



CT Case Number: 019265

27 August 2014

Fasken Martineau

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Competition Commission

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Dear All

N17 TOLL OPERATORS CONSENT ORDER PROCEEDINGS – TRIBUNAL CASE NO. 019265 – HEARD ON 20 AUGUST 2014

Having considered the submissions made by both parties during the above hearing and the response to the Tribunal's questions contained in the letter from Fasken Martineau dated 25 August 2014, the Tribunal hereby confirms the settlement agreement concluded between the Commission and N17 Toll Operators (Pty) Ltd, as per the Order delivered under the cover of this letter.

Yours Sincerely

Derrick Bowles

Case Manager

(sent electronically)

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 019265

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

THE N17 TOLL OPERATORS (PTY) LTD

Respondent

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member) and Prof I Valodia (Tribunal Member)

Heard on : 20 August 2014

Last submission : 25 August 2014

Decided on : 27 August 2014

ORDER

The Tribunal hereby confirms as an order in terms of section 58(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998) the settlement agreement reached between the Competition Commission and the Respondent, annexed hereto marked "A".



Presiding Member
Mr Norman Manoim

27 August 2014
Date

Concurring: Ms Y Carrim and Prof I Valodia

A

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

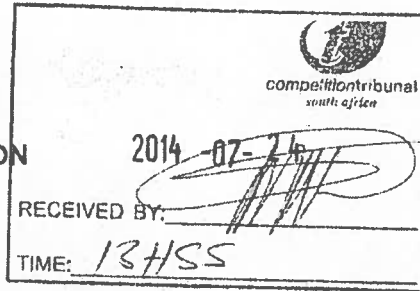
CT CASE NO: _____
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

and

N17 TOLL OPERATORS (PTY) LTD

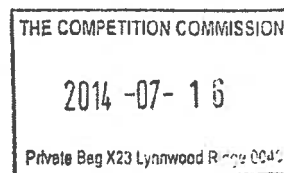


Applicant

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iii) and 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND N17 TOLL OPERATORS (PTY) LTD, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998

The Competition Commission ("Commission") and N17 Toll Operators (Pty) Ltd ("N17 Toll Operators") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act no. 89 of 1998, as amended ("the Act"), in respect of contraventions of section 4(1)(b)(iii) of the Act.



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1 DEFINITIONS

For the purposes of this consent agreement the following definitions shall apply

- 1.1 **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 **"Basil Read"** means Basil Read Holdings Limited, a public company duly incorporated in terms of the applicable laws of the Republic of South Africa with its principal place of business at the Basil Read Campus, 7 Romeo Street, Hughes, Boksburg, Gauteng, South Africa. Basil Read provides services in the construction, engineering, mining and property development sectors;
- 1.3 **"Bouygues"** means Bouygues Travaux Publics, a company incorporated under the laws of France with registration number B 407 985 308. Bouygues owns 50% share in N17 Toll Operators,
- 1.4 **"CLP"** means the Commission's Corporate Leniency Policy (Government Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 2008);
- 1.5 **"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 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;



- 1.6 “**Commissioner**” means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.7 “**Complaint**” means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Sep4641;
- 1.8 “**Concor**” means Concor Holdings (Pty) Ltd, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Concor House, 13 Church Street, Crown Mines, Johannesburg, Gauteng, South Africa. Concor is a diversified construction company providing building, civils, roads, mining, engineering, facility management services and construction materials. Concor was acquired by Murray and Roberts in 2006 and now operates as a subsidiary of the latter company;
- 1.9 “**Consent Agreement**” means this agreement duly signed and concluded between the Commission and N17 Toll Operators;
- 1.10 “**Group Five**” means Group Five Construction (Pty) Ltd, a public company incorporated under the laws of the Republic of South Africa with its principal place of business at No. 9 Country Estate Drive, Waterfall Business Estate, Jukskei View, Johannesburg, Gauteng, South Africa. Group Five provides integrated construction services focused on building, infrastructure and engineering sectors;

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- 1.11 **"Invitation"** means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act, as published on the website of the Commission on 1 February 2011;
- 1.12 **"Loser's fee"** means a fee paid by the winner of the tender to unsuccessful tenderers or losers of the tender as a compensation for the costs of tendering;
- 1.13 **"Murray and Roberts"** means Murray and Roberts Construction, a public company incorporated under the laws of the Republic of South Africa with its principal place of business at 20 Skeen Boulevard, Bedfordview, Johannesburg, Gauteng, South Africa. Murray and Roberts offers a range of engineering and contracting services that include civil and building construction, roadworks, earthworks, engineering and opencast mining;
- 1.14 **"N17 Toll Operators"** means N17 Toll Operators (Pty) Ltd, a private company incorporated under the laws of the Republic of South Africa with its principal place of business at 2nd Floor North Block, Hyde Park Office Tower, Jan Smuts Avenue, Hyde Park, Johannesburg, Gauteng, South Africa. N17 Toll Operators is owned by Bouygues with 50% share, Basil Read with 25% share and Ubambo with 25% share.
- 1.15 **"N17 project"** means the N17 Tolling and Maintenance Contract;
- 1.16 **"Non-prescribed prohibited practices"** refers to prohibited restrictive

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horizontal practices relating to the construction industry that are contemplated in section 4(1)(b) of the Act and that are on-going or had not ceased three years before the complaint was initiated, as contemplated in section 67 of the Act;

- 1.17 **"Parties"** means the Commission and N17 Toll Operators (Pty) Ltd;
- 1.18 **"Prescribed prohibited practices"** refers to prohibited restrictive horizontal practices relating to the construction industry that are contemplated in section 4(1)(b) of the Act and that ceased after 30 November 1998, but more than three years before the complaint was initiated;
- 1.19 **"Respondent"** means N17 Toll Operators (Pty) Ltd;
- 1.20 **"SANRAL"** means the South African National Roads Agency Limited, a public company incorporated under the laws of the Republic of South Africa with its principal place of business at 48 Tambotie Avenue, Val de Grace, Pretoria.
- 1.21. **"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 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.22. **"Ubambo"** means Ubambo Investment Holdings Limited, a company

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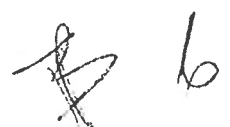
incorporated under the laws of the Republic of South Africa with registration number 1998/14976/06. Ubambo owns 25% share in N17 Toll Operators;

2 BACKGROUND

- 2.1 On 01 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated a complaint in terms of section 49B(1) of the Act under case number 2009Sep4641 into particular prohibited practices relating to conduct in construction projects, by the firms listed below.
- 2.2 The complaint concerned alleged contraventions of section 4(1)(b) of the Act as regards price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Grinaker LTA , Aveng (Africa) Ltd, Stefanutti Stocks Holdings Ltd, Group Five Ltd ("Group Five"), Murray & Roberts Limited ("Murray & Roberts"), Concor Limited ("Concor"), G. Liviero & Son Building (Pty) Ltd, Giuricich Coastal Projects (Pty) Ltd, Hochtief Construction AG, Dura Soletanche-Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Pilings CC, Rodio Geotechnics (Pty) Ltd, Diabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC, Wilson Bayly Holmes-Ovcon Ltd and other construction firms, including joint ventures.



- 2.3 Subsequent to the initiation of the complaint, the Commission received numerous applications for leniency under the CLP, which implicated several construction firms in collusive practices.
- 2.4 The Commission's investigation of the above complaint, as well as several others in the construction industry, led the Commission to believe that there was widespread collusion in the construction sector in contravention of section 4(1)(b)(iii) of the Act. Accordingly, in line with the purpose of the Act as well as the Commission's functions, the Commission decided to invite construction firms that were involved in collusive conduct to apply to engage in settlement on favourable terms. The Invitation was launched and published on the Commission's website on 1 February 2011. This was also done in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices, as well as in order to expedite finalisation of the investigations, under a fast track process.
- 2.5 The Invitation required firms to apply for settlement by disclosing all construction projects that were the subject of prescribed and non-prescribed prohibited practices. The closing date to apply for settlement in terms of the Invitation was 15 April 2011.
- 2.6 The Commission received settlement applications from 21 firms that disclosed a total number of 300 projects which were the subject of



collusive conduct. Of the 300 projects disclosed, 160 projects involved prescribed prohibited practices and 140 non-prescribed prohibited practices.

2.7 The 21 firms that responded to the Invitation implicated 25 firms which did not respond to the Invitation. Of the 21 firms, fifteen concluded consent agreements with the Commission, which agreements were confirmed as orders of the Tribunal on 22 and 23 July 2013.

2.8 The Commission thereafter continued with its investigation of the 25 firms that did not respond to the Invitation and were implicated by those that applied. N17 Toll Operators is one of the 25 implicated firms. N17 Toll Operators has agreed to settle the project it is implicated in.

3 CONDUCT IN CONTRAVENTION OF THE ACT

N17 Tolling and Maintenance Contract

Basil Read reached agreement on behalf of N17 Toll Operators with Murray & Roberts, Group Five and Concor (prior to the merger between Concor and Murray & Roberts in 2006) in respect of this two-part project on or about 2001, in that they agreed on a losers' fee arrangement. In terms of the agreement Group Five agreed to pay Murray & Roberts and Concor a losers' fee in exchange for being allocated the N1 North and N1 South Toll and Maintenance Contract.

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The parties to this agreement further agreed that N17 Toll Operators should win the N17 project, and would not therefore be paid a loser's fee. In line with the collusive arrangement, Group Five paid Murray & Roberts and Concor a loser's fee after winning the N1 North and N1 South Toll and Maintenance Contract, while N17 Toll Operators won the N17 project. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project involved the tolling and maintenance of the N1 North, N1 South, and N17, which started on or about 2002. The client for the project was SANRAL and the project was for 8 years, which expired on 31st March 2010 but was subsequently extended until 30 November 2013.

4 ADMISSION

N17 Toll Operators admits that the agreement as described in paragraph 3 above, is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. N17 Toll Operators admits that it was the beneficiary of the conduct described above.

5 CO-OPERATION

In so far as the Commission is aware, N17 Toll Operators

5.1 has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its



control, relating to the prohibited practice;

- 5.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practice;
- 5.3 has provided a written undertaking that it has immediately ceased to engage in, and will not in future engage in, any form of prohibited practice;
- 5.4 has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practice;
- 5.5 has confirmed that it has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

6 FUTURE CONDUCT

N17 Toll Operators agrees to:

- 6.1 prepare and circulate a statement summarising the content of this agreement to its employees, managers and directors within fourteen (14) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;
- 6.2 refrain from engaging in collusive tendering in contravention of section 4

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(1)(b)(iii) of the Act, and from engaging in any prohibited practice in future;

- 6.3 develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;
- 6.4 submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and
- 6.5 undertake henceforth to engage in competitive bidding.

7 ADMINISTRATIVE PENALTY

- 7.1 Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, N17 Toll Operators agrees that it is liable to pay an administrative penalty in the sum of **R424 121 [Four Hundred and Twenty Four Thousand One Hundred and Twenty One Rand]**, which penalty represents 2% of N17 Toll Operators annual turnover for the financial year ended 31 March 2013.



7.2 N17 Toll Operators shall pay the amount set out above in paragraph 7.1 to the Commission within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.

7.3 This payment shall be made into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account type: Current Account

Account number: 405 077 8576

Branch Code: 323 345

Reference: Case number 2009Sep4641 & N17 Toll Operators

7.4 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8 FULL AND FINAL SETTLEMENT



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This agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and N17 Toll Operators in respect of this conduct only.

FOR N17 TOLL OPERATORS (PTY) LTD

Dated and signed at Midrand on the 14 day of July 2014




Full Name: Edward Graham

Designation: Technical Manager

FOR THE COMMISSION

Dated and signed at PRETORIA on the 21st day of JULY 2014



TEMBINKOSI BONAKELE
COMMISSIONER