

SOUTH AFRICA / JUDGMENT

Competition Commission v BMS Medical CC (CO086Oct21) [2021] ZACT 102; [2023] 1 CPLR 7 (CT) (12 October 2021)

[2021] ZACT 102

COURT

Competition Tribunal

BEFORE

AW Wessels, T Vilakazi, A Ndoni

CASE / FILE NUMBER

CO086Oct21

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO086Oct21

In the matter between:

The Competition Commission

Applicant

And

BMS Medical CC

Respondent

Panel : AW Wessels (Presiding Member)

: T Vilakazi (Tribunal Member)

: A Ndoni (Tribunal Member)

Heard on : 12 October 2021

Decided on : 12 October 2021

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement concluded between the Competition Commission and BMS Medical CC annexed hereto.

Presiding Member Mr Andreas Wessels

Concurring: Dr Thando Vilakazi and Ms Andiswa Ndoni

Date: 12 October 2021

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

CC CASE NO: 2019SEP0024

COMPETITION COMMISSION OF SA

Applicant

BMS MEDICAL CC

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1) (b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND BMS MEDICAL CC, IN RESPECT OF A CONTRAVENTION OF SECTION 4{1}{b}{iii) OF THE COMPETITION ACT 89 OF 1998

Preamble

The Competition Commission ("Commission") and BMS Medical CC ("BMS Medical") hereby agree that an application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 490 read with section 58(1)(b) of the Competition Act no. 89 of 1998, as amended ("the Act"), in respect of a contravention of section 4(1)(b)(iii) of the Act.

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. "BMS Medical" means a close corporation duly registered in accordance with the laws of the Republic of South Africa, with its registered place of business situated at 84 Rietvlei, Table View, Cape Town;

1.3. "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;

1.4. "Commissioner" means the Commissioner of the Competition Commission (the Commissioner) in terms of section 24(1) of the Act;

1.5. "Consent Agreement" means this agreement duly signed and concluded between the Commission and BMS Medical;

1.6. "Department of Health Western Cape" means a department of the Government of Western Cape, responsible for providing public healthcare to the people of Western Cape, with its principal place of business situated at 4 Dorp Street, Provincial Building, Tower Block, Cape Town.

1.7. "DOHWC Tender" means tender issued by the Department of Health Western Cape under tender number: WCGHCC007/2017 for the provision of diagnostic sets to all hospitals / institutions.

1.8. "Parties" means the Commission and BMS Medical.

1.9. "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 the 1st Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. COMMISSION'S INVESTIGATION AND FINDINGS

2.1. On 18 September 2019, the Commission received a complaint from the Department of Health Western Cape ("DOHWC") in terms of section 49B(2)(b) of the Competition Act 89 of 1998, as amended ("the Act"). The DOHWC alleged that BMS Medical and M Meyer Surgical Sales CC t/a Intermed ("Intermed") being firms in a horizontal relationship colluded when tendering for the DOHWC Tender.

2.2. The DOHWC Tender was for the supply diagnostic sets to all hospitals/ health institutions under the control of the DOHWC. The diagnostic sets are toolsets which assist clinicians to perform a comprehensive physical examination of patients' eyes, ears, nose, and throats.

2.3. This complaint was investigated under case number 2019SEP0024.

2.4. The Commission's investigation found that on or about June 2018, BMS Medical and Intermed assisted each other when completing tender documents for DOHWC Tender. In this regard, the investigation revealed that the directors of BMS Medical and Intermed were sitting together in one office when they were completing their tender documents.

2.5. The conduct between BMS Medical and Intermed amounts to collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

3. ADMISSION

3.1. BMS Medical does not admit that it has acted in contravention of section 4(1)(b)(iii) of the Act as described in paragraph 2 above.

3.2. The Commission has agreed to enter into the Consent Agreement without an admission of liability by BMS Medical based on inter alia the following factors:

3.2.1 BMS Medical is a small firm;

3.2.2 The size of the tender was small size being an estimated R1 million for 3 years;

3.2.3 BMS Medical did not win the tender in question; and

3.2.4 BMS Medical is a first-time offender, it has never contravened the Act before.

4. CO-OPERATION

4.1. BMS Medical has provided full and expeditious co-operation to the Commission concerning the prohibited practice.

5. AGREEMENT REGARDING FUTURE CONDUCT

5.1. BMS Medical undertakes to refrain from engaging in any anti-competitive conduct in contravention of the Act in future.

5.2. BMS Medical will develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that all its members and board of directors do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring and detection of any contraventions of the Act.

5.3. BMS Medical shall circulate a statement summarising the contents of this Consent Agreement to all its members and board of directors within 60 (sixty) business days from the date of confirmation of this Consent Agreement by the Tribunal.

6. ADMINISTRATIVE PENALTY

6.1. BMS Medical agrees that it is liable to pay an administrative penalty of R20 000 (Twenty Thousand Rand). This amount does not exceed 10% of BMS Medical's annual turnover for the financial year ending February 2020.

6.2. BMS Medical will pay R20 000 (Twenty Thousand Rand) to the Commission in 10 months instalments after the confirmation of the Consent Agreement as an order of the Tribunal.

6.3. The payment shall be made into the Commission's bank account, details of which are as follows:

Bank name:

[...]

Branch name:

[...]

Account holder:

[...]

Account number:

[...]

Account type:

[...]

Branch Code:

[...]

Reference:

[...]

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

7. MONITORING

7.1. BMS Medical undertakes to submit a copy of the compliance programme referred to in clause 5.2 to the Commission within 60 calendar days of the date of confirmation of this Consent Agreement as an order to the Tribunal.

7.2. All reports in relation to conditions set out in this agreement, including but not limited to compliance programmes, proof of payment(s) etc, shall be submitted to the Commission at CartelSettlements@compcom.co.za.

8. FULL AND FINAL SETTLEMENT

8.1. This Consent Agreement is entered into in full and final settlement of the Commission's investigation under Case Number: 2019SEP0024 and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and BMS Medical relating to the conduct that is the subject of the Commission's investigation under Case Number: 2019SEP0024.

TEMBINKOSI BONAKELE

Commissioner

Dated and signed at PRETORIA on the 30th day of SEPTEMBER 2021.

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