COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 27/CR/Apr11
015420

In the matter between:

The Competition Commission — Applicant

and

Pentel South Africa (Pty) Ltd — Respondent

Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member) and T Madima (Tribunal Member)

Heard on : 10 October 2012

Decided on : 10 October 2012

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".

Presiding Member
A Wessels

Concurring: M Mokuena and T Madima

'A'

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CCCASENO: 2008AUG3921
CT CASE NO.: 27/CR/APR11

In the matter between:

THE COMPETITION COMMISSION Applicant

and

PENTEL SOUTH AFRICA (PTY) LTD Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND PENTEL SOUTH AFRICA (PTY) LTD IN RESPECT OF CONTRAVENTIONS OF SECTION 5 (2) OF THE COMPETITION ACT 89 OF 1998 AS AMENDED

The Competition Commission and Pentel South Africa (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of this Settlement Agreement as an order of the Tribunal in terms of sections 58 (1)(a)(iii) and 59(1) (a) of the Competition Act 89 of 1998, as amended, on the terms set out below. This agreement is concluded in settlement of the allegations of minimum resale price maintenance.

1. DEFINITIONS

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

1.1 **"Act"** means the Competition Act, 1998 (Act No.89 of 199) 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 Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;

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

1.4 **"Complainant"** means Desco Agencies CC, a close corporation duly incorporated and registered in accordance with laws of the Republic of South Africa, with its registered office, alternatively principal place of 16 Brassel Street, North End, Port Elizabeth. The complainant is an independent distributor of stationery products;

1.5 **"Independent distributors"** means firms that on-sell stationery products of firms such as Pentel South Africa to retailers;

1.6 **"Parties"** means the Commission and Pentel South Africa;

1.7 **"Pentel South Africa"** means Pentel South Africa (Pty) Ltd, a private company registered in accordance with company laws of the Republic of South Africa, with its registered office, alternatively principal place of business at 96 Shaft Street, corner Rachet Avenue, Stormill. Pentel South Africa is a wholly owned subsidiary of Pentel Co. Limited ("Pentel Japan") which is a manufacturer of stationery products that are supplied to independent distributors by Pentel South Africa;

1.8 **"Stationery products"** means writing materials which includes pens, tapes, markers, highlighters and files;

1.9 **"Settlement Agreement"** means this settlement agreement duly signed and concluded between the Commission and Pentel South Africa;

1.10 **"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 Building C, Mulayo Building. DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

2. COMPLAINT INVESTIGATION AND COMMISSION'S FINDINGS

2.1 On 15 August 2008 the Commission received a complaint against Pentel South Africa from Desco Agencies, a distributor of stationery products. The Complainant, in its complaint alleged that Pentel South Africa is engaged in the practice of minimum resale price maintenance in contravention of section 5(2) of the Act. The allegation was that the Complainant was not allowed to sell below Pentel South Africa's published price list, thus forcing it to be uncompetitive. The said allegations were based on correspondences exchanged between Pentel South Africa and the Complainant. Subsequent to submitting this complaint, the Complainant withdrew same on 06 March 2009. Based on the investigation conducted thus far, the Commission initiated the complaint.

2.2 During the course of the investigation of the complaint, the Commission found that:

2.2.1 An at all relevant time of the complaint Pentel South Africa was a branch and sole importer in South Africa of stationery products of Pentel Japan. Its main function was to conduct all sales and marketing within Southern Africa on behalf of Pentel Japan.

2.2.2 Pentel South Africa distributes these products through independent distributors who are located across South Africa. At the time of the alleged contravention, the following were the distributors appointed by Pentel:

- 2.2.2.1 PWS Group (Includes PWS Pretoria, PWS Johannesburg, PWS Cape Town and PWS Durban);
- 2.2.2.2 BSC Manufacturing (Pty) Ltd;
- 2.2.2.3 Trefoil Manufacturing (Pty) Ltd;
- 2.2.2.4 Flip File;
- 2.2.2.5 Desco Agencies CC
- 2.2.2.6 Interstate Group (includes Interstate Cape Town, Interstate Port Elizabeth and Interstate Durban.

2.2.3 Pentel South Africa and its distributors are considered to be in a supplier-customer relationship and hence are in a vertical relationship as contemplated in section 5 of the Act. The relevant product market is for the distribution of stationery products to distributors.

2.2.4 There is an agreement/understanding between Pentel South Africa and its customers that the distributors would purchase stationery products at prices reflected on Pentel South Africa's price list. Distributors in return are required to resell stationery products as per prices published on the price list taking the discount offered to them by Pentel South Africa as their profit margin.

2.2.5 Pentel South Africa concludes a distribution agreement with its distributors which is materially in the same terms for all distributors. In terms of clause 3 of the distribution agreement, it is compulsory for the distributors to charge prices as reflected on Pentel South Africa's price list hence the prevailing prices to be charged when re-selling were commonly understood by the distributors.

2.2.6 Sanctions, in the form of threats of cancellation of the distribution agreement and withdrawal of the discount afforded to eligible distributors, were put in place to enforce the implementation of Pentel South Africa's price lists. These sanctions were considered to be credible enough to penalize non-compliance by distributors.

2.2.7 The Commission's investigation revealed that, although the distribution agreement was materially the same for all distributors, Pentel South Africa only enforced compliance with its price list in one geographic area, Port Elizabeth in the Eastern Cape Province and only in relation to the Complainant.

3. ADMISSION

3.1 Pentel South Africa admits that it contravened section 5(2) of the Act in that it dictated the minimum resale price of stationery products to the Complainant as alleged in preceding clauses.

4 AGREEMENT CONCERNING FUTURE CONDUCT

4.1 Pentel South Africa agrees and undertakes:

4.1.1 to prepare and circulate a statement summarizing the content of this Settlement Agreement to its directors and shareholders within 30 days of the date of confirmation of this Settlement Agreement as an order of the Tribunal; and

4.1.2 to develop and implement a compliance programme incorporating corporate governance, designed to ensure that employees, management and directors within Pentel South Africa, its subsidiaries and/or divisions and business units do not engage in any contraventions of section 5 (2) of the Act or any similar conduct, a copy of which programme shall be submitted to the Commission within 60 days of the date of confirmation of this settlement agreement as an order by the Tribunal;

4.1.3 not to engage in any conduct which constitutes a prohibited practice in contravention of chapter 2 of the Act.

5 ADMINISTRATIVE PENALTY

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

5.2 The parties have agreed that Pentel South Africa will pay an administrative penalty in the sum of R2 840 451.00 (two million eight hundred and forty thousand four hundred and fifty-one rands only) being 3.41% of Pentel South Africa's total turnover in the 2011 financial year.

5.3 Pentel South Africa will pay the administrative penalty to the Commission within 30 days of confirmation of this Settlement Agreement as an order of the Tribunal into the following account:

NAME:	**COMPETITION COMMISSION FEE ACCOUNT**
BANK:	**ABSA BANK, PRETORIA**
ACCOUNT NO:	**405 077 8576**
BRANCH CODE:	**323 345**

5.4 The Commission will pay these sums to the National Revenue Fund in terms of section 59 (4) of the Act.

6 FULL AND FINAL RESOLUTION

This Settlement Agreement is entered into in full and final settlement and upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Pentel South Africa relating to any alleged contraventions by Pentel South Africa, and any of its subsidiaries and/or divisions to an alleged contravention of section 5 (2) of the Act that are the subject of the Commission's investigation under case number 2008Aug3921 and its complaint referral under CT case number 27/CR/APR11.

Dated at Rodepoort on this the 25 day of June 2012

Tetsuro Shinoda
Director: Pentel South Africa (Pty) Ltd

Dated at Pretoria on this the 19 day of July 2012

Shan Ramburuth
The Commissioner, Competition Commission