

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 113/CR/Nov07

In the matter between:

The Competition Commission

Applicant

and

CBC Fasteners (Pty) Ltd

Respondent

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

Heard on : 28 November 2007

Decided on : 28 November 2007

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A", in terms of section 49D(2)(a) of the Competition Act.


D Lewis

Concurring: N Manoim and Y Carrim

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA**

CT Case No:

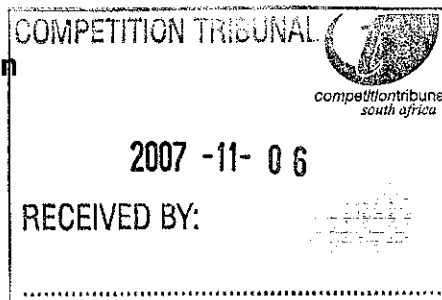
CC Case No: 2005Oct1882

In the matter between:

The Competition Commission

and

CBC Fasteners (Pty) Ltd



Applicant

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 1st Floor, Mulayo Building (Block C), the dti Campus, 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 3rd Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.
- 1.6 "*complaint*" means the complaint lodged by Nedshcroef Johannesburg (Pty) Ltd on 10 October 2005 in terms of section 49B(2) of the *Act*.
- 1.7 "*Complainant*" and "*Nedschroef*" means Nedschroef Johannesburg (Pty) Ltd, a private company duly incorporated and registered in accordance with the Company Laws of South Africa under registration number 2000/020534/07 and having its principal place of business at 52 Paul Smit Street, Dunswart, Boksburg North, Gauteng.
- 1.8 "*Respondent*" and "*CBC Fasteners*" means CBC Fasteners (Pty) Ltd, a private company with limited liability, duly registered in terms and incorporated as such in terms of the Company Laws of South Africa under registration number 1991/003246/07. CBC Fasteners has its principal place of business at No. 6 Coppinger Street, Factoria, Krugersdorp.

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*.

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3. BACKGROUND

- 3.1 On 28 August 2000, *Nedschroef* entered into a written agreement of sale with Teamcor Limited ("Teamcor"), in terms of which the former bought the assets of National Bolts, the automotive fastener manufacturing division of the latter for a price of R11 Million. The agreement came into effect at close of business on 29 September 2000 and two other firms were also signatories to the agreement, being *CBC Fasteners* and Waco International Limited ("Waco International").
- 3.2 Waco International signed in its capacity as holding company of Teamcor, therefore committing itself as surety for Teamcor's obligations arising out of the agreement and *CBC Fasteners* as a beneficiary of, and party to the restraint obligations imposed in terms of the agreement.
- 3.3 On 10 October 2005, *Nedschroef* lodged a complaint with the *Commission*, alleging that the agreement of sale contained clauses which constituted restrictive horizontal practices prohibited by section 4(1)(a) alternatively section 4(1)(b) and/or restrictive vertical practices in contravention of section 5(1) of the Act.
- 3.4 The alleged restrictive clauses of the agreement (clauses 15 and 16) consisted of restraint undertakings by Teamcor (the seller), *Nedschroef* (the purchaser) and *CBC Fasteners*. In addition *Nedschroef* and *CBC Fasteners* (clause 17 to 19) recorded their intention to co-operate with regard to sourcing, tooling manufacture, heat treatment and cross sourcing, undertook not to entice or solicit each other employees for a period of 10 years and agreed to afford each other "best customer" status in respect of prices and terms of payment relating to those products purchased from each other.

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3.5 The relevant clauses of the agreement are the following:

3.5.1 Clause 15

Clause 15 operates in favour of *Nedschroef* and it provides that:

"The seller (Teamcor) undertakes that for a period of ten (10) years from the effective date (the restraint period) it shall not directly or indirectly, at any place within the Republic of South Africa, Angola, Congo, Malawi, Mauritius, Mozambique, Swaziland, Namibia, Lesotho, Botswana, Seychelles, Tanzania, Zambia and Zimbabwe, whether for its own account or as a principal, agent, partner, representative, shareholder, member, consultant, adviser, financier or in any other like capacity whatsoever in relation to any person, and whether for its direct or indirect benefit or otherwise, and whether for a reward or otherwise, and whether formally or otherwise be interested or concerned in any business which manufactures and distributes those products listed or described in Annexure "F" to the agreement, provided that the foregoing provisions of this clause 15 shall not preclude or prevent the Avlock division of the seller with the consent of the purchaser (Nedschroef) to market and distribute those products listed in Annexure F upon such terms as may be agreed upon and shall not preclude the seller from retaining its shareholding in CBC Fasteners (Pty) Ltd".

3.5.2 Clause 16

(a) Clause 16.1 operates in favour of Teamcor and *CBC Fasteners*, where it provides that:

"The purchaser (Nedschroef) undertakes in favour of the seller (Teamcor) and CBC Fasteners (Pty) Limited that for a period of ten (10) years from the effective date (the restraint period) it shall not directly or indirectly, at any place within the Republic of South Africa,

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Angola, Congo, Malawi, Mauritius, Mozambique, Swaziland, Namibia, Lesotho, Botswana, Seychelles, Tanzania, Zambia and Zimbabwe, whether for its own account or as a principal, agent, partner, representative, shareholder, member, consultant, adviser, financier or in any other like capacity whatsoever in relation to any person, and whether for its direct or indirect benefit or otherwise, and whether for a reward or otherwise, and whether formally or otherwise be interested or concerned in any business which manufactures and/or distributes and/or imports any fasteners apart from those types of fasteners which are listed in Annexure "F" to the agreement".

- (b) Furthermore clause 16.3 confers benefits upon Avlock International in that it states that *Nedschroef* undertakes to sell and distribute all the Standard Hexagon Bolts referred to in Annexure F of the agreement which it may manufacture to Avlock International only, a division of Teamcor, or any other distributor as may be approved in writing by Teamcor.
- (c) Clause 16.4 confers benefits upon *CBC Fasteners*, as it provides that *Nedschroef* undertakes that it shall for a period of no less than ten (10) years from the effective date, purchase from CBC Fasteners its entire requirement of wheel nuts for the South African market at market price related prices.
- (d) Clause 16.5 provides that *Nedschroef* shall, for a period of 10 years, only manufacture for export, or if intended for customers within the countries listed in the agreement, exclusively for *CBC Fasteners* for distribution to such customers, the following products:
- 27 mm to 33 mm diameter range standard hexagon bolts
 - 16 mm to 24 mm diameter range standard hexagon bolts, which are longer than 200 mm



(e) Clause 16.6 further permits Teamcor and *CBC Fasteners* to inspect *Nedschroef's* premises and its records relating to its customers and its works orders, in order to monitor compliance with the above-mentioned undertakings by the latter.

(f) Clause 16.7 stipulated that by signing the agreement, *CBC Fasteners* accepted the benefits conferred upon it and in clause 16.8 it is recorded that the provisions of clause 16 shall be enforceable by either or both Teamcor and *CBC Fasteners*.

3.6 Besides filing the complaint, *Nedschroef* also brought an application for interim relief, which was opposed by *CBC Fasteners* and in which the Competition Tribunal granted relief on 1 February 2006. In granting the interim relief the Competition Tribunal made the following order in terms of section 49(c) of the Competition Act:

"That the relief sought operates and/or remains in force until the earlier of-

(i) *a final determination of the applicant's complaint in terms of the Competition Act, ... that clause 16 of the aforesaid sale agreement constitutes a prohibited practice as contemplated in terms of section 4(1)(a) alternatively section 4(1)(b) of the Act and is declared void,"*

4. COMMISSION'S INVESTIGATION

4.1 As a result of negotiations between *Nedschroef* and *CBC Fasteners* subsequent to the *Competition Tribunal* granting interim relief, a settlement agreement was entered into and *Nedschroef* indicated to the *Commission* that it wanted to withdraw its complaint.

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- 4.2 As the *Commission* was of the opinion that the agreement between the parties was *prima facie* case in contravention of section 4(1)(b) of the *Act*, it was decided in terms of Rule 16(2) of the Rules for Conduct of Proceedings in the Competition Commission, to continue with the investigation of the complaint as if the *Commissioner* initiated the complaint.

5. COMMISSION'S FINDINGS

- 5.1 The evidence in the *Commission's* possession suggests that all the essential elements for a successful prosecution under section 4(1)(b) of the *Act* are present, namely (i) an agreement, (ii) between parties in a horizontal relationship, which (iii) involves market division in that *Nedschroef* and *CBC Fasteners* would, for a period of 10 years, each be entitled to manufacture specific products; *Nedschroef* only the 29 products listed in Annexure F to the agreement of sale and *CBC Fasteners* all the general fastener products not listed in Annexure F, which would specifically include short lock bolts.
- 5.2 In terms of the agreement *Nedschroef* would further only supply its Standard Hexagon Bolts to Avlock International or directly to automotive manufacturers; and *Nedschroef*, for a period not less than 10 years, would purchase from *CBC Fasteners* its entire requirement of wheel nuts for the South African market.

6. AGREEMENT CONCERNING CONDUCT OF THE RESPONDENT

The *Commission* and the *Respondent* agree that the *Respondent's* conduct constituted a contravention of section 4(1)(b) of the *Act*. The *Respondent* has already taken steps to bring to an end the prohibited practice, but the *Commission* and the *Respondent* agree that the *Respondent* shall:



- 6.1 not enforce any of the restrictive clauses of the agreement or require any of the parties to the agreement to abide by the aforesaid clauses.
- 6.2 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*.
- 6.3 provide copies of this consent order to each of its present directors and during the five-year period following the confirmation of the order provide a copy to any future director on his or her appointment and in each case draw the attention of the director to the content of the order.
- 6.4 within twelve months from the date of this order, institute a compliance programme designed to ensure that employees are informed about the *Respondent's* obligations under competition law and the existence and substance of this consent order.
- 6.5 submit its compliance programme to the *Commission*, which programme will include, but not be limited to, establishing a mechanism for employees to report any contraventions of the *Act*.
- 6.6 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.

7. ADMINISTRATIVE PENALTY

- 7.1 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 R300 000.00 (three hundred thousand rand) in full and final resolution of all proceedings between the *Commission* and the *Respondent* under case number 2005Oct1882.

7.2 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 will be filed separately under cover of a Form CC7.

7.3 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*.

7.4 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

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

8. FULL AND FINAL RESOLUTION

This *Agreement*, upon confirmation thereof as a consent order by the *Competition Tribunal*, concludes all proceedings between the *Commission*

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and the *Respondent*, in relation to any alleged contraventions of the Act investigated under case number 2005Oct1882.

FOR THE RESPONDENT:

Dated and signed at MOGALKE CITY on this the 28 day of AUGUST 2007.

Signature: 

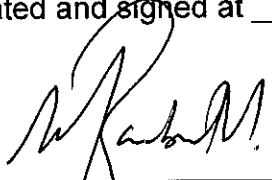
Name: ISAAC BENDER

Job description: FINANCIAL DIRECTOR

Duly authorized representative of CBC Fasteners (Pty) Ltd

FOR THE COMMISSION:

Dated and signed at Pretoria on this the 26 day of October 2007.



Shan Ramburuth

Commissioner

Competition Commission of South Africa