

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 112/FN/Nov05

In the matter between:

The Competition Commission

Applicant

and

Edward Snell & Company Ltd

1st Respondent

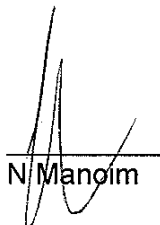
African Wines & Spirits (Pty) Ltd

2nd Respondent

Order

In terms of the agreement reached between the respondents and the Competition Commission -

1. The respondents are ordered to pay an administrative penalty in the amount of R100 000 (one hundred thousand rand only) for contravening section 13A(3) of the Act, such amount to be paid to the Competition Commission not later than 30 (thirty) days of the date of this order.
2. The respondents are jointly and severally liable for the payment of the penalty, the one paying the other to be absolved.


N Mandim

Concurring: D Lewis, Y Carrim

15 February 2006
Date

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

Competition Tribunal Case No.:
Competition Commission Case No.: 2004Nov1289

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

EDWARD SNELL & COMPANY LIMITED

First Respondent

AFRICAN WINES & SPIRITS (PROPRIETARY) LIMITED

Second Respondent

**APPLICATION IN TERMS OF RULE 42 OF THE RULES FOR THE CONDUCT OF
PROCEEDINGS IN THE COMPETITION TRIBUNAL**

BE PLEASED TO TAKE NOTICE that the Parties hereby apply to the above Honourable Tribunal for an order confirming the consent agreement entered into by the Applicants as more fully set out hereunder as a consent order in terms of rule 42 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

1. Definitions

For purposes of this Agreement the following definitions shall apply unless otherwise stated or the context otherwise requires -

Handwritten signatures and initials in the bottom right corner of the page. There are three distinct marks: a large, stylized signature, a set of initials 'EW', and a smaller signature or mark below them.

- 1.1 "the Act" the Competition Act, No. 89 of 1998 as amended from time to time;
- 1.2 "BP Ventures" Business Partners Ventures 1 (Proprietary) Limited, registration number 1998/013150/07, with its principal place of business at Business Partners Centre, 5 Wellington Road, Parktown, Johannesburg, Gauteng;
- 1.3 "Business Partners" Business Partners Limited, registration number 1981/000918/06 with its principal place of business at Business Partners Centre, 5 Wellington Road, Parktown, Johannesburg, Gauteng;
- 1.4 "Commission" or "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 Mulawo (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.5 "First Respondent" Edward Snell & Company Limited, registration number 1923/001266/06, with its principal place of business at 49 Joyner Road, Prospecton, Isipingo Beach, KwaZulu-Natal;
- 1.6 "the Parties" the Applicant, and the Respondents;
- 1.7 "the Respondents" the First and Second Respondents;

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- 1.8 "Second Respondent" African Wines & Spirits (Proprietary) Limited registration number 1999/001655/07, with its principal place of business at 49 Joyner Road, Prospecton, Isipingo Beach, KwaZulu-Natal;
- 1.9 "Tribunal" 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 Mulawo (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. Agreed Facts

- 2.1 Business Partners is a financier and advisor to small and medium enterprises providing debt and equity investment, mentorship and property management services. BP Ventures is a wholly owned subsidiary of Business Partners. At all relevant times BP Ventures held 60% of the total issued share capital in the Second Respondent, a local wine and spirits firm, and acted as a business advisor to the Second Respondent.
- 2.2 The Second Respondent experienced financial difficulties for several years. After various unsuccessful attempts in 2004 to divest the Second Respondent of its assets (including an offer by First Respondent to buy certain of its brands only) or involve it in ventures which were aimed to turn its business around, Business Partners instructed its attorneys to prepare an application for the Second Respondent's liquidation as it would not continue to finance a loss making operation.
- 2.3 On 11 June 2004, just before the commencement of the Second Respondent's liquidation proceedings on 14 June 2004, the First Respondent amended its original offer to purchase only the so-called own



brands and related stocks of the Second Respondent's business to one which involved the purchase of all the issued shares of the Second Respondent, effectively thus its entire business. The sale agreement was entered into on the same day and implemented on 15 June 2004. Had the sale not been concluded, Business Partners would have persisted with its application to liquidate the Second Respondent on 14 June 2004.

- 2.4 At the relevant time, the turnover of the Second Respondent for its preceding financial year (the year ended 30 March 2004) was just over R30 million and that of the First Respondent was about R800 million.
- 2.5 The transaction was not notified to the Competition Commission as a merger prior to its implementation.
- 2.6 The non-notification and implementation of the merger at the time was due to a *bona fide* error as follows

2.6.1 When the First Respondent was first interested to purchase the Second Respondent's own brands only (see 2.2 and 2.3), the First Respondent was advised by its attorneys, that due to the fact that value of "the transferred firm", (namely the value of the Second Respondents' own brands and related stocks) was well under R30 million (in fact just over R10 million), the then proposed transaction would not constitute a notifiable merger. In fact, its attorneys proceeded to draft an agreement of sale and made no reference to the Act for the reasons stipulated. That offer by the First Respondent was not accepted by BP Ventures.

2.6.2 Just prior to the application for the liquidation of the Second Respondent, First Respondent offered to purchase the shares and loan account of the Second Respondent for R4.25 million. Due to the small purchase price involved, neither of the Respondents was alerted to the notifiability of this transaction. In fact, the Respondents had requested their respective attorneys to review



the final agreements that were drafted in-house by them and no reference was made to the Act as it did not occur to the Respondents and their legal advisors that such an insignificant transaction could fall within the ambit of the Act.

2.6.3 In order to preserve the business of the Second Respondent, the transaction was implemented immediately.

2.7 Subsequently, the Respondents became aware that this transaction was possibly a notifiable merger and on 4 August 2004, their current attorneys advised them that based upon the applicable financial values of Second Respondent (per clause 2.4 above), the transaction was a notifiable merger, but as the Second Respondent lost its entitlement to the so-called agency brands due to the transaction, it could be a "divestiture" for purposes of paragraph 3(3) of the Schedule of General Notice 254 of 2001. As some 44% of the annual turnover of the Second Respondent would be implicated by such "divestiture", it would serve to reduce the relevant value of Second Respondent below the lower threshold of R30 million. Accordingly, the Respondents instructed their attorneys to obtain an advisory opinion from the Commission on that basis.

2.8 In its advisory opinion dated 7 September 2004, the Commission advised that -

"10. Since the agency brands have never belonged to any party to the agreement in question, the Commission agrees that no party to this agreement had a right to alienate or dispose those brands. Therefore, no disposal or divestment of the said brands occurred as contemplated in paragraph 3(3) of the Schedule of General Notice 254 of 2001. Thus, the Respondents do not appear to be entitled to deduct any of the turnover generated by those brands."

2.9 The Respondents did not challenge the Commission's opinion and notified the transaction as an intermediate merger on 11 November 2004. The merger was subsequently approved without conditions on 8 December 2004.



3. Administrative Penalty

3.1 By implementing the merger before approval by the competition authorities, the Respondents contravened section 13A(3) of the Act.

3.2 It is recorded that at all material times -

- a) The Respondents were *bona fide* in their actions and belief as they obtained and followed advice as more fully set out in 2.6 above.
- b) The merger was approved without conditions and the merger did not have any adverse effect on competition.
- c) No one suffered any loss or damage as a result of the premature implementation of the merger nor has First Respondent profited thereby.
- d) The Respondents have co-operated fully and openly with the Commission since becoming aware of their transgression.
- e) The Respondents have not previously been found in contravention of the Act.

3.3 In accordance with the provisions of rule 42 of the Rules for the Conduct of Proceedings in the Competition Tribunal, and for purposes of full and final settlement of the Respondents' liability in terms of the aforesaid and without admission that a penalty is due in law, the Respondents agree to pay a penalty in the amount of R100 000 (one hundred thousand rand only) as is hereby imposed on the Respondents, in terms of section 59 of the Act, for contravening section 13A(3) of the Act.

3.4 The penalty amount does not exceed 10% of the Respondents respective turnovers during the preceding financial year.



3 5 In terms of section 59(4) of the Act the administrative penalty shall be paid over to the National Revenue Fund account, the amount is payable in the bank account of the Commission whose banking details are as follow:

Bank : Absa
Account Name : Competition Commission fees
Branch Name : Pretoria
Branch Code : 323345
Account Number : 4050778576

Signed at CAPE TOWN on the day of November 2005.

AS WITNESSES:

1. J. J. J. J. J.
2. Chanda

[Signature]
ON BEHALF OF ~~SECOND AND THIRD~~ THE
RESPONDENTS

[Signature]

Signed at CAPE TOWN on the day of November 2005.

AS WITNESSES:

1. _____
2. _____

[Signature]
ACTING COMMISSIONER COMPETITION
COMMISSION

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 11/CR/Feb06

In the matter between:

The Competition Commission

Applicant

and

BMW Dealers

Respondents

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents.



Y Carrim

17 February 2006

Date

Concurring: U Bhoola, M Mokuena