

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 20/CR/Apr08

In the matter between:

Competition Commission

Applicant

and

Adcock Ingram Critical Care (Pty) Ltd
Tiger Brands Limited

First Respondent
Second Respondent

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and U Bhoola (Tribunal Member)

Heard on : 30 May 2008

Decided on : 02 June 2008

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: Y Carrim and U Bhoola

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No. 20/CR/FEB08
CC Case No. 2005Jan1404
2007Nov3376

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

ADCOCK INGRAM CRITICAL CARE (PTY) LTD

First Respondent

TIGER BRANDS LIMITED

Second Respondent

In re:

THE COMPETITION COMMISSION

Applicant

and

ADCOCK INGRAM CRITICAL CARE (PTY) LTD

First Respondent

DISMED CRITICARE (PTY) LTD

Second Respondent

THUSANONG HEALTH CARE (PTY) LTD

Third Respondent

TIGER BRANDS LIMITED

Fourth Respondent

**CONSENT ORDER AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
ADCOCK INGRAM CRITICAL CARE (PROPRIETARY) LTD AND TIGER BRANDS
LIMITED IN REGARD TO ALLEGED CONTRAVENTIONS OF SECTIONS 4(1)(b)(ii) and
4(1)(b)(iii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998) BY ADCOCK
INGRAM CRITICAL CARE (PROPRIETARY) LIMITED**

PB MR

The *Commission*, *AICC* and *Tiger* hereby agree that application be made for the confirmation of the *Consent Agreement* as 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 Agreement* the following definitions shall apply:

- 1.1 The **"Act"** means the Competition Act, 1998 (Act No. 89, of 1998), as amended;
- 1.2 **"AICC"** means Adcock Ingram Critical Care (Pty) Ltd;
- 1.3 **"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;
- 1.4 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the *Act*;
- 1.5 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission, *AICC* and *Tiger*;
- 1.6 **"Complaints"** means the complaints initiated by the *Commissioner* of the *Competition Commission* in terms of section 49B of the *Act* under case numbers 2005Jan1404 and 2007Nov3376;
- 1.7 **"Corporate Senior Management of AICC"** means collectively:
 - 1.7.1 K.J. Rowat – Managing Executive, *AICC*;
 - 1.7.2 M.Y. Mangel – Financial Executive, *AICC*;
 - 1.7.3 C. Morrison – Executive : Operations, *AICC*;




1.7.4 V. Desai – Business Development and Strategic Planning Manager, AICC;

1.7.5 S. Gounden – Executive : Renal International, AICC;

1.7.6 W.J. Riback – Category Executive : Specialised Therapies, AICC,

and includes an individual reference to one or more of them, as the context may require;

- 1.8 **"CLP"** means the Corporate Leniency Policy prepared and issued by the *Commission* as a guideline, to clarify the *Commission's* policy approach on matters falling within its jurisdiction in terms of the *Act*;
- 1.9 **"Days"** means calendar days;
- 1.10 **"Dismed"** means Dismed Criticare (Pty) Ltd;
- 1.11 **"FKSA"** means Fresenius Kabi South Africa (Pty);
- 1.12 **"Parties"** means the *Commission*, AICC and *Tiger*;
- 1.13 **"Thusanong"** means Thusanong Health Care (Pty) Ltd;
- 1.14 **"Tiger"** means Tiger Brands Limited, the 100% shareholder of Adcock Ingram Holdings Limited, which in turn is the 100% shareholder of AICC;
- 1.15 **"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.

PB MR

2.

The Complaints and Complaint Investigation

- 2.1 During 2005 the *Commission* received information regarding collusive tendering and the division of the private hospital market by *AICC* and other firms active in the South African healthcare market.
- 2.2 The *Commission* subsequently initiated and investigated complaints that:
- 2.2.1 *AICC*, *FKSA*, *Dismed* and *Thusanong* had engaged in collusive tendering in respect of the Contract RT 299 for the supply of large volume parenterals, including, irrigation solutions, administration sets and accessories to State hospitals throughout the country in contravention of section 4 of the Act;
- 2.2.2 *AICC* and *FKSA* had divided the private hospital market in contravention of section 4 of the Act.
- 2.3 During the investigations the *Commission's* inspectors interviewed representatives of the firms that were alleged to be involved in the collusive tendering and the division of markets.
- 2.4 *FKSA*, shortly after its representatives were interviewed, approached the *Commission* and applied for immunity from prosecution in terms of the *CLP* confessing its involvement in collusive tendering and market allocation. *FKSA* subsequently provided the *Commission* with detailed information about its role and the role of *AICC*, *Thusanong* and *Dismed* in the collusive tendering and market allocation and was granted conditional leniency after agreeing to assist the *Commission* in its investigations and in proceedings before the *Tribunal*.
- 2.5 The investigation established that at various stages during the period 1999 to 2007, *AICC*, *FKSA*, *Dismed* and *Thusanong* were involved in collusive tendering in contravention of section 4(1)(b)(iii) of the Act in respect of Contract RT 299, in that representatives of the firms:

- 2.5.1 Held discussions and meetings where they collaborated on their respective responses to the invitation to tender and discussed and agreed on prices prior to the submission of their respective tenders in response to invitations to tender for Contract RT 299; and
 - 2.5.2 Agreed that whenever tenders were not awarded as agreed or arranged between them, the winning firms would cede portions of their business (i.e. the business which formed part of Contract RT 299) to one or other of the losing firm(s) in certain proportions.
- 2.6 The investigation also established that during the period 2001 to 2002 AICC and FKSA had divided the private hospital market in contravention of section 4(1)(b)(ii) of the Act by allocating customers and specific types of goods or services among themselves.

3.

The Complaint Referral

- 3.1 The *Commission* referred the above complaints to the *Tribunal* on 11 February 2008.
- 3.2 *Tiger*, after receiving the Complaint Referral conducted its own investigation of the allegations made against its subsidiary AICC. It thereafter, in its capacity as the ultimate holding company of AICC, approached the *Commission* with a view to settling the matter in consequence whereof the *Consent Agreement* was concluded.

4.

Statement of Conduct

- 4.1 AICC admits that it has contravened sections 4(1)(b)(ii) and (iii) of the Act in that:
- 4.1.1 AICC and its competitors were involved in collusive tendering in respect of Contract RT 299; and
 - 4.1.2 AICC and FKSA divided the private hospital market by allocating customers and specific types of goods or services among themselves.



- 4.2 The *Corporate Senior Management* of AICC confirm that, to the best of their knowledge and belief, there are no further contraventions of section 4 of the Act, which were and/or might have been engaged in by AICC.

5.

Agreement Concerning Future Conduct

- 5.1 AICC agrees to cooperate with the *Commission* in relation to the prosecution of any other parties under the Complaint Referral.
- 5.2 AICC agrees:
- 5.3.1 To circulate a statement summarising the contents of this consent order to all employees above Paterson Grade D employed within AICC within 30 days from the date of this consent order.
- 5.3.2 To develop and implement a compliance programme with corporate governance designed to ensure that employees, management and directors within AICC do not engage in any contraventions of section 4(1)(b) of the Act, a copy of which programme shall be submitted to the *Commission* within 60 days of the date of confirmation of this consent order by the *Tribunal*.

6.

Tiger Brands Limited

- 6.1 No relief was sought by the *Commission* against *Tiger* in the complaint referral. *Tiger* admits no wrongdoing in respect thereof.
- 6.2 Notwithstanding the provisions of clause 6.1, *Tiger* hereby undertakes, in respect of all its businesses throughout South Africa, to take the steps set out below, with a view to preventing the employees, management and directors of firms within the *Tiger* group, from engaging in any conduct in contravention of section 4(1)(b) of the Act.
- 6.3 *Tiger* agrees:



- 5.3.1 To circulate a statement summarising the contents of this consent order to all employees above Paterson Grade D employed within the *Tiger* group within 30 days from the date of this consent order.
- 5.3.2 To, nationally, develop and implement a compliance programme with corporate governance designed to ensure that employees, management and directors within the *Tiger* group do not engage in any contraventions of section 4(1)(b) of the *Act*, a copy of which programme shall be submitted to the *Commission* within 60 days of the date of confirmation of this consent order by the *Tribunal*.
- 6.4 The Chief Executive Officer of *Tiger* confirms that, to the best of his knowledge and belief, there are no further contraventions of section 4 of the *Act*, which were and/or might have been engaged in by firms within the *Tiger* group of companies.

7.

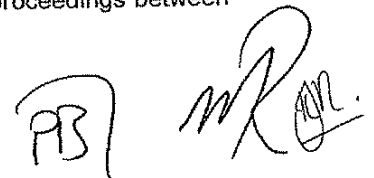
Administrative Penalty

- 7.1 In terms of section 58(1)(a)(iii), 59(2) and (3) of the *Act*, *AICC* is liable for an administrative penalty.
- 7.2 An administrative penalty in the amount of 8 per cent of its turnover from all operations for the financial year ending in 2007 is hereby imposed on *AICC*. This amounts to R53 502 800.
- 7.3 The penalty amount will be paid by *AICC* to the *Commission* within 30 days of the date of confirmation of this consent order by the *Tribunal*.

8.

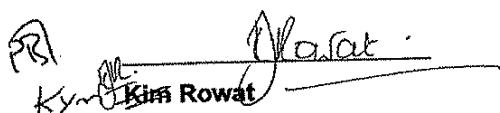
Full and Final Resolution

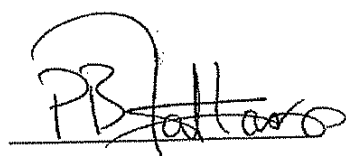
8. This *Consent Agreement* is entered into in full and final settlement and upon confirmation as a Consent Order by the *Tribunal*, concludes all proceedings between



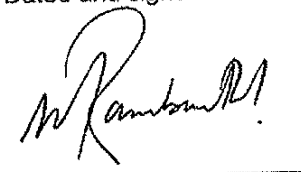
the *Commission*, *AICC* and *Tiger* relating to any alleged contravention by *AICC* of section 4(1)(b) of the *Act* that is the subject of the *Commission's* investigations under case numbers 2005Jan1404 and 2007Nov3376 .

Dated and signed in Johannesburg on this the 9th day of May 2008.


Kim Rowat
Director-authorised signatory
Adcock Ingram Critical Care (Pty) Ltd


Peter Matlare
Director-authorised signatory
Tiger Brands Limited

Dated and signed in Pretoria on this the 9th day of May 2008.


Shan Ramburuth
The Commissioner
Competition Commission