

SOUTH AFRICA / JUDGMENT

Competition Commission v MAHLE GmbH and Another (CO104Aug20) [2020] ZACT 59 (14 September 2020) [2020] ZACT 59

COURT

Competition Tribunal

BEFORE

M Mazwai, E Daniels, I Valodia

CASE / FILE NUMBER

CO104Aug20

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO104Aug20

In the matter between:

The Competition Commission Applicant

And

MAHLE GmbH

First Respondent

MAHLE Behr GmbH & Co. KG Second Respondent

Panel: M Mazwai (Presiding Member), E Daniels (Tribunal Member), I Valodia (Tribunal Member)

Heard on: 02 September 2020

Decided on: 14 September 2020

CONSENT AGREEMENT

CONSENT AGREEMENT IN TERMS OF SECTION 49D 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, MAHLE GMBH and MAHLE Behr GmbH & Co. KG, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b) OF THE ACT.

Preamble

The Competition Commission, MAHLE GmbH and MAHLE Behr GmbH & Co. KG 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 49D read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, No. 89 of 1998, as amended 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 complaints initiated by the Commissioner in terms of section 498(1) of the Act under case numbers 2014Nov0670; 2014Nov0624, 2015Mar0076, 2015Apr0210 and 2015Jul0403.

1.5 "Consent Agreement" means this agreement duly signed and concluded between the Commission, MAHLE and MAHLE Behr;

1.6 "Denso" means collectively Denso Automotive Deutschland GmbH, a company incorporated under the laws of Germany, with its principal place of business situated at Freisinger Strasse 21-23, D-85386 Eching, Germany, and Denso Corporation, a company incorporated under the company laws of Japan, with its principal place of business situated at 1-1, Showa-cha, Kariya, Aichi 448-8661, Japan;

1.7 "MAHLE" means MAHLE GmbH, a company incorporated under the laws of Germany, with its principal place of business situated at Pragstrasse 26-46, D- 70376 Stuttgart, Germany;

1.8 "MAHLE Behr" means MAHLE Behr GmbH & Co. KG, a company incorporated under the laws of Germany, with its principal place of business situated at Mauserstrasse 3, D-70469 Stuttgart, Germany;

1.9 "MAHLE Group" means the group of companies controlled by MAHLE, including MAHLE Behr, MAHLE Behr South Africa Proprietary Limited, MAHLE Filter Systems Japan Corporation, and MAHLE Electric Drives Japan Corporation (previously Kokusan Denki Company (Pty) Ltd);

1.10 "Parties" means the Commission, MAHLE and MAHLE Behr;

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

2. COMMISSION'S INVESTIGATION AND FINDINGS

2.1 The Commission initiated the Complaint on the basis of information that it received suggesting that from about 2005 to 2009, MAHLE Behr and Denso concluded a general agreement and/or were party to a concerted practice when responding to tenders issued by original equipment manufacturers ("OEMs"), in respect of the manufacture and supply of certain automotive components to certain OEMs outside of South Africa, in contravention of sections 4(1)(b)(i),(ii) and/or (iii) of the Act.

2.2 The Commission's investigation against MAHLE Behr revealed that from November 2005 to December 2009, Denso and MAHLE Behr had collusive contacts concerning the supply of Heating, Ventilation and Air Conditioning Units ("HVACs") for passenger cars to Volkswagen, Daimler and BMW outside the Republic of South Africa, with the overall aim to co-ordinate their pricing strategy vis-a-vis those customers.

2.3 The Commission considers that the conduct outlined above between Denso and MAHLE Behr constitutes a contravention of section 4(1)(b) of the Act.

3. FUTURE CONDUCT

MAHLE Behr agrees and undertakes to:

3.1 publish a statement concerning this Consent Agreement on the MAHLE Intranet, which is available to all employees, within thirty (30) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;

3.2 refrain from engaging in conduct that may be in contravention of section 4(1)(b) of the Act, and from engaging in any prohibited practice in future;

3.3 continue to 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 includes mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;

3.4 submit details 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

3.5 undertakes henceforth to engage in competitive practices.

4. ADMINISTRATIVE PENALTY

4.1 MAHLE Behr agrees and undertakes to pay an administrative penalty in the amount of R1 622 106 (One Million Six Hundred and Twenty-Two Thousand One Hundred and Six Only). This amount does not exceed 10% of MAHLE Behr's turnover.

4.2 MAHLE Behr shall pay the abovementioned amount to the Commission within 30 days from the date of confirmation of this consent agreement as an order of the Tribunal.

4.3 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: 2014Nov0670-Mahle Behr

4.4 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.

5. COMPLIANCE

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

6. FULL AND FINAL SETTLEMENT

6.1 This agreement, upon confirmation as an order of the Tribunal, is entered into in full and final settlement in respect of the Commission's investigations into the MAHLE Group under case numbers 2014Nov0670, 2014Nov0624, 2015Mar0076, 2015Apr0210 and 2015Jul0403.

6.3 This agreement concludes all pending proceedings between the Commission and the MAHLE Group.

Tembinkosi Bonakele

Commissioner

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Prepared on 12 October 2026 · Esheria