



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 609

2022

NOTICE IN TERMS OF SECTION 41 OF THE COMPETITION ACT, 2003

The Namibian Competition Commission, in terms of Section 41 of the Competition Act, 2003 (Act No. 2 of 2003), herewith gives notice that it intends to institute proceedings in Court in terms of section 38 of the Competition Act, against Maxes Office Machines (Pty) Ltd and RISO Africa (Pty) Ltd.

Section 38 of the Competition Act mandates the Namibian Competition Commission after consideration of any written representations made in terms of section 36 or any matters raised at a conference held in accordance with section 37, may institute proceedings in the Court against the undertaking or undertakings concerned for an order:

- (a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition;
- (b) restraining the undertaking or undertakings from engaging in that conduct;
- (c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;

- (d) imposing a pecuniary penalty; or
- (e) granting any other appropriate relief.

**V. NDALIKOKULE
CHIEF EXECUTIVE OFFICER AND
SECRETARY TO THE COMMISSION**

NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38

OSHANA PRINTING SHOP CC // MAXES OFFICE MACHINES (PTY) LTD
& RISO AFRICA (PTY) LTD
(CASE NUMBER: 2017APR0004COMP)

COMPETITION ACT, 2003
(Section 41, Rule 18(1))

1. The Namibian Competition Commission (“the Commission”) on 23 August 2017 initiated an investigation against Maxes Office Machines (Pty) Ltd & Riso Africa (Pty) Ltd. The Commission investigated the matter and gave notice of its proposed decision on 1 October 2019.
2. **The Commission gives notice that it intends to take the following action under section 38 of the Competition Act:**
 - 2.1 Following the investigation and consideration of all representations, including the written representations made in terms of section 36 and section 38 of the Competition Act, the Commission has resolved to institute proceedings in Court against the Respondents for an order:
 - 2.1.1 Declaring that the Respondents have contravened section 23(1) read with section 23(2)(b) and section 23(3)(e) of the Competition Act;
 - 2.1.2 Ordering the Respondents to cease with the conduct;
 - 2.1.3 Restraining the Respondents from engaging in the conduct in future;
 - 2.1.4 Seeking an appropriate pecuniary penalty against the Respondents in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors stated in section 53(3) of the Competition Act;
 - 2.1.5 Ordering that the Respondents to pay the costs of the proceedings; and
 - 2.1.6 Such further and/or alternative relief as the Court may consider appropriate;

Against:

The following undertakings/association of undertakings, are listed as the Respondents against which relief will be sought in terms of section 38:

- 2.1.7 **Maxes Office Machines (Pty) Ltd (“Maxes”)**, a company duly registered and incorporated in terms of the laws of the Republic of Namibia, with its principal place of business at 47 Marconi Street, Southern Industrial Area Windhoek, Namibia, and;

- 2.1.8 **RISO Africa (Pty) Ltd (“Riso Africa”)**, was established in 1994 as a representative of Riso Kagaku, headquartered in Japan. Riso Africa is a company duly registered and incorporated in terms of the laws of the Republic of South Africa, with its principal place of business at 154 Lechwe Avenue, Corporate Park South, Midrand 1683, Johannesburg, South Africa.

Both parties are jointly referred to as the “**Respondents**”.

3. **The nature of the conduct that is the subject-matter of the action is that:**

- 3.1 As part of its business activities, Maxes purchases office automation equipment from its suppliers and sells them to end-users and thereafter renders after-sale services and support to its clients. The office automation equipment supplied by Maxes includes high volume digital printing machines and duplicating machines. Riso Africa on the other hand manufactures and supplies two types of office printing equipment namely, the Riso Digital Duplicators and Riso ComColour Inkjet Printers.
- 3.2 As a result of their nature of business, the Respondents have entered into an exclusive distributorship agreement which has been in existence since 1996 in potential contravention of section 23(1) read with section 23(2)(b), 23(3)(e) of the Act (limiting or restricting market outlets or access).
- 3.3 The exclusive distributorship agreement designated Maxes as the sole distributor, service provider and retailer of Riso Africa’s office printing equipment, associated products and services in Namibia thus preventing any other party or entity to enter that market.
- 3.4 The Commission’s investigation, submissions received, and evidence uncovered indicates that the Respondents have entered into an exclusive agreement with each other that afforded Maxes exclusive rights in Namibia over the distribution, retailing and servicing of Riso digital duplicating machines in the Namibian market.
- 3.5 The Commission further found that the agreement between the Respondents amounts to a restrictive agreement between parties in a vertical relationship which prevents or substantially lessens competition by means of limiting market access or outlets as envisaged in terms of section 23(1) read with section 23(2)(b) and 23(3) (e) of the Act.
- 3.5.1 The Respondents denied that the exclusive distribution agreement is harmful to competition and advocated that, it is in fact pro-competitive;
- 3.5.2 The Respondent further indicated that, the relevant market is incorrectly defined by the Commission as Riso digital duplicators does not equate to a market on its own;
- 3.5.3 The exclusive distribution agreement does not foreclose the market for the distribution of Riso digital duplicators as the Complainant was afforded an opportunity to approach Maxes should it be willing to become a Riso related products’ dealer in Namibia, which it has refused;
- 3.5.4 There is no consumer harm that is arising from the exclusive distribution agreement between the Respondents;

- 3.5.5 The exclusive distribution agreement has been terminated on 14 February 2018, thus the Commission is not competent to seek relief from court into a conduct that has already lapsed.
- 3.6 The Respondents furthermore argued that, the Complainant and any other distributor can equally switch to the distribution of other digital duplicators present in the market;
- 3.7 The exclusive distribution agreement between the Respondents has not eliminated inter-brand competition in the market which is more of a competition concern should it have been prevented or lessened;
- 3.8 Even if the Complainant was to be afforded an opportunity to become a Riso Africa's second distributor in Namibia, it does not have the necessary skills and capacity to carry out the distribution business because, its business model is that of commercial printing.
- 3.9 Based on the grounds set out further down below, the Commission has not been persuaded by the above claims.
- 3.10 The Commission's investigation has in fact found that:

3.10.1 The market has been correctly defined

- 3.10.1.1 The investigation identified the product market as the distribution, servicing and maintenance of digital duplicators; therefore, all other digital duplicators present in the market are included and not only Riso digital duplicators as the Respondents have argued.

3.10.2 Evidence of Engaging in the Conduct:

- 3.10.2.1 The Respondents have not denied engaging into the exclusive distribution agreement and the Commission is also in possession of two pieces of evidence of the exclusive distribution agreement dated 11 November 1996 and 3 June 1997 respectively.

3.10.3 The exclusive distribution agreement between the Respondents is anti-competitive

- 3.10.3.1 The exclusive distribution agreement is inherently harmful to competition in the relevant market as well as to consumer welfare in the sense that Maxes can increase its prices however it wishes, consumers cannot cross-shop between various Riso digital duplicator distributors, due to the fact that there is only one distributor, and this could give rise to turnaround time in the provisioning of after-sale services.
- 3.10.3.2 Additional distributors of Riso digital duplicators could increase geographic representation for such a widely used product and this could in turn reduce transactional costs, eliminate the possibility of overpricing and overcharging on after sales services (maintenance and repairs), etc. The Commission has evidence which shows that, Maxes's geographical representation is limited even in areas in which it has branches in Namibia as a result transactional costs are high, which could be alleviated through additional distributors.

- 3.10.3.3 Maxes has benefited from a lack of competition. The exclusive distributorship agreement entered into by Maxes and Riso Africa afforded Maxes an opportunity to become extremely dominant in the relevant market despite the presence of inter-brand competition thus Maxes could easily abuse that dominant position in the relevant market. The evidence before the Commission indicates that, Maxes has a market share of 79% of the entire market for the distribution of digital duplicators in Namibia while the rest of the distributors for Duplo, Ricoh and Nashua digital duplicators only has 21% market share over the period of 5 years up to 2020.
- 3.10.3.4 Other digital duplicators (Duplo, Ricoh and Nashua) present in the market do not serve as a competitive restraint on Riso duplicators.
- 3.10.3.5 There is no intra-brand competition in the distribution of Riso digital duplicators in the relevant market considered as a result of the exclusive distributorship agreement that exist between the Respondents. Maxes thus has a complete monopoly over the distribution of the entire range of Riso products.
- 3.10.3.6 Duplo, Ricoh and Nashua digital duplicators are not distributed by means of exclusive distributorship agreements thus no barriers to entry exist. There is intra-brand competition within the distribution of Duplo, Ricoh and Nashua digital duplicators, making this market a perfectly competitive in comparison to the distribution of Riso digital duplicators which is considered a monopoly. Furthermore, the distributors of non-Riso digital duplicators affords Micro, Small and Medium Enterprises (“MSMEs”) an opportunity to also distribute these digital duplicators in the relevant market.
- 3.10.3.7 Evidence before the Commission further indicates that, Riso digital duplicators are priced higher than its competing digital duplicators as high as 5% more. This shows that, the Riso digital duplicators has a strong presence in the relevant market and it is considered a superior digital duplicator as compared to its rival products which is attributed to by non-pricing factors such as consumer preference and reliability.
- 3.10.4 **The exclusive distribution agreement forecloses or excludes potential distributors from distributing Riso digital duplicators**
- 3.10.4.1 Evidence before the Commission shows that, even the Complainant was denied an opportunity to distribute the Riso digital duplicators in 2017. Further evidence shows that, a potential distributor entered the market with hopes of distributing as part of its products range, the Riso related products and that potential distributors couldn’t succeed because of the existence of the exclusive distribution agreement between the Respondents. Another distributor has once distributed a Riso digital duplicator in the relevant market in 2011 and that distributor was immediately stopped by the Respondents after having learned of that sale.

3.10.4.2 There exists higher barrier to entry or non-existent entry of any potential distributor that may wish to distribute Riso digital duplicators in the relevant market.

3.10.5 Maxes supposedly terminated the exclusive distribution agreement with Riso Africa on 14 February 2018

3.10.5.1 The Commission is in possession of the termination letter addressed to Riso Africa dated 14 February 2018. However, Respondents have not satisfied the Commission that, such termination has been accepted by Riso Africa. To that end, Riso Africa has not endeavored to either publish on media or its website that, there is no longer an exclusive distribution agreement between itself and Maxes for the distribution of Riso related products in Namibia nor has Riso Africa communicated to the Complainant indicating same. Furthermore, Riso Africa has not communicated same to the Commission.

3.10.5.2 Information before the Commission further suggests that the exclusive distribution agreement between the Respondents still continues in practice.

3.10.6 The Commission is competent in seeking relief from court

3.10.6.1 The mere fact that Maxes terminated the exclusive distribution agreement with Riso Africa on 14 February 2018 does not preclude the Commission from seeking relief from court. Maxes terminated the exclusive distribution agreement almost 6 months into the Commission's investigation and the Commission as per section 57 of the Competition Act is empowered to initiate an investigation into any conduct as long as that conduct has not ceased three (3) years prior to the initiation of the Commission's investigation.

3.10.6.2 No exemption has been sought in terms of Part III of the Competition Act in this matter.

3.10.6.3 The conduct of the Respondents therefore amounts to a decision, agreements and concerted practices to enter into an exclusive distribution agreement in contravention of section 23(1) read with section 23(2)(b) and 23(3)(e) of the Competition Act.

4. Notwithstanding the above, the Commission records that it is willing to engage with the Respondents with the object of settling the matter in terms of section 40 of the Competition Act and to avoid proceedings in terms of section 38 of the Competition Act.

P. CARLSON
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION
