

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 017509

In the matter between:

The Competition Commission

Applicant

and

MGK Operating Company (Pty) Ltd

Respondent

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

Heard on: 14 August 2013

Decided on: 14 August 2013

Order

The Tribunal hereby confirms as an order in terms of section 58(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998) the settlement agreement reached between the Competition Commission and the respondent which is attached hereto as "Annexure A".



Presiding Member
A Wessels

Concurring: T Madima and A Roskam

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

CT Case No: _____
CC Case No: 2010FEB4902

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

MGK OPERATING COMPANY (PTY) LTD

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND MGK OPERATING COMPANY (PTY) LTD IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)(I) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED

The Competition Commission ("the Commission") and MGK Operating Company (Pty) Ltd ("MGK") hereby agree that an application be made to the Competition Tribunal ("the Tribunal") for confirmation of this Consent Agreement as an order of the Tribunal in terms of sections 58(1)(a)(iii) and 59(1)(a) of the Competition Act, No. 89 of 1998 as amended, on the terms set out below:

1. DEFINITIONS

1.1 For the purposes of this Consent Agreement the following definitions shall apply:

- 1.1.1 "Act" means the Competition Act, No. 89 of 1998, as amended;
- 1.1.2 "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.
- 1.1.3 "Complainant" means Mr. Petrus Van Heerden, a private person in his personal capacity;
- 1.1.4 "Complaint" means the complaint lodged by Mr. Petrus Van Heerden to the Commission on 03 February 2010 in terms of section 49B of the

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Act against the respondents for alleged contravention of section 4(1)(b)(i) of the Act;

- 1.1.5 "Consent Agreement" means this agreement duly signed and concluded between the Commission and MGK;
- 1.1.6 "MGK" means MGK Operating Company (Pty) Ltd, a company duly incorporated in accordance with the company laws of South Africa having its registered offices at Van Velden Street, Plaza Building, Brits;
- 1.1.7 "Obaro" means Obaro, a division of MGK Operating Company (Pty) Ltd.
- 1.1.8 "Respondent" means MGK Operating Company (Pty) Ltd;
- 1.1.9 "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, Gauteng; and
- 1.1.10 "Wes" means Wes Enterprises (Pty) Ltd, a company duly incorporated in accordance with the company laws of South Africa having its registered offices at Warmbad Avenue, Thabazimbi.

2. COMPLAINT INVESTIGATION AND THE COMMISSION'S FINDINGS

- 2.1 On 03 February 2010, the Commission received a complaint from Mr. Van Heerden alleging that Wes and MGK had entered into an agreement in terms of which their farmers' price of cattle feed was fixed.
- 2.2 The complainant alleged that Wes and MGK entered into an agreement in terms of which Wes would not sell its own manufactured Osma branded cattle feed in the Thabazimbi area at prices lower than that of its distributor, MGK's prices.
 - 2.2.1 In support of these allegations, the complainant submitted an email exchange between himself and a Wes employee which was intended to illustrate that there existed an arrangement between Wes and MGK in relation to the prices at which they would sell the Wes manufactured Osma branded cattle feed to customers i.e. farmers.
 - 2.2.2 The email Mr. Van Heerden submitted was sent by Ms. Magriet Du Plessis, an employee of Wes to himself in response to a query he made regarding certain products including Osma. His



query was whether he could obtain a cheaper price from Wes for the product. In response to this, Ms. Du Piessis sent an email outlining that Obaro's selling prices are the same as theirs because they have an agreement not to sell their products cheaper.

- 2.3 Following Mr. Van Heerden's complaint, the Commission duly investigated the complaint as a possible contravention of section 4(1)(b)(i) of the Act. The investigation established that Wes which is a manufacturer of cattle feed under the Osma brand also retailed its product at their Thabazimbi manufacturing plant.
- 2.3.1 The Commission's investigation revealed that Wes entered into a distribution agreement with Obaro, MGK's retail division for the retail of its products. In terms of this agreement, Wes would supply MGK with its products, including the Wes manufactured cattle feed which MGK would then sell in its retail stores to farmers throughout the country. Wes also issued its distributors, including Obaro with a price list that indicate the price at which the distributors can obtain the product from Wes as well as a suggested selling price to farmers.
- 2.4 The investigation established that MGK has a retail store in the Thabazimbi area which is in close proximity to where Wes' manufacturing plant is situated. The information provided to the Commission suggested that MGK was concerned that Wes also retails its product from its manufacturing plant and that they may be directly competing with them (as the manufacturer) in this area. To address MGK's concerns, Wes gave MGK the assurance that it would not sell the Osma at prices lower than Wes' suggested retail price given to MGK's Obaro retail outlets including in the Thabazimbi area.
- 2.5 After a careful assessment of the respondent's business relationship with MGK (Obaro) in terms of section 4(1) of the Act, the Commission found that even though the predominant nature of the agreement between MGK and Wes was a vertical one (i.e. an agreement entered into between a supplier and distributor), the relationship between MGK and Wes in respect of Thabazimbi and, specifically, in respect of Osma cattle feed, is of a horizontal nature and as such Wes and MGK are competitors in the market for the retailing of the Osma branded cattle feed in the Thabazimbi area. As a result, the Commission concluded that the undertaking by Wes not to sell its product at prices lower than Wes' suggested retail price to MGK i.e. not to undercut its retailer/competitor contravenes section 4(1)(b)(i) of the Act as it amounts to price fixing.
- 2.6 During the investigation the Commission also considered the broader vertical relationship that exists between the parties of a supplier-distributor relationship between Wes and MGK.



3. ADMISSION

MGK admits that it has contravened section 4(1)(b)(i) of the Act, only when having regards to the factual circumstances as referred to in clause 2 above.

4. AGREEMENT CONCERNING FUTURE CONDUCT

4.1 MGK agrees and undertakes:

- 4.1.1 To prepare and circulate a statement summarising the content of this Consent Agreement to its employees who are managers and to its directors and relevant corporate governance structures within thirty (30) days after the date of confirmation of this Settlement Agreement as an order of the Tribunal; and
- 4.1.2 To continue with the development and implementation of its existing compliance program which incorporate corporate governance and is designed to ensure that employees, management and directors within MGK, its subsidiaries and/or divisions and business units do not engage in any contraventions of section 4(1)(b)(i) of the Act or any similar conduct. A copy of the current programme is attached hereto.

5. ADMINISTRATIVE PENALTY

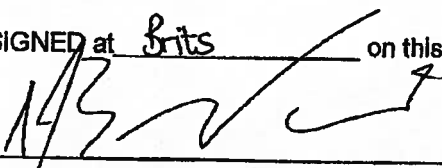
- 5.1 Having regard to the the provisions of section 58(1)(a)(iii), read with sections 59(1)(a), 59(2) and (3) of the Act, MGK agrees to pay an administrative penalty.
- 5.2 The parties have agreed that MGK will pay an administrative penalty in the sum of R32 346.19 being 1.5% of the base turnover for the total sales of the Osma branded feed from Wes for Obaro in the Thabazimbi area for the 2009 financial year.
- 5.3 MGK shall remit payment of the administrative penalty into the following bank account:
- | | |
|--------------------------------|-------------------------------|
| <u>Name of account holder:</u> | <u>COMPETITION COMMISSION</u> |
| <u>Bank name:</u> | <u>ABSA BANK PRETORIA</u> |
| <u>Account number:</u> | <u>4050778576</u> |
| <u>Branch code:</u> | <u>323345</u> |
- 5.4 The Commission will pay the administrative penalty into the National Revenue Fund in terms of section 59(4) of the Act.



6. FULL AND FINAL SETTLEMENT

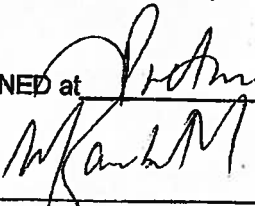
This Consent Agreement is entered into in full and final settlement and upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and MGK relating to any alleged contraventions by MGK (or its shareholders), and any of its subsidiaries and or divisions to an alleged contravention of section 4(1)(b)(i) of the Act that are the subject of the Commission's investigation under case number 2010FEB4902.

SIGNED at Brits on this the 23rd day of July 2013.



Duly authorised signatory
MGK Operating Company (Pty) Ltd

SIGNED at Protman on this the 29 day of July 2013.



Shan Ramburuth
The Commissioner, Competition Commission