

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 17/CR/Feb07

In the matter between:

The Competition Commission

Applicant

and

Zip Heaters (Australia) (Pty) Ltd

Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 07 March 2007

Decided on : 12 March 2007

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 respondent.



D Lewis
Presiding Member

Concurring: N Manoim and Y Carrim

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

CT Case No:

CC Case No: 2005Jul1724

In the matter between:

The Competition Commission

Applicant

and

Zip Heaters (Australia) (Pty) Ltd

Respondent

**AGREEMENT ON THE TERMS OF AN APPROPRIATE ORDER IN TERMS OF
SECTION 49D OF THE COMPETITION ACT, ACT NO. 89 OF 1998, AS
AMENDED.**

1. DEFINITIONS

For the purposes of this agreement the following definitions shall apply:

- 1.1 "Act" means the Competition Act, Act No. 89 of 1998, as amended.
- 1.2 "Agreement" means the agreement set out herein, duly signed by the *Commissioner* and the *Respondent*.
- 1.3 "Commission" and "Applicant" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the

Act with principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

- 1.4 "*Commissioner*" means the Competition Commissioner of South Africa, the Chief Executive Officer of the *Commission* appointed by the Minister of Trade and Industry in terms of section 22 of the *Act*.
- 1.5 "*Competition Tribunal*" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the *Act* with principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.
- 1.6 "*Complaint*" means the complaint filed by the Kwikot (Pty) Ltd on 18 July 2004 in terms of section 49B(2) of the *Act*.
- 1.7 "*Complainant*" and "*Kwikot*" means Kwikot (Pty) Ltd, a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa with principal place of business at Aberdeen Road, Industrial Sites, Benoni.
- 1.8 "*Distribution Agreement*" means the *Distribution Agreement* entered into between the Complainant and Respondent, annexed as **Annexure A**.
- 1.9 "*Respondent*" and "*Zip*" means Zip Heaters (Australia) (Pty) Ltd, a private company duly incorporated and registered in accordance with the company laws of Australia with principal place of business at 67 Allingham Street, Condell Park, New South Wales.

2. APPLICATION TO THE COMPETITION TRIBUNAL

The *Applicant* and the *Respondent* in the above matter hereby agree that application be made by the *Applicant* to the *Competition Tribunal* to have this *Agreement* confirmed as a consent order as provided for in section 58(1)(b) of the Act.

3. INTRODUCTION

On 18 July 2005 *Kwikot* filed a *complaint* with the *Commission* in terms of section 49B(2) of the *Act*, alleging that *Zip* was enforcing a restraint of trade, which prevented *Kwikot* from entering the South African market for manufacturing and distributing instantaneous boiling water heaters.

4. BACKGROUND

4.1 The *Complainant* and *Respondent* entered into the Distribution Agreement in 1998, in terms of which the *Complainant* was appointed an exclusive manufacturer and distributor of the *Respondent's* products including automatic continuous electric boiling water heaters ("instantaneous boiling water heaters") in African countries and the Indian Ocean islands. It was agreed that the Distribution Agreement would be in force for a period of seven (7) years. This Distribution Agreement provided *Kwikot* with unique and exclusive technology, owned and patented by *Zip*, with respect to the design and manufacture of instantaneous boiling water heaters.

4.2 In terms of clause 4.8 of the Distribution Agreement it was agreed that the *Complainant* would not manufacture and sell/resell products that compete with the *Respondent's* products during the lifetime of the Distribution

Agreement. It was also agreed in terms of clause 4.9 of the Distribution Agreement, that if either party terminated the Distribution Agreement for any reason other than legally for breach by the other party, then the party terminating the Distribution Agreement could not, for a period of two years thereafter, be involved, directly or indirectly, in the manufacture or sale of competing products.

- 4.3 On or about 14 May 1999 the *Complainant* assigned its rights to manufacture and distribute the *Respondent's* products to City Metal Products (Pty) Ltd (City Metals), a company then related to the *Complainant* by virtue of common shareholding¹ and a Deed of Assignment ("Deed") was concluded by the *Complainant*, City Metals and the *Respondent* (Annexed as Annexure B). City Metals was subsequently sold by Boumat Ltd to Franke Kitchen Systems ("Franke") on or about 30 June 1999, and Franke continued to distribute and manufacture the *Respondent's* products in accordance with the Distribution Agreement.
- 4.4 As a consequence of the above, the *Complainant*, which also later on became an independent entity from Boumat Ltd through a management buyout, ceased to manufacture and distribute the *Respondent's* products. The *Complainant* however continued to be bound in terms of clause 4.2 of the Deed, to certain clauses of the Distribution Agreement including (1) the termination clause (clause 12 (1)(d)), (2) the post-termination non-compete obligation (clause 4.9) and (3) the non-compete obligation during the lifetime of the exclusive Distribution Agreement (clause 4.8). This in effect meant that the *Complainant* could not enter the market with products that compete with the *Respondent's* product during the seven (7) year lifetime of the Distribution Agreement if it did not terminate the Distribution Agreement earlier. Further, after termination of the Distribution

¹ Kwikot and City Metals (Pty) Ltd were both owned by the Boumat Ltd

Agreement by the Complainant, the *Complainant* was unable to enter the market for a further period of two (2) years.

- 4.5 The *Respondent* remained active in the market for manufacturing and distribution of instantaneous boiling water heaters in the South African market, through its distribution arrangement with Franke.
- 4.6 On or about 30 June 2005 and upon expiry of the seven (7) year period of the Distribution Agreement, the *Complainant* terminated the Distribution Agreement with a view to independently entering the market with products that compete with the *Respondent's* products. It was however unable to enter the market, as the *Respondent* required it to adhere to the post termination non-compete obligation described in paragraph 4.2 above.

5. COMMISSION'S FINDINGS

After completing its investigation, the *Commission* concluded that:

- 5.1 The relevant market is the market for the manufacturing and distribution of instantaneous boiling water heaters within South Africa.
- 5.2 Prior to the coming into force of the Deed referred to in paragraph 4.3 above, the *Complainant* sold electric hot water storage systems and distributed instantaneous boiling water heaters within South Africa. However, it distributed instantaneous boiling water heaters pursuant to the Distribution Agreement with the *Respondent*, in terms of which it acquired from the *Respondent* the necessary technology to enable it to manufacture and sell such products. Moreover, the *Complainant* currently has the necessary ability and capacity to re-enter this market. The *Respondent* sold instantaneous boiling water heaters into South Africa during the duration of the Distribution Agreement, initially

through Kwikot, and thereafter through Franke. After the Complainant terminated the Distribution Agreement on or about 30 June 2005, the *Complainant* was unable to enter this market as a result of the non-compete obligation, which prevented it from manufacturing or selling instantaneous boiling water heaters in South Africa for a period of 2 years from the termination of the Distribution Agreement. The *Complainant* and *Respondent* were initially parties in a vertical relationship. They are considered by the Applicant to have become parties in a horizontal relationship as contemplated in section 4(1) of the Act pursuant to the conclusion of the Deed and subsequent sale of City Metal Products to Franke because they were already involved in the electric storage water heater business and had the ability to enter the electric boiling water heaters business, and were therefore potential competitors. The Applicant's finding is that Kwikot could have competed in the market but was prevented from doing so by the post-termination non-compete agreement.

5.3 According to the Applicant, the purpose and effect of the post-termination non-compete obligation was to prevent competition between the *Complainant* and *Respondent* after the termination of the Distribution Agreement. The party that had terminated the Distribution Agreement was prevented from competing with the other party for a period of two years. According to the Respondent, this was a mechanism to protect the party that had not terminated the Distribution Agreement – thus protecting the Respondent, whose technology had been acquired by the Complainant, or the Complainant, who would have invested in marketing and distribution.

5.4 According to the Applicant the above restriction agreed to by the *Complainant* and *Respondent* constitutes a contravention of section 4(1)(b)(ii) alternatively 4(1)(b)(i) of the Act.

6. AGREEMENT CONCERNING CONDUCT OF THE RESPONDENT

- 6.1 It is recorded that the *Respondent* has already informed the *Complainant* that it is free to sell instantaneous boiling water heaters and any other products, which compete with the *Respondent's* products in any territory.
- 6.2 The *Commission* and the *Respondent* agree that the *Respondent* shall:
- 6.2.1 Continue to refrain from enforcing clause 4.9 of the Distribution Agreement or requiring the *Complainant* to abide by the aforesaid clause.
 - 6.2.2 Refrain from engaging in the fixing of any trading conditions or division of markets in contravention of section 4(1)(b)(i), alternatively section 4(1)(b)(ii) of the *Act*.

7. CLAIMS FOR DAMAGES

It is recorded that -

The *Respondent* is not prepared to tender any payment of alleged damages to the *Complainant*. The *Complainant* and the *Respondent* have reached a separate agreement in this regard.

8. ADMINISTRATIVE PENALTY

- 8.1 In terms of section 58(1)(a)(iii) of the *Act* read with section 59(1)(a), 59(2) and (3) of the *Act*, the *Respondent* agrees to pay an administrative penalty of R78 500 00 (seventy eight thousand five

hundred rand) in full and final resolution of all proceedings between the *Commission* and the *Respondent* under case number 2005Jul1724.

- 8.2 The above amount does not exceed 10% of the *Respondent's* annual turnover in and exports from the Republic during the preceding financial year. Details of the annual turnover of the *Respondent* during the preceding financial year are attached under cover of a CC7 as Annexure ~~B~~^C hereto.
- 8.3 The administrative penalty will be paid not later than 30 (thirty) business days after the confirmation of this *Agreement* as a Consent Order by the *Competition Tribunal*.
- 8.4 The penalty amount is to be paid into the bank account of the *Commission*. The *Commission's* banking details are as follows:

Bank:	ABSA Bank
Name of Account:	The Competition Commission Fees
Branch Name:	Pretoria
Branch Code:	323345
Account Number:	4050778576

- 8.5 The *Commission* will pay over the penalty amount to the National Revenue Fund referred to in Section 59(4) of the *Act*

9. FULL AND FINAL RESOLUTION

This *Agreement*, upon confirmation thereof as a consent order by the *Competition Tribunal*, concludes all proceedings between the *Commission* and the *Respondent*, in relation to any alleged contraventions of the *Act* investigated under case number 2005Jul1724

FOR THE RESPONDENT:

Dated and signed at SYDNEY on this the 14 day of FEBRUARY 2007.

Signature: B. Chertkow

Name: BRIAN CHERTKOW

Job description: MANUFACTURING DIRECTOR

Duly authorized representative of Zip Heaters (Australia) (Pty) Ltd

FOR THE COMMISSION:

Dated and signed at Pretoria on this the 16 day of Feb 2007.

Shan Ramburuth

Shan Ramburuth

Commissioner

Competition Commission of South Africa

17/CR/feb 07

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

2007-03-09

CT Case No:

CC Case No: 2005Jul1724

M. G. Lom

In the matter between:

The Competition Commission

Applicant

and

Zip Heaters (Australia) (Pty) Ltd

Respondent

ADDENDUM TO THE AGREEMENT BETWEEN THE APPLICANT AND THE
RESPONDENT ON THE TERMS OF AN APPROPRIATE ORDER IN TERMS
OF SECTION 49D OF THE COMPETITION ACT, ACT NO. 89 OF 1998, AS
AMENDED

1. DEFINITIONS

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- 1.9 "*Respondent*" and "*Zip*" means Zip Heaters (Australia) (Pty) Ltd, a private company duly incorporated and registered in accordance with the company laws of Australia with principal place of business at 67 Allingham Street, Condell Park, New South Wales

2. AGREEMENT BETWEEN THE APPLICANT AND THE RESPONDENT

On 16 February 2007, the *Applicant* and the *Respondent* entered into an agreement on the terms of an appropriate order in terms of section 49D of the *Act* as amended (the Consent Agreement). This Agreement shall at all

times be read together with and interpreted in the context of the Consent Agreement

3. AMENDMENT TO THE CONSENT AGREEMENT

The Applicant and the Respondent agree that Clause 7 of the Consent Agreement be amended by the insertion of the following sentence after the words "It is recorded that-":

"The Respondent denies that it has contravened the Act"

FOR THE RESPONDENT:

Dated and signed at DEKEMAN on this the 7 day of MARCH 2007

Signature: B. Chertkov
Name: BRIAN CHERTKOV
Job description: MANUFACTURING DIRECTOR
Duly authorized representative of Zip Heaters (Australia) (Pty) Ltd

FOR THE COMMISSION:

Dated and signed at _____ on this the ___ day of _____ 2007

[Handwritten Signature]

Shan Ramburuth
Commissioner
Competition Commission of South Africa