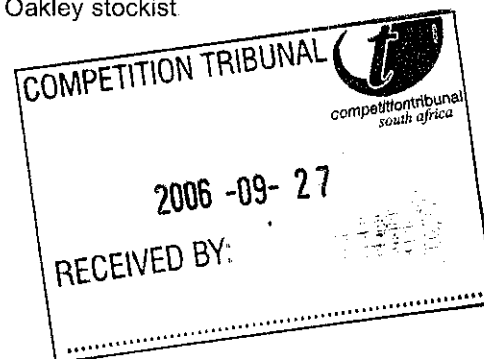
From: the Competition Commission

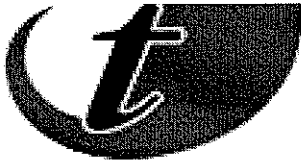
The Competition Commission alleges that the Respondent contravened the provisions of the Competition Act, section 5(2) by engaging in the following prohibited conduct:

(Concise statement of the alleged prohibited practice:)

Oakley Athletic (Pty) Ltd ("Oakley") was involved in a practice of minimum resale price maintenance, in contravention of section 5(2) of the Competition Act in that:

- i). Oakley determined and maintained the retail prices to be charged by independent retail outlets ("retailers") to consumers on its current range of sunglasses;
- ii). Oakley instructed retailers not to offer any discounts off the retail prices; and
- iii). Oakley informed retailers that anyone caught discounting, might jeopardise its future supply of Oakley products and/or forfeit its status as Oakley stockist





competitiontribunal

south africa

Form CT1(1) Page 2 About this Form

This form is issued in terms of section 50 of the Competition Act.

This form is to be used only for a referral by the Competition Commission.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served with this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any other answer must be in affidavit form, setting out in numbered paragraphs:

- (a) a concise statement of the grounds on which the Complaint is opposed;
- (b) the material facts or points on which the respondent relies;
- (c) an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Contacting the Tribunal

The Competition Tribunal
Private Bag X28
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Commission

The Competition Commission seeks an order granting the following relief:

(Concise statement of the order or relief sought:)

Confirmation of the Consent Agreement entered into between the Competition Commission and the Respondent as a Consent Order.

This referral is to proceed as a consent proceeding.

This referral is to proceed as a contested proceeding. Attached is an affidavit setting out the grounds of this complaint, and a statement of the material facts and the points of law relevant to it, as required by Competition Tribunal Rule 15(2).

Name and Title of person authorised to sign on behalf of the Competition Commission:

Mark Worsley : Chief Legal Counsel

Authorised Signature: