

SOUTH AFRICA / JUDGMENT

Competition Commission v Bridgestone South Africa (Pty) Ltd (92/CR/Dec09) [2012] ZACT 34; [2012] 2 CPLR 232 (CT) (8 May 2012)

[2012] ZACT 34

COURT
Competition Tribunal

BEFORE
Y Carrim, A Ndoni, M Mokuena

CASE / FILE NUMBER
92/CR/Dec09

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 92/CR/Dec09

In the matter between:

THE COMPETITION COMMISSIONApplicant

And

BRIDGESTONE SOUTH AFRICA (PTY) LTDFirst Respondent

MAXIPREST TYRES (PTY) LTDSecond Respondent

AUTO AND TRUCK TYRES CCThird Respondent

In re:

Panel: Y Carrim (Presiding Member) A Ndoni (Tribunal Member) and M Mokuena (Tribunal Member)

Heard on : 02 May 2012 Order issued on : 08 May 2012 ORDER The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents, annexed hereto marked "A". Presiding Member Y Carrim Concurring: A Ndoni and M Mokuena

Heard on : 02 May 2012

Order issued on : 08 May 2012

ORDER

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents, annexed hereto marked "A".

Presiding Member

Y Carrim

Concurring: A Ndoni and M Mokuena

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

CC CASE NO: 2007SEP3213

CT CASE NO: 92/CR/DEC09

BRIDGESTONE SOUTH AFRICA (PTY) LTDFirst Respondent

SETTLEMENT AGREEMENT IN TERMS OF SECTION 58(1)(a) READ WITH SECTION 59 OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION, BRIDGESTONE SOUTH AFRICA (PTY) LTD AND MAXIPREST TYRES (PTY) LTD IN RESPECT OF CONTRAVENTION OF SECTIONS 4(1)(b)(i) and 4(1)(b)(ii) OF THE COMPETITION ACT, 1998 The Competition Commission, Bridgestone South Africa (Pty) Ltd and Maxiprest Tyres (Pty) Ltd hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of sections 58(1) (a) and 59 of the Competition Act No.89 of 1998, as amended, on the terms set out below: 1

Definitions In this Settlement Agreement, unless the context indicates otherwise, the following definitions will apply: 1.1. 'Act' means the Competition Act, 89 of 1998, as amended; 1.2.

'Bridgestone' means the First Respondent, Bridgestone South Africa (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at the corner of Isando and Quality Roads, Isando, Johannesburg. 1.3. 'Bridgestone brand' means tyres imported and manufactured by Bridgestone bearing the Bridgestone trademarks. 1.4. '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. 1.5. 'Complainant' or 'ATT' means the Third Respondent, Auto and Truck Tyres CC, a close corporation with its principal business situated at 5 Bezuidenhout Street, Wadeville, Germiston. 1.6. 'Firestone' means tyres imported and manufactured by Bridgestone bearing the Firestone trademarks. . . 1.7. 'Maxiprest' means the Second Respondent, Maxiprest Tyres (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at the corner of van Acht and Gewei Streets, Isando, Johannesburg. Whilst Maxiprest and Bridgestone are subsidiary companies in the same group, Maxiprest was an operationally independent company during the Relevant Period. 1.8. 'Parties to the agreement' refers to the Commission, Bridgestone and Maxiprest. 1.9. 'Relevant Period' means the period between October 2002 and 30 September 2005. 1.10.

'Settlement agreement' means this agreement duly signed and concluded between the parties to the agreement. 1.11. TBR/S tyres' means truck and bus radial / truck and bus bias tyres, 1.12.

'Tribunal' means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria. 2 The Complaint and Complaint investigation 2.1. On 19 September 2007, the Commission commenced an investigation against Maxiprest and Bridgestone pursuant to the Complainant

applying to the Commission for conditional immunity under the Commission's Corporate Leniency Policy. It was alleged by ATT that: (1) ATT, Bridgestone and Maxiprest were involved in price fixing, division and allocation of markets and collusive tendering during

the period 2002 to 2007; (2) Bridgestone was engaged in the practice of minimum resale price maintenance during the same period in that it compelled ATT and Maxiprest to adhere to specific price levels in respect of Bridgestone and Firestone branded tyres. 3 The Commission duly conducted an investigation which revealed that: 3.1. In 2002 ATT and Maxiprest entered into negotiations for the purchase by Maxiprest of 26% of ATT's shares. By October 2002, and in light of these negotiations, ATT and Maxiprest concluded an agreement in relation to the sale of Bridgestone and Firestone branded tyres, the main terms of which were: (1) Maxiprest would treat ATT as if it were a Maxiprest branch, so that: (a) ATT received the same discount structure and prices from Bridgestone as a Maxiprest branch; (b) ATT would charge, the same minimum prices to customers as other Maxiprest branches; (c) ATT and Maxiprest would not compete for each other's customers.

SETTLEMENT AGREEMENT IN TERMS OF SECTION 58(1)(a) READ WITH SECTION 59 OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION, BRIDGESTONE SOUTH AFRICA (PTY) LTD AND MAXIPREST TYRES (PTY) LTD IN RESPECT OF CONTRAVENTION OF SECTIONS 4(1)(b)(i) and 4(1)(b)(ii) OF THE COMPETITION ACT, 1998

The Competition Commission, Bridgestone South Africa (Pty) Ltd and Maxiprest Tyres (Pty) Ltd hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of sections 58(1)(a) and 59 of the Competition Act No.89 of 1998, as amended, on the terms set out below:

1 Definitions

In this Settlement Agreement, unless the context indicates otherwise, the following definitions will apply:

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

1.2. 'Bridgestone' means the First Respondent, Bridgestone South Africa (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at the corner of Isando and Quality Roads, Isando, Johannesburg.

1.3. 'Bridgestone brand' means tyres imported and manufactured by Bridgestone bearing the Bridgestone trademarks.

1.4. '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.

1.5. 'Complainant' or 'ATT' means the Third Respondent, Auto and Truck Tyres CC, a close corporation with its principal business situated at 5 Bezuidenhout Street, Wadeville, Germiston.

1.6. 'Firestone' means tyres imported and manufactured by Bridgestone bearing the Firestone trademarks. . .

1.7. 'Maxiprest' means the Second Respondent, Maxiprest Tyres (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at the corner of van Acht and Gewei Streets, Isando, Johannesburg. Whilst Maxiprest and Bridgestone are subsidiary companies in the same group, Maxiprest was an operationally independent company during the Relevant Period.

1.8. 'Parties to the agreement' refers to the Commission, Bridgestone and Maxiprest.

1.9. 'Relevant Period' means the period between October 2002 and 30 September 2005.

1.10. 'Settlement agreement' means this agreement duly signed and concluded between the parties to the agreement.

1.11. 'TBR/S tyres' means truck and bus radial / truck and bus bias tyres,

1.12. 'Tribunal' means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

2 The Complaint and Complaint investigation

2.1. On 19 September 2007, the Commission commenced an investigation against Maxiprest and Bridgestone pursuant to the Complainant

applying to the Commission for conditional immunity under the Commission's Corporate Leniency Policy. It was alleged by ATT that:

(1) ATT, Bridgestone and Maxiprest were involved in price fixing, division and allocation of markets and collusive tendering during

the period 2002 to 2007;

- (2) Bridgestone was engaged in the practice of minimum resale price maintenance during the same period in that it compelled ATT and Maxiprest to adhere to specific price levels in respect of Bridgestone and Firestone branded tyres.

3 The Commission duly conducted an investigation which revealed that:

3.1. In 2002 ATT and Maxiprest entered into negotiations for the purchase by Maxiprest of 26% of ATT's shares. By October 2002, and in light of these negotiations, ATT and Maxiprest concluded an agreement in relation to the sale of Bridgestone and Firestone branded tyres, the main terms of which were:

- (1) Maxiprest would treat ATT as if it were a Maxiprest branch, so that:
- (a) ATT received the same discount structure and prices from Bridgestone as a Maxiprest branch;
 - (b) ATT would charge, the same minimum prices to customers as other Maxiprest branches;
 - (c) ATT and Maxiprest would not compete for each other's customers.
- (2) It was concluded, amongst others, that (a) there was an agreement between ATT and Maxiprest to fix prices and to allocate customers in the sale of Bridgestone and Firestone branded tyres including TBR/S tyres and re-treaded tyres; and (b) this conduct contravened sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act. In light of its findings, the Commission referred the complaint against Bridgestone and Maxiprest in December 2009 to the Tribunal. 4 Settlement 4.1. Maxiprest commenced settlement negotiations with the Commission during the course of the investigation; however consensus on an appropriate administrative penalty could not be reached.
- (2) It was concluded, amongst others, that
- (a) there was an agreement between ATT and Maxiprest to fix prices and to allocate customers in the sale of Bridgestone and Firestone branded tyres including TBR/S tyres and re-treaded tyres; and
 - (b) this conduct contravened sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act. In light of its findings, the Commission referred the complaint against Bridgestone and Maxiprest in December 2009 to the Tribunal.

4 Settlement

4.1. Maxiprest commenced settlement negotiations with the Commission during the course of the investigation; however consensus on an appropriate administrative penalty could not be reached.

4.2. In continuing efforts to co-operate and resolve this matter, Maxiprest proposed a further settlement offer to the Commission in November 2011 4.3. This agreement is the product of negotiations between the Commission, Bridgestone and Maxiprest. . 5 Admission ' 5.1. Maxiprest

admits that it reached an agreement with ATT in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii) of the Act during the Relevant Period and in relation to the sale of Bridgestone and Firestone branded TBR/S tyres and re-treaded tyres in Gauteng. 6 Future Conduct 6.1. Since the initiation of the complaint against Maxiprest and Bridgestone, both companies have undertaken extensive competition

law compliance initiatives. 6.2. Maxiprest, accordingly, undertakes: (1) To refrain from engaging in any conduct which contravenes section 4(1)(b) of the Act in the future; (2) To develop and implement a compliance programme which incorporates corporate governance, designed to ensure that all its relevant

employees are aware of the provisions of the Competition Act and do not contravene them; and (3) to submit a copy of the aforementioned compliance programme to the Commission within 90 days of the date of confirmation of this Settlement Agreement as an order of the Tribunal. 6.3. in order to reach resolution of this Complaint but without any admission of liability, Bridgestone undertakes to supply ATT on the same basis as any other independent dealer, subject to Bridgestone's reasonable commercial terms and conditions of sale which include its credit control processes. 7 Administrative penalty 7.1. Maxiprest accepts that it is liable to pay an administrative penalty in terms of sections 58(1)(a)(iii) and 59 of the Act in the amount of R 9 355 970.39. The administrative penalty represents 6.5% of Maxiprest's annual turnover for the sale of TBR/S and retreaded tyre sales in Gauteng

for the financial year ended 31 December 2010. 7.2. Maxiprest will pay the administrative penalty to the Commission within 60 days of the confirmation of this Consent Agreement as an order of the Tribunal. 7.3. Maxiprest shall remit payment of the administrative penalty into the following bank account: Name of account holder: COMPETITION COMMISSION ABSA Bank name: ABSA BANK PRETORIA Account number: 4050778576 Branch code: 23345 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. Full and final settlement This Agreement, upon confirmation as an order of the Tribunal, concludes the proceedings between the Commission, Bridgestone and Maxiprest in relation to the Commission's investigation against both Maxiprest and Bridgestone, arising from the complaint and leniency application by ATT, and that is the subject of the Commission's investigation and complaint referral under the Commission's case number 2007SEP3213 and the Tribunal's case number 92/CR/DEC09. SIGNED at ISANDO on this the 2nd day of MAY 2012 H MATSUZAKI Duly authorised signatory of Maxiprest Tyres (Pty) Ltd SIGNED at ISANDO on this the 2nd day of MAY 2012 M J HALFORDY Duly authorized signatory of Bridgestone South Africa (Pty) Ltd SIGNED at PRETORIA on this the 4th day of MAY 2012 Shan Ramfouruth Commissioner: Competition Commission

4.2. In continuing efforts to co-operate and resolve this matter, Maxiprest proposed a further settlement offer to the Commission in November 2011

4.3. This agreement is the product of negotiations between the Commission, Bridgestone and Maxiprest. .

5 Admission '

5.1. Maxiprest admits that it reached an agreement with ATT in contravention of sections 4(1)(b) (i) and 4(1)(b)(ii) of the Act during the Relevant Period and in relation to the sale of Bridgestone and Firestone branded TBR/S tyres and re-treaded tyres in Gauteng.

6 Future Conduct

6.1. Since the initiation of the complaint against Maxiprest and Bridgestone, both companies have undertaken extensive competition

law compliance initiatives.

6.2. Maxiprest, accordingly, undertakes:

- (1) To refrain from engaging in any conduct which contravenes section 4(1)(b) of the Act in the future;
- (2) To develop and implement a compliance programme which incorporates corporate governance, designecMo ensure that all its relevant

employees are aware of the provisions of the Competition Act and do not contravene them; and

- (3) to submit a copy of the aforementioned compliance programme to the Commission within 90 days of the date of confirmation of this Settlement Agreement as an order of the Tribunal.

6.3. in order to reach resolution of this,Complaint but without any admission of liability, Bridgestone undertakes to supply ATT on the same basis as any other independent dealer, subject to Bridgestone's reasonable commercial terms and conditions of sale which include its credit control processes.

7 Administrative penalty

7.1. Maxiprest accepts that it is liable to pay an administrative penalty in terms of sections 58(1) (a)(iii) and 59 of the Act in the amount of R 9 355 970.39. The administrative penalty represents 6.5% of Maxiprest's annual turnover for the sale of TBR/S and retreaded tyre sales in Gauteng for the financial year ended 31 December 2010.

7.2. Maxiprest will pay the administrative penalty to the Commission within 60 days of the confirmation of this Consent Agreement as an order of the Tribunal.

7.3. Maxiprest shall remit payment of the administrative penalty into the following bank account:

Name of account holder: COMPETITION COMMISSION ABSA

Bank name: ABSA BANK PRETORIA

Account number: 4050778576

Branch code: 23345

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.

Full and final settlement

This Agreement, upon confirmation as an order of the Tribunal, concludes the proceedings between the Commission, Bridgestone and Maxiprest in relation to the Commission's investigation against both Maxiprest and Bridgestone, arising from the complaint and leniency application by ATT, and that is the subject of the Commission's investigation and complaint referral under the Commission's case number 2007SEP3213 and the Tribunal's case number 92/CR/DEC09.

SIGNEDat ISANDO on this the 2nd day of MAY 2012

H MATSUZAKI

Duly authorised signatory of Maxiprest Tyres (Pty) Ltd

SIGNEDat ISANDO on this the 2nd day of MAY 2012

M J HALFORTY

Duly authorized signatory of Bridgestone South Africa (Pty) Ltd

SIGNEDat PRETORIA on this the 4th day of MAY 2012

Shan Ramfouruth

Commissioner: Competition Commission

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