

SOUTH AFRICA / JUDGMENT

Competition Commission v Kalundu Trading (Pty) Ltd (CO080Aug20)

[2020] ZACT 58 (14 August 2020)

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COURT

Competition Tribunal

BEFORE

Y Carrim, F Tregenna, A Ndoni

CASE / FILE NUMBER

CO080Aug20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO080Aug20

In the matter between:

The Competition Commission Applicant

And

Kalundu Trading (Pty) Ltd Respondent

Panel: Y Carrim (Presiding Member), F Tregenna (Tribunal Member), A Ndoni (Tribunal Member)

Heard on: 14 August 2020

Decided on: 14 August 2020

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement between the Competition Commission and Kalundu Trading (Pty) Ltd annexed hereto.

CONSENT AGREEMENT IN TERMS OF SECTION 490 AS READ WITH SECTIONS 58(1)(a)(iii) and 58(1) (b) OF THE COMPETITION ACT, 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND KALUNDU TRADING (PTY) LTD, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b) (ii) OF THE COMPETITION ACT, 1998.

Preamble

The Competition Commission and Kalundu Trading (Pty) Ltd ("Kalundu") hereby agree that 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)(a)(iii) and 58(1)(b) of the Competition Act, No. 89 of 1998, as amended, in respect of contraventions of section 4(1)(b) (ii) of the Act, on the terms set out below.

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 "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 Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.3 "Commissioner" means the Commissioner of the Commission, appointed in terms of section 22 of the Act;

1.4 "Complaint" means the complaint initiated by the Commissioner in terms of section 498(1) of the Act under case number 2019Mar0067;

1.5 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Kalundu;

1.6 "Kalundu" means Kalundu Trading (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 situated at 182 Allan Road, Glen Austin Agricultural Holdings, Midrand, Gauteng.

1.7 "POS" means POS Services Holland (South Africa) (Pty) Ltd ("POS"), a company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business situated at Unit no. 7, Mica Drive, Newport Business Park, Kya Sand Ext 101, Johannesburg, Gauteng;

1.8 "Parties" means the Commission and Kalundu;

1.8 "Respondents" means Kalundu and POS;

1.10 "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 Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. COMMISSION'S INVESTIGATION AND FINDINGS

2.1 On 11 March 2019, the Commissioner initiated a complaint in terms of section 498(1) of the Act against the Respondents. The allegations against the Respondents are that they entered into an agreement and/or engaged in a concerted practice to divide markets by allocating customers in the market for the supply of starter motors and alternators. The case was investigated under case number: 2019Mar0067.

2.2 The Commission's investigation against Kalundu and POS revealed the following:

2.2.1 Prior to POS entering the South African market towards the end of 2006, Kalundu supplied starter motors and alternators to wholesalers, which it sourced directly from Original Equipment Manufacturers such as Bosch, Lucas and others.

2.2.2 Subsequent to POS entering the South African market, towards the end of 2006, POS and Kalundu entered into an agreement in terms of which Kalundu will purchase starter motors and alternators exclusively from POS to on-sell to wholesalers on condition that POS will not approach Kalundu's existing and future customers of starter motors and alternators in the country.

2.2.3 This agreement was negotiated and concluded by Mr Harald van Haarster, the owner of POS and Mr Patrick Scharer the owner of Kalundu towards the end of 2006.

2.2.4 In order to monitor compliance with the agreement, Mr Scharer of Kalundu would send a list containing the names of Kalundu customers to POS and POS would ensure that it does not approach these customers. POS was at liberty to sell to any other customer that was not on Kalundu's customer list.

2.2.5 Kalundu's list of customers which POS was precluded from approaching initially contained about eight (8) companies in 2007. This list was updated from time to time as and when Kalundu obtained new customers. By August 2018, the list contained about two hundred (200) customers, which included Midas.

2.2.6 In and around August 2018, POS approached Midas to market and sell its starter motors and alternators. When Kalundu became aware of POS' action, it instructed its lawyers to issue a letter to POS demanding it to desist from poaching its customers in compliance with the agreement.

2.2.7 The conduct outlined above between POS and Kalundu constitutes division of markets by allocating customers in contravention of sections 4(1)(b)(ii) of the Act.

3. ADMISSION

Kalundu admits that it engaged in prohibited practices in contravention of section 4(1)(b)(ii) of the Act in relation to the conduct described in paragraph 2 above.

4. FUTURE CONDUCT

Kalundu agrees to:

4.1 prepare and circulate a statement summarizing the contents of this Consent Agreement to its employees, managers and directors within fourteen (14) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;

4.2 refrain from engaging in conduct in contravention of section 4(1)(b) of the Act in future;

4.3 develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;

4.4 submit a copy of such compliance programme to the Commission within sixty (60) days of the date of confirmation of this Consent Agreement as an order by the Tribunal; and

4.5 undertakes henceforth to engage in competitive practices.

5. ADMINISTRATIVE PENALTY

5.1 Kalundu agrees and undertakes to pay an administrative penalty in the amount of R458 979, 52 (four hundred and fifty-eight thousand and nine hundred and seventy-nine rands and fifty-two cents). This amount does not exceed 10% of Kalundu's turnover in the Republic of South Africa for the financial year ending February 2019.

5.2 The payment shall be made in 36 monthly instalments of R12 749,43 (twelve thousand, seven hundred and forty-nine rands and forty-three cents). The first instalment shall be made after six months of the confirmation of the Consent Agreement as an order of the Tribunal.

5.3 No interest will be levied upon the administrative penalty for the first twelve instalments. Thereafter, interest will be levied on the remaining outstanding balance at the prevailing interest rate, on debts owing to the State as prescribed by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act 1 of 1999, as amended. At the time of the signature of this Consent Agreement, the applicable interest rate is 10.25%.

5.4 The administrative penalty must be paid into the Commission's bank account which is as follows:

Name: The Competition Commission Bank: Absa Bank, Pretoria

Account Number: [...]

Branch Code: 632005

Ref: 2019Mar0067/ Kalundu

5.5 The administrative 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.

6. COMPLIANCE

All compliance reports and proof of payments relating to this matter shall be forwarded to the Commission at CartelSettlements@compcom.co.za .

7. FULL AND FINAL SETTLEMENT

This agreement, upon confirmation as an order of the Tribunal, is entered into in full and final settlement in respect of the Commission's

investigation into the activities of Kalundu under case no. 2019Mar0067 and concludes all proceedings between the Commission and

Kalundu.

Tembinkosi Bonakele

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