

SOUTH AFRICA / JUDGMENT

Competition Commission v Premium Brand Distributors (Pty) Ltd

(CR210Mar14/SA156Nov16) [2016] ZACT 114; [2016] 2 CPLR 663 (CT) (7 December 2016)

[2016] ZACT 114

COURT

Competition Tribunal

BEFORE

M Mazwai, A Ndoni, I Valodia

CASE / FILE NUMBER

CR210Mar14/SA156Nov16

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competitiontribunal

COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR210Mar14/SA156Nov16

In the matter between:

The Competition Commission

Applicant And

Premium Brand Distributors (Pty) Ltd

Respondent

Panel :

M Mazwai (Presiding Member)

A Ndoni(Tribunal Member)

I Valodia (Tribunal Member)

Heard on :

07 December 2016

Decided on :

07 December 2016

Settlement Agreement

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

07 December 2016

Date

Presiding Member

Ms Mondo Mazwai

Concurring: Ms Andiswa Ndoni and Prof. Imraan Valodia

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT Case No.018663

CC Case No.2011AUG0189

In the matter between

COMPETITION COMMISSION Applicant

and

PREMIUM BRAND DISTRIBUTORS (PTY) LTD

Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND PREMIUM BRAND DISTRIBUTORS (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 6(2) OF THE COMPETITION ACT NO.89 OF 1998, AS AMENDED.

Preamble

The Competition Commission ("the Commission") and Premium Brand Distributors (Pty) Ltd ("Premium Brand") hereby agree that application be made to the Competition Tribunal ("the Tribunal") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 27(1)(d) read with section 59(1)(a) of the Competition Act (Act No.89 of 1998), as amended, ("the Act") in respect of an alleged contravention of section 5(2) of the Act on the terms set out below:

1. DEFINITIONS

For the purposes of this Settlement 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 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

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

1.4. "Complaint" means the complaint lodged by Gasp Colour Imaging (Pty) Ltd in terms of section 498(2) of the Act under case number 2011Aug0189;

1.5. "Gasp Colour" means Gasp Colour Imaging (Pty) Ltd. a company duly incorporated in terms of the laws of South Africa with its principal place of business at Unit 1A, 16-24 Queenspark Studio, Queenspark Avenue, Salt River, Cape Town;

1.6. "Settlement Agreement" means this agreement duly signed and concluded between the Commission and Premium Brand Distributors (Pty) Ltd;

1.7. "Nikon Corporation" a company based in Japan that manufactures, sells and exports photographic equipment;

1.8. "Nikon Products" means Nikon branded photographic equipment. in particular, cameras, lenses, flashes etc;

1.9. "Parties" means the Commission and Premium Brand Distributors (Pty) Ltd;

1.10. "Premium Brand Distributors" or "Premium Brand" means Premium Brand Distributors (Pty) Ltd, a company duly incorporated with limited liability in accordance with the laws of South Africa with its principal place of business at Kyalami Business Park, 131 Kyalami Boulevard, Midrand, Johannesburg; and

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

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BACKGROUND

2.1. On 10 August 2011, the Commission received a complaint against Premium Brand (formerly registered as Foto Distributors (Pty) Ltd) from Gasp Colour. In its complaint, Gasp Colour alleged, amongst other things, that Premium Brand, a sole authorised distributor of Nikon branded products in South Africa, prohibits its network of retailers from selling Nikon branded photographic equipment at any price below its wholesale list price plus a mark-up of not less than 5%.

2.2. Premium Brand is an importer and distributor of photographic equipment or imaging products such as reflex and compact cameras, binoculars, lenses, and flashes in South Africa. Premium Brand has been granted an exclusive licence by the Nikon Corporation, based in Japan, to distribute its products in South Africa, Lesotho and Swaziland. Nikon manufactures optical Instruments ranging from imaging products such as cameras and camcorders to sport optics such as binoculars and telescopes as well as precision equipment such as Integrated circuit steppers and scanners. Premium Brand distributes brands such as Lexar Memory, Gitzo Tripods, Nikon Software and Nikon photographic equipment.

2.3. In terms of the distribution arrangement between Nikon and Premium Brand, Nikon sells its products to Premium Brand Distributors for distribution, inter alia, in South Africa. In turn, Premium Brand Distributors sells the Nikon products to its retailer network in terms of trading agreements concluded with retailers. Retailers then on-sell the Nikon products to their customers who, in the main, comprise of professional and non-professional photographers. In terms of the trading agreements concluded between Premium Brand Distributors and its retailer network, retailers undertake to exclusively purchase the Nikon products from Premium Brand Distributors. Retailers are not precluded from selling competing products in their retail outlets. Premium Brand Distributors supplies the Nikon products to large chain store retailers such as Makro, Game, and Hi-fi Corporations; specialist retailers such as ORMS, SA Camera and Camera World; and buying groups such as New Heights, Iser Group and Group Appliances.

3. COMMISSION'S INVESTIGATION AND FINDINGS

3.1. The Commission conducted an investigation into Premium Brand Distributors' alleged conduct and found the following:

3.1.1. The relationship between Premium Brand Distributors and its retailers is a vertical relationship;

3.1.2. Premium Brand Distributors does not sell Nikon products directly to end customers and therefore does not compete with its retailers.

3.1.3. The nature of Premium Brand Distributors' conduct took the form of co-ordinating the advertised prices of its network of retailers.

3.1.4. Premium Brand's conduct spanned a period of four years, from 2006 to 2012.

3.2. On 28 March 2014, the Commission referred the complaint against Premium Brand to the Tribunal under Tribunal case number CT: 018663.

3.3. Following a prehearing on 27 June 2016, the Commission and Premium Brand engaged in settlement discussions in order to avoid further protracted litigation in this matter.

4. ADMISSION

Premium Brand admits that it co-ordinated the advertisement of the Nikon Brand by, inter alia, co-ordinating the prices at which the Nikon brand was advertised in a manner which may have had the effect of contravening section 5(2) of the Act.

5. AGREEMENT CONCERNING PREMIUM BRAND DISTRIBUTOR'S FUTURE CONDUCT

Premium Brand Distributors agrees and undertakes:

5.1. Not to engage in resale price maintenance in contravention of section 5(2) of the Act;

5.2. To develop and circulate a policy document to all its distributors Informing them that all recommended retail prices in relation to Nikon products are recommendation only and all distributors are at all times free to determine their own retail prices;

5.3. Develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include a mechanism for the monitoring and detection of any contravention of the Act;

5.4. To submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

5.5. To prepare and circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed at Premium Brand distributors within 60 days from the date of confirmation of this Settlement Agreement by 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, the parties have agreed that Premium Brand will pay an administrative penalty in the amount of R300 500.00 (Three Hundred Thousand and Five Hundred Rand, only). This amount does not exceed 10% of Premium Brand's annual turnover in the Republic for Its financial year ended 30 June 2016.

6.2. Premium Brand Distributors will pay the amount set out in paragraph 6.1 above to the Commission within 3 (three) months from the date of confirmation of this Settlement Agreement by the Tribunal.

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

NAME:THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER: [4...]

BRANCH CODE: 323 345

PAYMENT REF:2011AUG0189 -Premium Brand

6.4. 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.

7. FULL AND FINAL SETTLEMENT

This Settlement Agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Premium Brand relating to the alleged contravention of section 5(2) the Act that was the subject of the Commission's investigation under Commission Case No. 2011AUG0189.

Dated and signed at PRETORIA on the 20TH day of OCTOBER 2016

For Premium Brand Distributors (Pty) Ltd

Duly authorised representative of

PREMIUM BRAND DISTRIBUTORS (PTY) LTD

Full Names STEFAN VAN DER WALT

Dated and signed at PRETORIA on the 3RD day of NOVEMBER 2016

For the Competition Commission

TEMBINKOSI BONAKELE

COMMISSIONER

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