

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case no.: 90/CR/Dec02**

In the application of:

**The Competition Commission**

**Applicant**

**And**

**Italtile Franchising  
Italtile Ceramics  
Italtile Limited**

**First Respondent  
Second Respondent  
Third Respondent**

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**ORDER**

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In terms of section 49(D) of the Competition Act, the Tribunal confirms the agreement annexed hereto, as annexure "A" as a consent order, subject to an amendment to paragraph 7.1 of the agreement, which with the consent of the parties is substituted by the paragraph set out below:

*" 7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, the respondents have agreed to jointly and severally, pay an administrative penalty in the amount of R2 000 000,00 (TWO MILLION RANDS), which amount does not exceed 10% of the respondents' annual turnover."*

  
D. Lewis

20 September 2005  
Date

Concurring: N. Manoim, M. Mokuena

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**

**HELD AT PRETORIA**

**CT Case No:**

**CC Case No: 2001SEP1**

**In the matter between:**

**THE COMPETITION COMMISSION**

**APPLICANT**

**and**

**ITALTILE FRANCHISING  
ITALTILE CERAMICS LTD  
ITALTILE LTD**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

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**Consent Order, regarding violation of section 5(2) and of the Competition  
Act, 1998 (Act No. 89 of 1998), as amended**

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The Applicant and the Respondents in the above matter hereby agree to conclude 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 Order* the following definitions shall apply:

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

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- 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, Cnr Meitjie & Esselen Street, Pretoria, Gauteng.
- 1.3 “*Competition 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, Cnr Meitjie & Esselen Street, Pretoria, Gauteng.
- 1.4 “*Complainants*” means Mohammed Rafique Rahim, an adult male businessperson and Ceramic Floor Tiling Botswana (Pty) Ltd, a company incorporated and registered in Botswana, which carries business from Plot 14457/7, Gaborone Botswana.
- 1.5 “*Complaint*” means the complaint lodged with the *Commission* by the Complainants in terms of section 49B of the *Act* and filed with the *Commission* under case number 2001Sep1.
- 1.6 “*Consent Order*” means this agreement in its duly signed form by both the *Commission* and the *Respondent*.
- 1.7 “*Days*” means calendar days.
- 1.8 “*First Respondent*” means Italtile Franchising a company duly incorporated and registered in terms of the company laws of South Africa, which carries on business at the Italtile Center Building, corner of William Nicol Drive and Peter Place, Bryston, Sandton

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1.9 “*Second Respondent*” means Italtile Ceramics Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, which carries on business at Arbeid Street Strijdompark, Gauteng.

1.10 “*Third Respondent*” means Italtile Ltd, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, which carries on business at the Italtile Centre Building, corner of William Nicol Drive and Peter Place, Bryanston, Sandton.

## 2. Background

The Complainants lodged a complaint with the Commission in terms of section 49B of the *Act* on 3 September 2001. In the complaint submission, the Complainants made the following allegations:

2.1 The Complainants allege that the respondents divide markets by allocating territories to franchisees, thus guaranteeing no competition amongst franchisees. The respondents ensure that franchisees do not operate within a certain radius of each other;

2.2 The respondents fix prices and trading conditions for the franchisees and engage in collusive tendering;

2.3 The respondents are engaged in price discrimination against franchisees who do not agree or abide by the fixed terms of their franchise agreements and thereby compel these franchisees to accept the fixed terms;

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- 2.4 The respondents are engaged in resale price maintenance in that they control prices at which franchisees sell their product. Franchisees are strictly prohibited from discounting prices at which they sell their products, and require permission from the respondents to discount prices;
- 2.5 The respondents being dominant firms, engage in exclusionary conduct by forcing franchisees to deal or not to deal with particular suppliers; and
- 2.6 The respondents being dominant firms, engage in exclusionary conduct in that they compel franchisees to accept conditions unrelated to the object of their franchise agreements.

### 3. **The Investigation**

Following the submission of the complaint by the Complainants, the Commission undertook an investigation into the alleged prohibited practices of the respondents.

- 3.1 The investigative team obtained documentation setting out the respondents' strict enforcement of their pricing policy. The Commission considered this documentation to be a prima facie indication of minimum resale price maintenance by the respondents.
- 3.2 Subsequently, the Commission embarked on a field investigation during which interviews were conducted and further documentation was collected.
- 3.3 The Commission concluded that:

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3.3.1 The respondents are a group which compel franchisees to charge prices that are set centrally by the group;

3.3.2 Deviation from the centrally set prices, under certain circumstances, requires that franchisees obtain prior approval from the respondents;

3.3.3 The respondents, through their officials threatened to terminate franchises that do not sell products at the set prices;

3.3.4 The prices set centrally in the group are, therefore, mandatory.

3.4. The Commission decided not to refer all the particulars of the complaint as submitted by the Complainants as it concluded that there was insufficient substance to warrant referral in most instances. It refers only the particulars of the complaint that relate to the contravention of section 5(2) of the Act.

#### **4. Relevant provisions of the Act**

##### **Section 5(2) and (3)**

4.1 Section 5(2) prohibits the practice of minimum resale price maintenance. Section 5(2) and (3) of the Act states:

*"5. Restrictive Vertical Practices Prohibited:*

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2) *The practice of resale price maintenance is prohibited.*

3) *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*

(a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*

(b) *if the product has its price stated on it, the words “recommended price” appear next to the stated price.”*

4.1.1 In order to sustain a charge of minimum resale price maintenance against the respondents in this case the following elements must be proved:

4.1.1.1 an understanding within the industry regarding the prices at which Italtile’s franchises would on-sell the products concerned;

4.1.1.2 the respondents enforce this understanding by imposing or threatening a sanction against dealers who do not comply with their determined prices;

## **5. Commission’s findings**

The Commission concluded that:

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- 5.1 the conduct referred to in paragraphs 3.3 1 – 3.3.4 falls within the ambit of section 5(2) of the Act in that it amounts to the minimum resale price maintenance.
- 5.2 the respondents' conduct was therefore in contravention of the provisions of section 5(2), which prohibits the practice of minimum resale price maintenance.

## **6. Agreement concerning conduct**

The Commission and the Respondents agree that the Respondents shall:

- 6.1 cease and desist from engaging in the alleged anti-competitive conduct of resale price maintenance.
- 6.2 take prompt and effective action in ensuring that the franchisees terminate their part in implementing the alleged anti-competitive conduct as set out in paragraph 5.
- 6.3 the Respondents will not itself or through any officer or employee of the respondents or any person authorized to act on behalf of the respondents notify to distributors, or otherwise publish, in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of any of the Respondents products, other than as expressly provided for in section 5(3) of the Act;
- 6.4 refrain in the future from engaging in any unlawful conduct in contravention of the Act in its dealings with its franchisees;

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- 6.5 circulate to all its franchisees within one month from the date of this consent order a statement conveying that a settlement has been reached with the Commission in terms of which Italtile has undertaken to institute a compliance programme to ensure compliance by Italtile and all its employees with the provisions of the Competition Act, and advising franchisees:
- 6.5.1 that they are free to sell, advertise and display for sale of goods supplied by the respondents at whatever price they may choose;
- 6.5.2 that the respondents do not in any way condone and positively discourage agreements between franchisees as to the prices to be charged or quoted by the franchisees for goods supplied by the respondents;
- 6.6 provide copies of this consent order to each of its present directors and provide a copy to any future director appointed during the five year period following the order, on his or her appointment and in each case draw the attention of the director to the contents of this consent order;
- 6.7 institute, within six months from the date of this order, a compliance programme designed to ensure that employees and franchisees are informed about the respondents' obligations under competition law and the existence and substance of this consent order;
- 6.8 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; and

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6.9 compliance programme to be submitted to the Commission. Such compliance programme will include, but not be limited to, establishing a mechanism for franchisees & consumers to report incidents where any minimum discounts are imposed.

## 7. **Administrative penalty**

7.1 In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, the respondents have agreed to pay an administrative penalty in the amount of **R2 000 000, 00 (TWO MILLION RANDS)**, which amount does not exceed 10% of the respondents' annual turnover.

7.2 The administrative penalty will be paid not later than thirty (30) days after the confirmation of this Consent Order by the Tribunal. The said amount is payable to the Commission, whose banking details are as follows:

Bank: ABSA

Name of Account: The Competition Commission Fees

Branch Name: Pretoria

Branch Code: 323345

Account Number: 4050778576

7.3 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 Settlement**

This Agreement concludes proceedings between the Competition

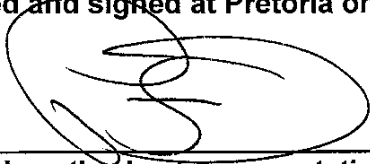
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Commission and the respondents before the Tribunal under case  
Number 90/CRDEC02.

Dated and signed at Pretoria on this

the day of

2005.



A duly authorised representative  
of the respondents

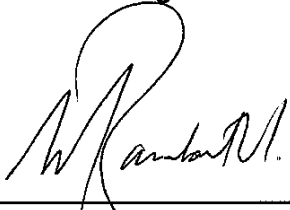
<sup>74</sup>  
8 September 2005

Date

Dated and signed at Pretoria on this

the day of

2005.



The Commissioner  
Competition Commission

05/09/05  
Date