

SOUTH AFRICA / JUDGMENT

Competition Commission v Paramount Mills (Pty) Ltd (CR087Mar10/SA253Feb19) [2019] ZACT 19 (13 March 2019)

[2019] ZACT 19

COURT

Competition Tribunal

BEFORE

Y Carrim, A Ndoni, I Valodia

CASE / FILE NUMBER

CR087Mar10/SA253Feb19

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR087Mar10/SA253Feb19

In the matter between:

The Competition Commission

Applicant

And

Paramount Mills (Pty) Ltd

Respondent

Panel: Y Carrim (Presiding Member)

A Ndoni (Tribunal Member)

I Valodia (Tribunal Member)

Heard on: 13 March 2019

Decided on: 13 March 2019

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Paramount Mills (Pty) Ltd annexed hereto marked "A".

Presiding Member

Ms Yasmin Carrim

13 March 2019

Date

Concurring: Ms Andiswa Ndoni and Prof. Imraan Valodia

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC Case No: 2007Mar2844

CT Case No: CR087Mar10/SA253Feb19

In the matter between

THE COMPETITION COMMISSION

Applicant

PARAMOUNT MILLS (PTY) LTD

Respondent

SETTLEMENT AGREEMENT IN TERMS OF SECTION 27(1)(d) READ WITH SECTIONS 58(1)(a)(iii) AND 59(1)(a) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND PARAMOUNT MILLS (PTY) LTD IN RESPECT OF ALLEGED CONTRAVENTIONS OF THE COMPETITION ACT, 1998.

1. PREAMBLE

The Competition Commission ("the Commission") and Paramount Mills (Pty) Ltd ("Paramount") hereby agree that an application be made to the Competition Tribunal ("the Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 27(1)(d) read with sections 58(1)(a)(iii) and 59(1)(a) of the Competition Act 89 of 1998, as amended ("the Act") on the terms set out below:

2. DEFINITIONS

For the purposes of this Settlement Agreement the following definitions shall apply:

2.1 "Act" means the Competition Act 1998 (Act No. 89 of 1998), as amended;

2.2 "Affected turnover" means turnover for the sale of white maize meal for human consumption for the financial year ending in 2007;

2.3 "Blinkwater Milling" means Blinkwater Mills (Pty) Ltd, a company duly incorporated as such in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 57 Walter Sisulu Street, Middelburg, Mpumalanga;

2.4 "Bothaville" means Bothaville Milling (Pty) Ltd t/a Thuso Mills, a company duly incorporated as such in accordance with the applicable laws of

the Republic of South Africa, with its principal place of business at 10th Avenue, Industria Site, Bothaville, Free State Province;

2.5 "Brenner" means Brenner Mills (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at 980 Park Street, Arcadia, Pretoria, Gauteng;

2.6 "Carolina Mills" means Carolina Mills (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 27 Voortrekker Street, Carolina, Mpumalanga Province;

2.7 "CLP" means the Commission's Corporate Leniency Policy in Government Gazette number: 31064 of 2008;

2.8 "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;

2.9 "Complaint" means the complaint initiated by the Commissioner in terms of section 498(1) of the Act under CC case number: 2007Mar2844 and CT

case number: 15/CR/MAR10;

2.10 "Days" means business days;

2.11 "Foodcorp" means Foodcorp (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 415 Mitchell Street, Pretoria West, Gauteng;

2.12 "Godrich" means Godrich Milling (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at Lanham Street, Extension Bronkhorstspuit, Mpumalanga Province;

2.13 "Kalel" means Kale! Mills, now t/a Isizwe Mills (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic

of South Africa, whose last known business address was at 32 Watt Street, Industrial Area, Middelburg, Mpumalanga;

2.14 "Keystone" means Keystone Milling (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at 47 Lucas Street, Rustenburg, North West Province;

2.15 "NTK Business" means the maize milling business of NTKLA which was acquired from NTK Kooperasie in 2003;

2.16 "NTK Kooperasie" means the cooperative known as NTK Kooperasie or Northern Transvaal Cooperative Limited, which operated the NTK Business prior to 2003;

2.17 "NTKLA" means NTK Limpopo Agri (Proprietary) Limited, a company duly incorporated in accordance with the applicable laws of the Republic

of South Africa under registration number: 1980/008381/06, with its principal place of business at 84 Limpopo Street, Modimolle, Limpopo Province;

2.18 "Paramount" means Paramount Mills (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at 4 Royan Road, Gately East London, Eastern cape;

2.19 "Paramount Holdings Limited" means Paramount Holding Limited, a company duly incorporated in accordance with the applicable laws of Bermuda, with registration number: 48029;

2.20 "Parties" means the Commission and Paramount;

2.21 "Pioneer" means Pioneer Foods (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at 32 Markstraat, Paarl, Cape Town, Western Cape;

2.22 "Premier" means Premier Foods (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at 1 Joint Street, Isando, Johannesburg, Gauteng;

2.23 "Pride Milling" means Pride Milling (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at Ground Floor, Block C, Futuram Office Park, 117 Lenchen Avenue, Centurion, Pretoria, Gauteng;

2.24 "Progress Millingn means AM Alberts (Pty) Ltd, trading as Progress Milling, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at No. 1 20th Street, Industria Polokwane, Limpopo Province;

2.25 "Respondents" means all the firms that are cited in the complaint referral;

2.26 "Seaboard Corporation" means a public company incorporated in Delaware with company number 0405526, with its registered office is at 9000 West 57th Street, Suite 300, Shawnee Mission, KS 66202, United States of America;

2.27 "Settlement Agreement" means this agreement duly signed and concluded between the Commission and Paramount;

2.28 "Tiger" means Tiger Brands Limited, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 3010 William Nicol Drive, Bryanston, Johannesburg, Gauteng;

2.29 "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 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.30 "TWK" means TWK Milling, the milling business of TWK Agri (Pty) Ltd;

2.31 "TWK Agri" means TWK Agri (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 31a Market St, Piet Retief, Mpumalanga Province;

2.32 "Westra" means Westra Milling (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa,

with its principal place of business at Stasia Straat, Christiana, Northern Cape.

3. BACKGROUND AND THE COMMISSION'S INVESTIGATIONS AND FINDINGS

3.1 On or about 14 March 2007, the Commission initiated a complaint against Tiger, Pioneer, Foodcorp, Pride Milling and Progress Milling in the maize milling industry, under CC case number: 2007Mar2844. The initiation was subsequently amended to include other players in the maize milling industry namely, Bothaville, Godrich, TWK, Keystone, Westra, Carolina Mills, Brenner, Paramount, NTK Milling (Pty) Ltd, Kalel, and Blinkwater. The complaint was initiated after the Commission had received a corporate leniency application from Premier in 2007, which was corroborated by a further corporate leniency application by Tiger in the same year.

3.2 The Commission's investigation revealed that at various stages during the period 1999 to 2007 the respondents were involved in price fixing of white milled maize in contravention of section 4(1)(b)(i) of the Act in that various representatives of the firms cited as respondents engaged in the following conduct:

3.2.1 Attended various meetings and held telephone discussions in which they reached agreements in contravention of section 4(1)(b)(i) of the Act, and in such meetings and telephone discussions, the respondents, inter alia, agreed:

3.2.1.1 To fix the prices of milled white maize products;

3.2.1.2 To create uniform price lists for wholesale, retail and general trade customers; and

3.2.1.3 To the timing of the price increases and implementation thereof.

3.2.2 The agreements concluded at these meetings were used to secure coordination at both regional and national levels, and were mutually reinforcing.

3.3 During the above period, representatives of Paramount attended a number of these meetings and engaged in telephone conversations with Paramount's competitors (being millers of white maize products) at which they agreed to:

3.3.1 Directly fix the selling price of milled white maize products;

3.3.2 Directly fix dates on which such agreed price increments were to be implemented; and

3.3.3 Exchanged information about their pricing structures.

3.4 This conduct constitutes price fixing and fixing of trading conditions in contravention of section 4(1)(b)(i) of the Act.

3.5 Through these price fixing arrangements, Paramount and its competitors prevented and/ or limited price competition amongst themselves in relation to pricing of milled white maize meal products.

3.6 Prior to 2013, JRB Investments Limited was the majority shareholder in Paramount Mills.

3.7 On 28 August 2013 JRB Investments Limited sold a portion of its shareholding in Paramount Mills to Paramount Holdings Limited. Paramount Holdings Limited is a wholly owned subsidiary of the Seaboard Corporation. The Seaboard Corporation and Paramount Holdings Limited had no interest in Paramount Mills prior to 28 August 2013. Paramount Holdings Limited did not exist prior to 2013, and was specifically established to hold shares in Paramount Mills on behalf of the Seaboard Corporation. Currently, Paramount Holdings Limited is the largest shareholder in Paramount Mills.

3.8 The Seaboard Corporation, does not admit liability on the part of itself, its subsidiaries, affiliates and related companies as they were not a party to the abovementioned collusive conduct and did not have any direct or indirect interest

4. ADMISSION OF LIABILITY

4.1 Paramount admits that it contravened section 4(1)(b)(i) of the Act in that during the period between 1999 to 2006, it agreed with its competitors in the white maize milling market to directly and indirectly fix the selling price of milled white maize products,

agreed on the dates upon which these prices were to be implemented, and exchanged information about their pricing structures.

5. FUTURE CONDUCT

5.1 Paramount confirms that the conduct referred to above has ceased, and it agrees to fully cooperate with the Commission in the prosecution of the remaining respondents under the Complaint referral. This cooperation includes, but is not limited to:

5.1.1 Providing such documentary evidence in its possession or under its control concerning the alleged contraventions contained in the Settlement Agreement, as well as to assist the Commission in the prosecution of the alleged contraventions covered by the Settlement Agreement;

5.2 Paramount further agrees and undertakes to:

5.2.1 Prepare and circulate a statement summarising the content of this Settlement Agreement to its managers and directors within 14 (fourteen) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal;

5.2.2 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; and

5.2.3 Submit a copy of such compliance programme outlined above to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order of the Tribunal.

6. ADMINISTRATIVE PENALTY

6.1. Having regard to the provisions of sections 58(1)(a)(iii) read with sections 59(1)(a), 59(2) and 59(3) of the Act, Paramount accepts that it is liable to pay an administrative penalty.

6.2. The parties have agreed that Paramount will pay an administrative penalty in the total amount of R1 320 819.00 (one million, three hundred and twenty thousand, eight hundred and nineteen Rand), being 3% of Paramount's affected turnover for the 2007 financial year.

6.3. Paramount will pay half of the administrative penalty in the amount of R660 409.56 (Six hundred and sixty thousand, four hundred and nine Rand, and fifty six cents) within 10 (ten) days of the confirmation of this Consent Order as an order of the Tribunal. The balance will be paid in 12 equal instalments in the amount of R55 034.12 (fifty five thousand and thirty four Rand, twelve cents), and the last instalment will be paid on or before 31 January 2020.

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

Bank name: Absa Bank

Branch name: ABS COMM PUBL NR

Account holder: The Competition Commission

Account number: [...]

Account type: Current Account Branch Code: 638056

Reference: Case number 2007Mar2844/ Paramount

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

7. FULL AND FINAL SETTLEMENT

This agreement is entered into in full and final settlement of the complaint set out in paragraph 3 above, and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and Paramount in respect of the conduct

contemplated under the Commission's complaint case number: 2007Mar2844.

Dated and signed at East London on the 30 day of January 2019

Paramount

Name in Full: Johannes Gert Hendrik Comrink

Authority: Director

For the Commission

Dated and signed at PRETORIA on the 12 day of February 2019

Tembinkosi Bonakele

The Commissioner: Competition Commission

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