

SOUTH AFRICA / JUDGMENT

Competition Commission v BMW South Africa (Pty) Ltd t/a BMW Motorrad (97/CR/Sep08) [2010] ZACT 21; [2010] 1 CPLR 64 (CT) (17 March 2010) [2010] ZACT 21

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Andiswa Ndoni

CASE / FILE NUMBER

97/CR/Sep08

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 97/CR/Sep08

In the matter between:

Competition Commission Applicant

and

BMW South Africa (Pty) Ltd t/a BMW Motorrad First Respondent

Panel Norman Manoim (Presiding Member);

Yasmin Carrim (Tribunal Member); and

Andiswa Ndoni (Tribunal Member)

Heard on 17 March 2010

Decided on : 17 March 2010

ORDER

The Tribunal hereby confirms the settlement agreement and the addendum thereto, agreed to between the Competition Commission and the First Respondent, annexed hereto marked A and B respectively.

Norman Manoim Presiding Member

Concurring: Yasmin Carrim and Andiswa Ndoni

BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO: 97CRSep08 CC CASE NO: 2004Oct1239

In the matter between:

COMPETITION COMMISSION Applicant

BMW SOUTH AFRICA (PTY) LTD t/a BMW MOTORRAD First Respondent

in re:

BMW SOUTH AFRICA (PTY) LTD First Respondent

LYNDHURST AUTO (PTY) LTD Second Respondent

AUTOHAUS MONTI (PTY) LTD Third Respondent

NORTHSIDE MOTORCYLCES (PTY) LTD Fourth Respondent

SOVEREIGN MOTORS (PTY) LTD Fifth Respondent

TOMMY JOHNS MOTORCYCLES (PTY) LTD Sixth Respondent

SPEED BIKE-BLOEMFONTEIN (PTY) LTD Seventh Respondent

SPEED BIKE CENTRE-KLERKSDORP (PTY) LTD Eighth Respondent

BAVARIAN MOTORCYCLES (PTY) LTD Ninth Respondent

MENLYN MOTORRAD (PTY) LTD Tenth Respondent

AUTO ATLANTIC MOTORCYCLES TWEFCO (PTY) LTD Eleventh Respondent

AUTO ALPINA MOTORCYLCES (PTY) LTD Twelfth Respondent

AUTO UMHLANGA (PTY) LTD Thirteenth Respondent

SETTLEMENT AGREEMENT The applicant and the first respondent hereby agree that application be made to the Competition Tribunal ("Tribunal") to confirm the settlement agreement as an order of the Tribunal in terms of section 58(1)(a) of the Act on the terms set out below. 1.

Definitions 1.1. The 'Act' means the Competition Act, 89 of 1998, as amended. 1.2. 'authorised dealers' means parties contracted to the first respondent to distribute and/or sell in South Africa motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which the first respondent imports, distributes and/or sells in South Africa. 1.3. 'BMW*' means the first respondent, BMW (South Africa) (Pty) Ltd, a company duly incorporated with limited liability in accordance with the laws of South Africa with its principal place of business at 1 Bavaria Road, Randjiespark Extension 17, Midrand. 1.4. 'BMW Lifestyle Centre' means BMW's Lifestyle Centre in Midrand through which BMW also sells and/or distributes new motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like). 1.5.

'Commission' means the applicant, 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 Building C, The dti Campus, 77 Meintjies Street, Sunnyside, Pretoria. 1.6. 'Commissioner' means the Commissioner of the Commission appointed in terms of section 22 of the Act. 1.7. The 'Complainant' means Fourier Holdings (Pty) Ltd t/a Bryanston Motorcycles, whose principal place of business was situated at the corner of William Nicol Drive and Grosvenor Avenue, Bryanston. 1.8. The 'DAR' means the Dealer Area of Responsibility which is stipulated in dealer agreements concluded between BMW and authorised dealers to demarcate the geographical area in respect of which an authorised dealer is given a right to sell and/or distribute motorcycles and accessories as defined below. 1.9. 'motorcycles and accessories' mean motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which BMW distributes and/or sells through the authorised dealers and through BMW Lifestyle Centre. 1.10. 'Parties' mean the Commission and BMW. 1.11. '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 Building C, Mulayo Building, dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. Complaint investigation 2.1. On 8 October 2004 the Complainant submitted a complaint alleging anti-competitive conduct by BMW.

SETTLEMENT AGREEMENT

The applicant and the first respondent hereby agree that application be made to the Competition Tribunal ("Tribunal") to confirm the settlement agreement as an order of the Tribunal in terms of section 58(1)(a) of the Act on the terms set out below.

1. Definitions

1.1. The 'Act' means the Competition Act, 89 of 1998, as amended.

1.2. 'authorised dealers' means parties contracted to the first respondent to distribute and/or sell in South Africa motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which the first respondent imports, distributes and/or sells in South Africa.

1.3. 'BMW*' means the first respondent, BMW (South Africa) (Pty) Ltd, a company duly incorporated with limited liability in accordance with the laws of South Africa with its principal place of business at 1 Bavaria Road, Randjiespark Extension 17, Midrand.

1.4. 'BMW Lifestyle Centre' means BMW's Lifestyle Centre in Midrand through which BMW also sells and/or distributes new motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like).

1.5. 'Commission' means the applicant, 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 Building C, The dti Campus, 77 Meintjies Street, Sunnyside, Pretoria.

1.6. 'Commissioner' means the Commissioner of the Commission appointed in terms of section 22 of the Act.

1.7. The 'Complainant' means Fourier Holdings (Pty) Ltd t/a Bryanston Motorcycles, whose principal place of business was situated at the corner of William Nicol Drive and Grosvenor Avenue, Bryanston.

1.8. The 'DAR' means the Dealer Area of Responsibility which is stipulated in dealer agreements concluded between BMW and authorised dealers to demarcate the geographical area in respect of which an authorised dealer is given a right to sell and/or distribute motorcycles and accessories as defined below.

1.9. 'motorcycles and accessories' mean motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which BMW distributes and/or sells through the authorised dealers and through BMW Lifestyle Centre.

1.10. 'Parties' mean the Commission and BMW.

1.11. 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 Building C, Mulayo Building, dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. Complaint investigation

2.1. On 8 October 2004 the Complainant submitted a complaint alleging anti-competitive conduct by BMW.

2.2. The Commission investigated the complaint and referred (on 4 September 2008) the following particulars of the complaint to the Tribunal for

determination:

2.2.1. BMW engages in the practice of resale price maintenance in contravention of section 5(2) of the Act in that it does not permit authorised dealers to offer discounts to customers in respect of motorcycles and accessories. BMW abuses its dominance in contravention of section 8(c) of the Act in that it prevents authorised dealers from competing for customers in areas outside their DARs whilst not imposing a similar restriction against BMW Lifestyle Centre. Alternatively to section 8(c), that this conduct of BMW amounts to a prohibited vertical practice in contravention of section 5(1) of the Act. 2.3. BMW filed answering affidavits in which it denies the allegations against it. It does not admit any of the alleged contraventions,

including in this agreement.

3. Withdrawal of part of the complaint referred 3.1. On 11 November 2009 the Commission formally and unconditionally withdrew the complaint based on sections 8(c) and 5(1) of the Act.

4. Set down of the complaint 4.1. The complaint relating to section 5(2) of the Act was set down for hearing before the Tribunal from 15 to 19 March 2010. 4.2. The Commission filed three witness statements on 18 February 2010. It confirmed to BMW on 22 February 2010 that it would not be filing any further witness statements. BMW filed nine witness statements, the ninth of which was filed on 8 March 2010. 5. The Commission's considerations for settlement 5.1. In agreeing to settle with BMW, the Commission has taken into account the following: 5.1.1. One of its key witnesses no longer wishes to testify and refuses to accept any subpoena. 5.1.2. BMW terminated its dealer agreement with the Complainant during 2002 and/or early 2003. The conduct complained of by the Complainant relates to the period when BMW and the Complainant were still contracted to each other. 5.1.3. The termination of the dealer agreement resulted in High Court proceedings between BMW and the Complainant which are unrelated to this complaint. BMW has expressed a willingness, independently of these competition proceedings, to enter into discussions with the Complainant to resolve the High Court litigation - which concerns commercial disputes between BMW and the Complainant. 5.1.4. BMW agrees to give relevant undertakings as to future conduct as set out below.
6. Agreement concerning future conduct 6.1. Notwithstanding that BMW denies that it has contravened section 5(2) of the Act, it undertakes, in order to resolve the complaint referral, that it will not in future enforce any rule, policy or practice against its authorised dealers not to give any discounts to customers in respect of motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which it imports and sells in South Africa through its network of authorised dealers. 7. Full and Final Settlement 7.1. This agreement, upon confirmation by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and BMW relating to any alleged contravention by BMW of the Act, and without limiting the generality of the foregoing, from all and any alleged conduct by BMW that is the subject of the Commission's referral under CC case number 2004Oct1239 and Tribunal case number 97CRSep08. Dated and signed at Pretoria on the 16 day of March 2010

2.2. The Commission investigated the complaint and referred (on 4 September 2008) the following particulars of the complaint to the Tribunal for

determination:

2.2.1. BMW engages in the practice of resale price maintenance in contravention of section 5(2) of the Act in that it does not permit authorised dealers to offer discounts to customers in respect of motorcycles and accessories.

BMW abuses its dominance in contravention of section 8(c) of the Act in that it prevents authorised dealers from competing for customers in areas outside their DARs whilst not imposing a similar restriction against BMW Lifestyle Centre. Alternatively to section 8(c), that this conduct of BMW amounts to a prohibited vertical practice in contravention of section 5(1) of the Act.

2.3. BMW filed answering affidavits in which it denies the allegations against it. It does not admit any of the alleged contraventions,

including in this agreement.

3. Withdrawal of part of the complaint referred

3.1. On 11 November 2009 the Commission formally and unconditionally withdrew the complaint based on sections 8(c) and 5(1) of the Act.

4. Set down of the complaint

4.1. The complaint relating to section 5(2) of the Act was set down for hearing before the Tribunal from 15 to 19 March 2010.

4.2. The Commission filed three witness statements on 18 February 2010. It confirmed to BMW on 22 February 2010 that it would not be filing any further witness statements. BMW filed nine witness statements, the ninth of which was filed on 8 March 2010.

5. The Commission's considerations for settlement

5.1. In agreeing to settle with BMW, the Commission has taken into account the following:

5.1.1. One of its key witnesses no longer wishes to testify and refuses to accept any subpoena.

5.1.2. BMW terminated its dealer agreement with the Complainant during 2002 and/or early

2003. The conduct complained of by the Complainant relates to the period when BMW and the Complainant were still contracted to each other.

5.1.3. The termination of the dealer agreement resulted in High Court proceedings between BMW and the Complainant which are unrelated to this complaint. BMW has expressed a willingness, independently of these competition proceedings, to enter into discussions with the Complainant to resolve the High Court litigation - which concerns commercial disputes between BMW and the Complainant.

5.1.4. BMW agrees to give relevant undertakings as to future conduct as set out below.

6. Agreement concerning future conduct

6.1. Notwithstanding that BMW denies that it has contravened section 5(2) of the Act, it undertakes, in order to resolve the complaint referral, that it will not in future enforce any rule, policy or practice against its authorised dealers not to give any discounts to customers in respect of motorcycles and accessories (helmets, rider gear, boots, gloves, top boxes, panniers and the like) which it imports and sells in South Africa through its network of authorised dealers.

7. Full and Final Settlement

7.1. This agreement, upon confirmation by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and BMW relating to any alleged contravention by BMW of the Act, and without limiting the generality of the foregoing, from all and any alleged conduct by BMW that is the subject of the Commission's referral under CC case number 2004Oct1239 and Tribunal case number 97CRSep08.

Dated and signed at Pretoria on the 16 day of March 2010

Director: Legal Services BMW (South Africa) (Pty) Ltd t/a BMW Motorrad duly authorised
Dated and signed at Pretoria on the 16 day of March 2010
Commissioner Competition Commission
ADDENDUM TO SETTLEMENT AGREEMENT Case No. 97/CR/Sep08
BMW acknowledges the right of the Complainant to apply for a Declaration in terms of section 58(1)(a)(v) or (vi) of the Act in respect of its complaint under section 5(2) of the Act, in this matter. Any such application shall be made within 20 business days of the date of this order.
Dated and signed at Pretoria on the 17 day of March 2010
Director: Legal Services BMW (South Africa) (Pty) Ltd t/a BMW Motorrad duly authorised
Dated and signed at Pretoria on the 17 day of March 2010
Commissioner Competition Commission

Director: Legal Services

BMW (South Africa) (Pty) Ltd t/a BMW Motorrad duly authorised

Commissioner

Competition Commission

ADDENDUM TO SETTLEMENT AGREEMENT Case No. 97/CR/Sep08

BMW acknowledges the right of the Complainant to apply for a Declaration in terms of section 58(1)(a)(v) or (vi) of the Act in respect of its complaint under section 5(2) of the Act, in this matter.

Any such application shall be made within 20 business days of the date of this order.

Dated and signed at Pretoria on the 17 day of March 2010

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