

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: 89/CR/Nov04**

**In the matter between:**

**The Competition Commission**

**Applicant**

**and**

**J Melnick & Co (Pty) Ltd**

**Respondent**

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**Order**

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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.

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David Lewis

**17 November 2004**  
Date

Concurring: **Norman Manoim and Yasmin Carrim**

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**In the Competition Tribunal of South Africa**

**Held at Pretoria**

**CT Case No:**

**CC Case No: 2003Mar418**

In the matter between:

**The Competition Commission**

**Applicant**

**and**

**J Melnick & Co (Pty) Ltd**

**Respondent**

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**Consent Order, regarding a violation of section 5(2) of the Competition Act,  
1998 (Act No. 89 of 1998), as amended**

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The Applicant and the Respondent in the above matter hereby agree to conclude a consent order in terms of section 49D of the Competition Act No. 89 of 1998, as amended, on the terms set out more fully below.

**1. Definitions**

For the purposes of this *Consent Order* the following definitions shall apply:

- 1.1 The "Act" means the Competition Act, 1998 (Act No. 89, of 1998), as amended.

  
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- 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, Gauteng.
- 1.3 "*Competition 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 Meitjies Street, Sunnyside, Pretoria, Gauteng.
- 1.4 "*Complainant*" means Finro Enterprises (Pty) Ltd t/a Finro Cash & Carry, a company situated in Port Elizabeth.
- 1.5 "*Complaint*" means the complaint lodged with the *Commission* by the Complainant in terms of section 49B(2) of the *Act* and filed with the *Commission* under case number 2003Mar418.
- 1.6 "*Consent Order*" means this agreement in its duly signed form by both the *Commission* and the *Respondent*.
- 1.7 "*Days*" means calendar days.
- 1.8 "*Respondent*" means J Melnick & Co (Pty) Ltd t/a Melnicks (hereafter referred to as "JMC").

## 2. Background

- 2.1 The *Complainant*, who operates as a wholesaler of a variety of consumable goods to the retail trade, including Red Bull Energy Drink (hereinafter referred to as "Red Bull"), lodged a *complaint* against the *Respondent* with the *Commission*, in terms of section 49B(2) of the *Act*, on 11 March 2003.



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2.2 At all material times, the *Respondent* was the sole importer and distributor of various well-known international brands of consumable goods such as Lindt and Sprungli Chocolates, Act II Popcorn, Carpe Diem Wellness Drinks, Mentos Chewy Dragées and Red Bull, with branches in Cape Town, Port Elizabeth, Durban and Johannesburg.

2.3 In its *complaint* submission, the *Complainant* made the following allegations:

2.3.1 JMC had recommended to its distributors, minimum prices at which Red Bull should be sold. Distributors not adhering to the pricing policy, would lose their distribution rights for Red Bull.

2.3.2 In the event of a distributor transgressing the said pricing policy, JMC banned the remainder of its distributors from supplying Red Bull to the "transgressor".

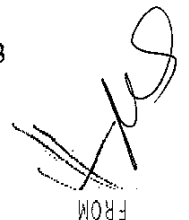
2.3.3 It believed JMC might be engaging in the practice of minimum resale price maintenance or that JMC was abusing its dominant position by excluding firms from entering or expanding in a market.

### 3. The Investigation

3.1 Following the submission of the *complaint*, the *Commission* undertook an investigation into the alleged prohibited practices of JMC.

3.2 During the investigation the investigation team confirmed that JMC recommended minimum prices at which Red Bull was to be sold by the wholesale resellers it supplied.

3.3 The investigation team further established that during the period from August 2000 to September 2001 the wholesale distribution of Red Bull was



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governed by a well-known and clearly understood convention regarding pricing which was enforced by JMC in that:

3.3.1 JMC advised its wholesale distributors that they could lose their distribution rights should they transgress its pricing policy.

3.3.2 JMC conducted periodic checks of its wholesale distributors to ensure that they were not selling at prices below its prescribed minimum resale price.

3.3.3 Any wholesale distributor that was found to be reselling Red Bull at prices below the JMC recommended price could lose its distribution rights and would then no longer be supplied with Red Bull. This occurred in the case of the *Complainant*.

3.3.4 While the no-supply policy was being applied *vis-à-vis* the *Complainant*, JMC warned other distributors that they too could have their supply lines revoked if they supplied Red Bull to the *Complainant*.

**4. Relevant provision of the Act**

**Section 5(2)**

4.1 Section 5(2) prohibits the practice of minimum resale price maintenance. Section 5 of the *Act* states:

~~"5. Restrictive Vertical Practices Prohibited:~~

- 1) .....
- 2) *The practice of resale price maintenance is prohibited.*

- 3) *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
  - (a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*
  - (b) *if the product has its price stated on it, the words “recommended price” appear next to the stated price.”*

4.2 In order to sustain a charge of minimum resale price maintenance against the *Respondent* in this case, the following elements must be proved:

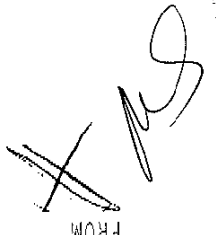
4.2.1 an understanding within the industry regarding the price(s) at which the wholesale resellers would on-sell Red Bull;

4.2.2 the *Respondent* enforces this understanding by imposing or threatening a sanction on those wholesale resellers who do not comply with its prescribed prices.

**5. Commission's findings**

5.1 The Commission concluded that JMC's implementation of the maximum discount policy and enforcement thereof through sanctioning wholesale distributors who failed to comply with its pricing policy was in contravention of section 5(2) of the *Act*.

5.2 The investigation team further concluded that JMC was dominant in the relevant market and that its withdrawal of the *Complainant's* distribution rights and the ban on other distributors supplying the



*Complainant* with Red Bull constituted an exclusionary act in contravention of section 8(c) of the Act. The Commission however decided not to refer this complaint to the Tribunal, as it found that the conduct concerned (the refusal to supply) was carried out by JMC, solely in order to enforce its minimum resale pricing policy.

**6. Statement of conduct by JMC**

JMC admits that the articulation and implementation of its pricing policy on wholesale resellers of Red Bull during the period from August 2000 to September 2001 was in contravention of section 5(2) of the Act. This conduct was stopped by JMC in September 2001 as soon as it became aware that its conduct contravened the Act.

**7. Agreement concerning future conduct**

The *Commission* and JMC agree that JMC shall:

- 7.1 not engage in the alleged anti-competitive conduct of resale price maintenance by imposing a maximum discount structure in respect of any of its products;
- 7.2 take prompt and effective action in ensuring that its wholesale distributors terminate their part in implementing the alleged anti-competitive conduct;
- 7.3 JMC will not itself or through any officer or employee of JMC or any person authorized to act on behalf of JMC, notify to distributors, or otherwise publish, in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of any JMC products, other than as expressly provided for in section 5(3) of the Act;

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- 7.4 refrain in the future from engaging in any anti-competitive unlawful conduct in its dealings with its distributors;
- 7.5 circulate to all its wholesale distributors within one month from the date of this consent order a statement conveying the contents of the consent order and advising them:
- 7.5.1 that they are free to sell, advertise and display for sale all goods supplied by JMC at whatever price they may choose;
  - 7.5.2 that JMC does not in any way condone and positively discourages agreements between distributors as to the prices to be charged or quoted by the resellers of goods supplied by JMC;
  - 7.5.3 that JMC offer to supply Red Bull to the *Complainant* on the same terms and conditions applicable to all customers of the same type; and
  - 7.5.4 provide copies of this consent order to each of its present directors and provide a copy to any future director on his or her appointment and in each case draw the attention of the director to the contents of this consent order, during the period from the confirmation of the *Consent Order* by the *Tribunal* to 31 December 2009;
- 7.6 institute, within twelve months from the date of this order, a compliance programme (the compliance programme will include, but not be limited to, establishing a mechanism for distributors & consumers to report incidents where any maximum discounts are imposed) designed to ensure that employees and distributors are



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informed about JMC's obligations under competition law and the existence and substance of this consent order;

7.7 submit the compliance programme to the *Commission*;

7.8 require its employees to comply with the substance of this consent order and take appropriate disciplinary action against any employee who fails to do so; and

**8. Administrative penalty**

8.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the *Act*, JMC is liable for an administrative penalty.

8.2 An administrative penalty in the amount of **R 200 000, 00** is hereby imposed on JMC, in accordance with section 59 of the *Act*. This penalty amount does not exceed 10% of the JMC's turnover during its preceding financial year.

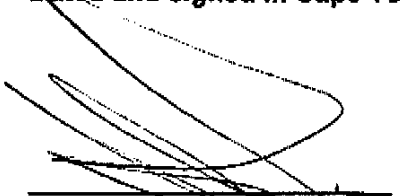
8.3 JMC is therefore liable and agrees to pay an administrative penalty in the amount of **R 200 000, 00** to be paid not later than thirty (30) days after the confirmation of this *Consent Order* by the *Tribunal*. The said amount is payable to the *Commission*, whose banking details are as follows:

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

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8.4 The Commission will pay over the penalty amount to the National Revenue Fund, referred to in section 59(4) of the Act.

Dated and signed in Cape Town on this the 28 day of October 2004.



Chief Executive Officer: JMC

Dated and signed in Pretoria on this the 30<sup>th</sup> day of October 2004.



Adv. Menzi Simelane  
The Commissioner  
Competition Commission