

# COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 53/AM/Jul11

In the matter between:

**Kansai Paint Co., Ltd**

**Acquiring firm**

**Freeworld Coatings Ltd**

**Target firm**

And

**Competition Commission**

**Respondent**

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Panel : N Manoim (Presiding Member), M Mokuena (Tribunal Member) and M Holden (Tribunal Member)

Heard on : 22 November 2011

Decided on : 23 November 2011

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## ORDER

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The acquisition by Kansai Paint Co., Ltd of the remaining issued share capital of Freeworld Coatings Ltd is approved in terms of section 16 (2) (b) subject to the conditions attached hereto as Annexure A.

  
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Presiding Member  
N Manoim

**Concurring:** M Mokuena and M Holden

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**

In the intermediate merger (subject to reconsideration) between:

**KANSAI PAINT Co., Ltd. ("KANSAI")**

**ACQUIRING FIRM**

and

**FREEWORLD COATINGS LIMITED ("FREEWORLD")**

**TARGET FIRM**

and

**COMPETITION COMMISSION SOUTH AFRICA**

**RESPONDENT**

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***MERGER CONDITIONS***

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**1. INTERPRETATION**

- 1.1 The headings of the clauses in the Tribunal's order are for the purposes of convenience and reference only, and shall not be used in the interpretation of, or to modify or amplify, the terms of this order, or any clause thereof.
- 1.2 In the Tribunal's order, unless a contrary intention clearly appears, words importing:
- 1.2.1 any one gender include the other genders;
  - 1.2.2 the singular includes the plural and vice versa;
  - 1.2.3 natural persons include legal persons and vice versa.
- 1.3 The following terms shall have the meaning assigned to them hereunder, both in the Tribunal's order and in any annexures to the Tribunal's order, and cognate expressions shall have corresponding meanings, namely:

- 1.3.1 **"the Act"** means the Competition Act 89 of 1998, as amended;
- 1.3.2 **"Clearance date"** means 18 April 2011;
- 1.3.3 **"Coatings"** means OEM automotive, refinish, decorative or industrial coatings;
- 1.3.4 **"the Commission"** means the Competition Commission of South Africa as established in terms of section 19 of the Act, and shall include all advisers and consultants to the Commission;
- 1.3.5 **"the Tribunal"** means the Competition Tribunal of South Africa as established in terms of section 26 of the Act.
- 1.3.6 **"the Tribunal's order"** means this order;
- 1.3.7 **"Days"** means business days;
- 1.3.8 **"DuPont"** means E. I. du Pont Nemours and Company and its affiliates;
- 1.3.9 **"DuPontFreeworld Joint Venture"** means DuPontFreeworld (Proprietary) Limited;
- 1.3.10 **"Freeworld"** means Freeworld Coatings Limited and its subsidiaries;
- 1.3.11 **"Joint Venture Agreement"** means the agreement between DuPont and Freeworld governing their relationship as shareholders in the DuPontFreeworld Joint Venture;
- 1.3.12 **"Kansai"** means Kansai Paint Co. Ltd;
- 1.3.13 **"Manufacturing agreements"** means the existing agreements between Freeworld and the DuPontFreeworld Joint Venture and/or DuPont for the manufacture of OEM automotive coatings and between Freeworld and DuPont for the manufacture of refinish automotive coatings;
- 1.3.14 **"Master Global Alliance Agreement"** means the agreement between PPG and Kansai dated 1 July 2004;
- 1.3.15 **"Merging parties"** means Kansai Paint Co. Limited and Freeworld Coatings Limited;
- 1.3.16 **"OEM"** means Original Equipment Manufacturer;
- 1.3.17 **"PPG"** means PPG Industries, Inc.;
- 1.3.18 **"Proposed Merger"** means the proposed acquisition by Kansai of the majority of the issued share capital of Freeworld;
- 1.3.19 **"South Africa"** means the Republic of South Africa.

## 2. MANUFACTURING AGREEMENTS

2.1 Kansai, as the majority shareholder of Freeworld, shall ensure that Freeworld continues to manufacture OEM coatings for the DuPontFreeworld Joint Venture and/or DuPont and refinish coatings for DuPont. Any agreements in this regard shall:

2.1.1 be on the same terms and conditions as the manufacturing agreements, subject to such amendments as may be mutually agreed by the parties provided that any such amendments are consistent with 2.3;

2.1.2 subsist for a period of at least five (5) years from the clearance date or for such shorter period as the DuPontFreeworld Joint Venture and/or DuPont may require.

2.1.3 be implemented in such a manner as to protect commercially sensitive information and intellectual property belonging to the DuPontFreeworld Joint Venture and/or DuPont.

2.2 Kansai shall use its reasonable commercial endeavours to ensure that all necessary amendments to the manufacturing agreements are effected and provided to the Commission by no later than six (6) months after the date of the Tribunal's order, provided that Kansai shall be entitled to seek one extension from the Commission for a period of three (3) months, upon good cause shown.

2.3 The merging parties will ensure that the protocol to prevent the flow of information (attached hereto marked annexure A) from the DuPontFreeworld Joint Venture and/or DuPont to the merging parties be honoured for the duration of the manufacturing agreements.

### **3. EMPLOYMENT**

Freeworld shall, for a period of three (3) years after the clearance date, ensure that there are no retrenchments as a result of the merger in relation to its business (save in relation to the chief executive officer, chief financial officer, directors and those employees having management authority who report directly to the chief executive officer).

### **4. OBLIGATION TO MANUFACTURE LOCALLY**

For a period of ten (10) years from the clearance date, Freeworld will continue to manufacture all proprietary Coatings currently manufactured using Freeworld's technology as well as the complementary products currently manufactured by Hamilton's South Africa. Freeworld will maintain or expand its current decorative and refinish automotive coatings operations in South Africa.

### **5. RESEARCH AND DEVELOPMENT ("R&D")**

Freeworld shall invest in R&D in the decorative business in South Africa. Unless otherwise provided, the undertakings shall endure for a period of five (5) years from the clearance date.

5.1 Freeworld's existing R&D capacity shall continue to be located, conducted and expanded in South Africa on the basis set out in clauses 5.2 to 5.7 below;

5.2 All existing R&D projects, which are currently being conducted in South Africa by Freeworld, will be continued until they have been completed;

5.3 Freeworld will maintain all existing R&D facilities in South Africa, with a view to using:

5.3.1 such facilities as an original R&D centre, with a particular focus on innovation in Coatings;

5.3.2 the products developed pursuant to such R&D in South Africa;

5.4 Freeworld will maintain the level of funding provided by Freeworld to South African academic institutions;

- 5.5 Freeworld will continue to support and develop the Freeworld paint academies;
- 5.6 Freeworld will continue to provide bursaries and loans to South African students, in order to pursue their studies at accredited academic institutions in South Africa;
- 5.7 Freeworld shall, for a period of ten (10) years from the clearance date, invest in R&D at least that percentage of Freeworld's annual revenue that is equal to the average of that invested by Freeworld in R&D for the previous five (5) years. Freeworld will provide the Commission with an auditor's certificate confirming compliance with this condition.
- 5.8 Proof of compliance with the above conditions shall be furnished to the Commission each year by no later than three (3) months after the finalisation of Freeworld's annual financial statements.

## **6. NOTIFICATION OF SMALL MERGERS**

The merging parties and their subsidiaries (whether held directly or indirectly) shall notify the Commission of any small merger having an effect in South Africa to which the merging parties or their subsidiaries (whether held directly or indirectly) are a party, either in the capacity of target or acquiring firm.

## **7. APPLICATION OF THE MASTER GLOBAL ALLIANCE AGREEMENT IN SOUTH AFRICA**

Kansai shall notify the Commission if, at any time, the Master Global Alliance Agreement is extended to apply in South Africa, as well as if a manufacturing or distribution agreement is concluded between Kansai and PPG in respect of South Africa.

Kansai shall ensure that no director that serves on the board of any entity that forms a part of PPG Kansai Automotive Finishes shall serve on the board of Freeworld or its subsidiaries and that no employee or consultant that provides services to PPG Kansai Automotive Finishes is employed by or provides consulting services to Freeworld or its subsidiaries.

## **8. BLACK ECONOMIC EMPOWERMENT**

Kansai will use reasonable commercial endeavours to implement a relevant and appropriately structured BEE equity transaction that results in a minimum of 15% of the issued share capital of Freeworld being sold to a consortium of broad-based BEE participants aligned with the interest of Freeworld.

The BEE equity transaction shall be implemented within two (2) years of the Clearance Date. The time period may be extended upon written application by the merging parties to the Commission for a maximum of one (1) further period of one (1) year on good cause shown. The Commission's consent to an extension may not be unreasonably withheld.

## **9. CONFIDENTIALITY**

The contents of this document, save for annexure "A2" to "A26", are not confidential.