

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 19/CR/Mar11
015651

In the matter between:

The Competition Commission

Applicant

and

Erf 179 Bedfordview (Pty) Ltd

Respondent

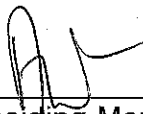
Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member) and T Madima (Tribunal Member)

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

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

CT CASE NO: 19/CR/MAR11

CC CASE NOs: 2009July4569 & 2009July4571

In the matter between:

COMPETITION COMMISSION

Applicant

and

Erf 179 BEDFORDVIEW (PTY) LIMITED

Respondent

**AGREEMENT BETWEEN THE COMPETITION COMMISSION AND Erf 179
BEDFORDVIEW (PTY) LIMITED IN RESPECT OF A CONTRAVENTION OF
SECTION 4(1)(b)(ii) OF THE COMPETITION ACT NO 89 OF 1998, AS AMENDED**

The Competition Commission and Erf 179 Bedfordview (Pty) Limited hereby agree that application be made to the Competition Tribunal ("Tribunal") for confirmation of this 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

In this Agreement, unless the context indicates otherwise, the following definitions shall apply:

- 1.1. **"the Act"** means the Competition Act No. 89 of 1998, as amended;

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- 1.2. **"Agreement"** means this agreement duly signed and concluded between the Commission and Erf 179;
- 1.3. **"Bedford Square"** means Bedford Square Properties (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 9 Gordon Hill, Parktown, Johannesburg. Bedford Square is the registered owner of the remaining extent of erf 39 Bedford Gardens situated in Bedfordview - which constitutes part of the site-assembly making up the Bedford Square Shopping Centre, a regional shopping centre situated in Bedfordview, Johannesburg;
- 1.4. **"Bedford Square complaint"** means a complaint lodged on 22 May 2009 by Bedford Square with the Commission against Liberty and Erf 179 in respect of the Bedford Square deed of restraint, under case number: 2009May4442;
- 1.5. **"Bedford Square deed of restraint"** means the notarial deed of restraint registered on 21 June 2004 as a servitude in favour of certain erven respectively owned by Liberty and Erf 179 against erf 39, Bedford Gardens owned by Bedford Square;
- 1.6. **"Bedford Square restraint"** means a clause contained in the Bedford Square settlement agreement and the Bedford Square deed of restraint which provides that Bedford Square and its successors in title shall not for a period of eleven (11) years from 04 November 2003 conclude a lease agreement in terms of which any rental space located on erf 39 Bedford Gardens is let to Woolworths or Mica Hardware;
- 1.7. **"Bedford Square settlement agreement"** means a settlement agreement concluded and entered into by Bedford Square, Cavaleros Group (representing Erf 179) and Liberty on 04 November 2003 which led, *inter alia*, to the registration of the Bedford Square deed of restraint;

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- 1.8. "**Cavaleros Group**" means Cavaleros Group Holdings (Pty) Limited which owns the entire issued share capital of Erf 179.
- 1.9. "**CLP**" means the Corporate Leniency Policy issued by the Commission in terms of the Act to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Act;
- 1.10. "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act as a juristic person, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;
- 1.11. "**Commissioner**" means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;
- 1.12. "**Complaint**" means the complaint initiated by the Commissioner on 27 August 2009 in terms of section 49B(1) of the Act against Erf 179, Liberty, Bedford Square and Win Twice for an alleged contravention of section 4(1)(b)(ii) of the Act, investigated by the Commission under case numbers 2009July4569 and 2009July4571 and referred to the Tribunal under case number: 19/CR/Mar11;
- 1.13. "**Deeds of restraint**" refers collectively to the Bedford Square deed of restraint and the Win Twice deed of restraint;
- 1.14. "**Erf 179**" means Erf 179 Bedfordview (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 7D Goldenhuis Road, Malvern East, Germiston. Erf 179 is the registered owner of the Village View Shopping Centre, a community shopping centre situated in Bedfordview, Johannesburg.
- 1.15. "**Liberty**" means Liberty Group Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South



Africa, with its principal place of business at 1 Arneshoff Street, Johannesburg. Liberty is the registered owner of the Eastgate Shopping Centre, a super-regional shopping centre situated in Bedfordview, Johannesburg;

- 1.16. "**Restraints**" refers collectively to the Bedford Square and the Win Twice restraints;
- 1.17. "**Settlement agreements**" refers collectively to the Bedford Square and the Win Twice settlement agreements;
- 1.18. "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;
- 1.19. "**Win Twice**" means Win Twice Properties (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Smit Road, Bedford Shopping Centre. Win Twice is the registered owner of four erven – erven 50, 51, 54 and 64 Bedford Gardens – which constitute part of the site-assembly making up the Bedford Square Shopping Centre;
- 1.20. "**Win Twice complaint**" means the complaint attached as an annexure to the application for conditional leniency in terms of the CLP made by Win Twice to the Commission on 11 August 2009 in respect of the Win Twice deed of restraint;
- 1.21. "**Win Twice deed of restraint**" means the notarial deed of restraint registered on 12 July 2004 as a servitude in favour of certain erven respectively owned by Liberty and Erf 179 against erven 50, 51, 54 and 64 Bedford Gardens owned by Win Twice;

- 1.22. "**Win Twice restraint**" means a clause contained in the Win Twice settlement agreement and the Win Twice deed of restraint which provides that Win Twice shall not, for a period of fifteen years from the date of registration of the servitude (14 June 2004) allow the operation of a Woolworths stand-alone store, a Woolworths Food Store and a Woolworths Departmental Store if same would include a Woolworths Food Store; and
- 1.23. "**Win Twice settlement agreement**" means a settlement agreement concluded and entered into by, *inter alia*, Win Twice, Erf 179 and Liberty on 04 November 2003 which led to the registration of the Win Twice deed of restraint.

2. Background to the complaint investigation

- 2.1. The Complaint concerns the Deeds of restraint which were executed and registered on 21 June 2004 and 14 June 2004, respectively. The Deeds of restraint were registered as a result of settlements concluded between, *inter alia*, Erf 179 and Bedford Square in relation to town planning disputes between the parties which, in turn, arose out of two separate applications for the rezoning of land (by way of efforts to remove and amend zoning restrictions on the relevant land) brought by Bedford Square and Win Twice, respectively, in terms of the Gauteng Removal of Restrictions Act No. 3 of 1996, as amended.
- 2.2. The object of Bedford Square's application for rezoning of land was to obtain approval from the Greater Germiston Council for the erection of, *inter alia*, a regional shopping centre (later known as the "**Bedford Square**" centre) on the remaining extent of erf 39 Bedford Gardens,¹ which was acquired as vacant land. The purpose of Win Twice's application for rezoning of land was to obtain approval from the Ekurhuleni Metropolitan Municipality for the upgrade and expansion of

¹ Erf 39 Bedford Gardens was subdivided into portions 3 and 4 and the remaining extent of erf 39. Portions 3 and 4 were sold to third parties and Bedford Square retained ownership of the remaining extent of erf 39 Bedford Gardens.



an existing shopping centre then known as the "Bedford Centre" erected on erven 50, 51, 54 and 64 Bedford Gardens. The two applications for rezoning of land were brought to remove certain restrictive title conditions in terms of, and to effect certain amendments to, the Bedfordview Town Planning Scheme, 1995, and thus sought to effect changes which impacted upon town planning and land usage rights in the Bedfordview area. Both Bedford Square and Win Twice are subsidiaries of the HBW Group (Pty) Ltd, which is involved in the business of retail property development. The shopping centre subsequently erected by Bedford Square on the remaining extent of erf 39 Bedford Gardens and the Bedford Centre owned by Win Twice, although separated by a public road, are now regarded as a single shopping centre known as the Bedford Shopping Centre.

- 2.3. Liberty owns a super-regional shopping centre known as "Eastgate" and Erf 179 owns a small community shopping centre known as "Village View". Eastgate and Village View are both situated in Bedfordview, Johannesburg within a radius of about 2km from the Bedford Shopping Centre and would be affected by the proposal to rezone and redevelop Erf 39 Bedford Gardens. According to Erf 179, in terms of town planning principles and Erf 179's and Liberty's proprietary and land usage rights, they were entitled to lodge objections to both Bedford Square's and Win Twice's applications for rezoning of land, which Erf 179 (and a number of other parties) so did.
- 2.4. Bedford Square's application for rezoning of land was approved by the Greater Germiston Council on 25 April 2000, but Erf 179 (represented by the Cavaleros Group) lodged an appeal with the Townships Board for Gauteng against the approval. Eventually, on 04 November 2003, Bedford Square, Cavaleros Group (representing Erf 179) and Liberty settled the disputes in relation to the town planning matters by concluding the Bedford Square settlement agreement which, *inter alia*, contained the Bedford Square restraint.
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- 2.5. Win Twice's application for rezoning of land was made on 19 September 2002. However, Win Twice commenced with a costly upgrade of the "Bedford Centre" before its application for rezoning was approved by the Ekurhuleni Metropolitan Municipality (which Erf 179 alleged was in contravention of the zoning rights applicable to the property at the time). According to Erf 179, in terms of town planning principles and in accordance with their proprietary and land usage rights, Erf 179 and Liberty lodged objections to Win Twice's application for rezoning of land. The dispute was referred to the Townships Board for Gauteng. Eventually, on 04 November 2003, Win Twice, Erf 179 and Liberty settled their disputes in relation to the town planning matters by concluding the Win Twice settlement agreement which contained, *inter alia*, the Win Twice restraint.
- 2.6. The Restraints arise out of the foregoing town planning disputes and, on 21 June 2004 and 14 June 2004, the Deeds of restraint were registered in a public register held with the Registrar of Deeds, pursuant to the Settlement agreements.
3. **Complaint investigation and findings**
- 3.1. On 22 May 2009, Bedford Square lodged a complaint with the Commission against Liberty and Erf 179 in respect of the Bedford Square deed of restraint. On the basis of allegations made in the Bedford Square complaint, *inter alia*, that Liberty is dominant in the market and that the Bedford Square deed of restraint constitutes an exclusionary act, the Commission investigated the Bedford Square complaint under section 8(d)(i) of the Act. However, upon concluding its investigation of the Bedford Square complaint, the Commission found that the information available to it was not sufficient to establish a contravention of section 8(d)(i) and as a result on 31 August 2009 the Commission issued a notice of non-referral. A month before the Commission could conclude its investigation of the Bedford Square complaint, on 21 July 2009 Bedford Square made an application for



and was subsequently granted conditional immunity by the Commission in terms of the CLP on the basis of its participation in the execution and registration of the Bedford Square deed of restraint.

- 3.2. On 11 August 2009, Win Twice also made an application for and was later granted conditional leniency by the Commission in terms of the CLP on the basis of its participation in the execution and registration of the Win Twice deed of restraint. Win Twice attached the Win Twice complaint as an annexure to its application for conditional immunity.
- 3.3. On 27 August 2009, the Commissioner, acting in terms of section 49B(1) of the Act, initiated the Complaint.
- 3.4. Upon concluding its investigation of the Complaint, the Commission determined that the Restraints constitute a contravention of section 4(1)(b)(ii) of the Act in that they divide markets by allocating customers and territories.
- 3.5. On 21 December 2010, the Commission concluded a consent agreement with Liberty which was confirmed as an Order of the Tribunal on 04 March 2011. On 15 March 2011, the Commission referred the Complaint to the Tribunal for adjudication and sought relief only against Erf 179.

4. Settlement discussions

Erf 179 pro-actively requested a meeting with the Commission and, on 31 May 2011, the Commission and Erf 179 held a meeting, in which Erf 179 made a settlement proposal to the Commission. In the meeting, Erf 179 advised the Commission that it had agreed with Bedford Square and Win Twice not to enforce the Deeds of restraint. Erf 179 subsequently reduced in writing the settlement proposal made to the Commission at the aforesaid meeting.

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5. Admission

Erf 179 admits that the Restraints, concluded in the context of the settlement of town planning disputes, resulted in a contravention of section 4(1)(b)(ii) of the Act.

6. Agreement concerning future conduct

Erf 179 agrees and undertakes to:

- 6.1. procure the cancellation of the Deeds of restraint;
- 6.2. not to enforce clauses 3 and 2.3 respectively of the Bedford Square and the Win Twice Settlement agreements;
- 6.3. refrain from engaging in customer allocation in contravention of sections 4(1)(b)(ii) of the Act; and
- 6.4. develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a prohibited practice in terms of the Act, a copy of which programme shall be submitted to the Commission within ninety (90) days of the date of confirmation of this Settlement Agreement as an Order of the Tribunal.

7. Administrative penalty

- 7.1. Erf 179 is liable for payment of an administrative penalty in terms of sections 58(1)(a)(iii), 59(2) and (3) of the Act in the amount of **R 272 187.95**. The administrative penalty represents **2.5%** of Erf 179 annual turnover for financial year ended February 2008.
- 7.2. The administrative penalty will be paid by Erf 179 to the Commission within thirty (30) days after the date of confirmation of this Agreement

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as an Order of the Tribunal. Erf 179 shall remit payment of the administrative penalty into the following bank account:

Name of account holder: COMPETITION COMMISSION

Bank name: ABSA BANK PRETORIA

Account number: 4050778576

Branch code: 323345

- 7.3. The Commission will pay the administrative penalty into the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

8. Full and final settlement

This Agreement, upon confirmation thereof as an Order of the Tribunal, terminates all proceedings between the Commission and Erf 179 in relation to the contravention of section 4(1)(b)(ii) of the Act, being the complaints –

- 8.1. investigated and referred under the Commission's case numbers: 2009July4569 and 2009July4571 and the Tribunal's case number: 19/CR/Mar11, respectively; and

- 8.2. submitted to the Commission by Bedford Square and Win Twice under the Commission's case numbers: 2009May4442 and 2011Feb5650.

SIGNED at Bruma on this the 4 day of September 2012.



Duly authorised signatory of Erf 179
Bedfordview (Proprietary) Limited



SIGNED at Proton on this the 18 day of Sept 2012.

Shan Ramburuth
Shan Ramburuth
Commissioner, Competition Commission

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