

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016949

In the matter between:

The Competition Commission

Applicant

and

Basil Read Holdings (Pty) Ltd

Respondent

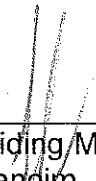
Panel: N Manoim (Presiding Member), Y Carrim
(Tribunal Member) and T Madima (Tribunal
Member)

Heard on: 18 July 2013

Decided on: 22 July 2013

Order


The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A" and the addendum thereto marked "B".



Presiding Member
N Manoim

Concurring: Y Carrim and T Madima

"A"

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No.
CC Case No. 2009Feb4279/2009Sep4641

Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

BASIL READ HOLDINGS LIMITED

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND BASIL READ HOLDINGS LIMITED ("BASIL READ"), IN REGARD TO CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998

PREAMBLE

WHEREAS the Competition Commission is empowered to, inter alia, investigate alleged contraventions of the Competition Act, 1998;

WHEREAS the Competition Commission is empowered to, inter alia, conclude consent agreements in terms of section 49D of the Competition Act, 1998;

WHEREAS the Competition Commission has invited firms in the construction industry to engage in settlement of contraventions of the Competition Act, 1998;

WHEREAS Basil Read Holdings Limited has accepted this invitation and has agreed to

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MR *TH*

settle in accordance with the terms of the invitation;

NOW THEREFORE the Competition Commission and Basil Read Holdings Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this consent agreement as an order of the Competition Tribunal in terms of section 49D as read with sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998.

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 company duly incorporated under the laws of the Republic of South Africa with its principal place of business at the Basil Read Campus, Romeo Street, Hughs, Boksburg. Basil Read operating as a multi-disciplinary construction and engineering firm focused on construction, property development, engineering and mining opportunities;
- 1.3 **"CIDB"** means the Construction Industry Development Board;
- 1.4 **"CIDB Regulations"** refers to the Construction Industry Development Regulations, 2004 (as amended) (Government Notice No. 692 of 9 June 2004, published in Government Gazette No. 26427 of 9 June 2004);
- 1.5 **"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);
- 1.6 **"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;
- 1.7 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.8 **"Complaints"** means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case numbers 2009Feb4279 and 2009Sep4641;

1.9 **"Consent agreement"** means this agreement duly signed and concluded between the Commission and Basil Read Holdings Limited;

1.10 **"Cover Price"** means generally, a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so, in order that the firm that does not wish to win the tender may submit a higher price; or alternatively a price that is provided by a firm that does not wish to win a tender to a firm that does wish to win that tender in order that the firm that wishes to win the tender may submit a lower price.

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 **"Non-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 are on-going or had not ceased three years before the complaints were initiated, as contemplated in section 67 of the Act;

1.13 **"Parties"** means the Commission and Basil Read;

1.14 **"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 complaints were initiated;

1.15 **"Respondent"** means Basil Read;

1.16 **"Settlement"** refers to settlement in terms of the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act and the procedures detailed therein;

1.17 **"Sub-sector of the construction industry"** refers to the classes of construction work defined in Schedule 3 of the CIDB Regulations, substituted by Government Notice No. 8986 of 14 November 2008, published in Government Gazette No. 31603 of 14 November 2008; and

1.18 **"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.

2. The Complaint

2.1 On 10 February 2009 the Commission initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in the construction of the stadiums for the 2010 FIFA Soccer World Cup against Grinaker-LTA (the construction operating business unit of Aveng), Group Five Limited, Basil Read Holdings Limited, WBHO Construction (Pty) Ltd, Murray & Roberts Limited, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv llc and Bouygues Construction SA.

2.2 In addition, 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 into particular prohibited practices relating to conduct in construction projects, by the firms listed below. 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, Murray & Roberts, Concor Ltd, 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.

3. The Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act

3.1 The Commission's investigation of the Complaints, as well as several other of the Commission's investigations in the construction industry, led the Commission to believe that there was widespread collusion in contravention of section 4(1)(b)(iii) of the Act in the construction industry.

3.2 Section 4(1)(b) provides-

"4. Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if -

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices :

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering."

3.3 The collusive conduct engaged in, in the context of the Invitation and this Consent Agreement, was collusive tendering or "bid-rigging". Collusive tendering involves particular conduct by firms whereby as competitors they collude regarding a tender resulting in the tender process being distorted. The bid prices and the bid submissions by these competitors as well as the outcome of the tender process is not the result of competition on the merits. "Cover pricing" in this context occurs when conspiring firms agree that one or more of them will submit a bid that is not intended to win the contract. The agreement is reached in such a way that among the colluding firms, one firm wishes to win the tender and the others agree to submit non-competitive bids with prices that would be higher

than the bid of the designated winner, or the price will be too high to be accepted, or the bid contains special terms that are known to be unacceptable to the client. Collusive tendering therefore applies to agreements or concerted practices which have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa.

- 3.4 In terms of section 2 of the Act, two of the key objects of the Act are to promote the efficiency, adaptability and development of the economy, and to provide consumers with competitive prices and product choices. Section 217 of the Constitution, 1996 calls for a procurement or tender system which is fair, equitable, transparent, competitive and cost-effective.
- 3.5 In addition, the Commission is required in terms of section 21(1) of the Act, *inter alia*, to implement measures to increase market transparency, to investigate and evaluate alleged contraventions of Chapter 2 of the Act, and to negotiate and conclude consent agreements in terms of section 49D for confirmation as an order of the Competition Tribunal in terms of section 58(1)(b) of the Act.
- 3.6 Therefore, in the interest of transparency, efficiency, development of the construction industry, the provision of competitive prices, and a cost-effective, comprehensive and speedy resolution of the investigations referred to above, the Commission decided to fast track these investigations and their resolution by inviting firms that were involved in collusive conduct, namely restrictive horizontal practices in the construction industry, to apply to engage in settlement on the terms set out in the Invitation.
- 3.7 On 1 February 2011 the Commission issued a media release about the Invitation and published same on its website. In the Invitation, hereto attached and marked as **Annexure A**, the Commission offered firms the opportunity to settle alleged contraventions of the Act, if they would:

3.7.1 submit an application in terms of PART 2 of the Invitation;

3.7.2 agree to pay an administrative penalty or penalties determined by the Commission as envisaged in paragraph 10.2 read with paragraphs 19-28 of the Invitation; and

3.7.3 comply with the requirements of the settlement process as set out in PART 1 and PART 3 of the Invitation.

3.8 Applying firms were required to *inter alia* provide the Commission with truthful and timely disclosure of information and documents relating to the prohibited practices and to provide full and expeditious co-operation to the Commission concerning the prohibited practices.

3.9 An applying firm could request the Commission to consider its application in terms of the Invitation as an application for a marker or as an application for immunity under the CLP. Firms could also apply for a marker or for immunity under the CLP before making an application in terms of the Invitation.

3.10 The deadline to apply for a settlement in terms of the Invitation was 12h00 on Friday 15 April 2011.

4. Applications by Basil Read

4.1 On 15 April 2012 Basil Read applied for leniency and settlement in terms of the Invitation.

4.2 Basil Read applied for and disclosed ten (10) prohibited practices.

4.3 Of these, eight (8) are non-prescribed prohibited practices and two (2) are prescribed prohibited practices. Basil Read was first to apply for two (2) non-prescribed prohibited practices for Conditional Immunity in terms of the CLP.

4.4 Furthermore Basil Read is implicated in one (1) non-prescribed prohibited practice which it did not disclose. Basil Read has agreed to settle this prohibited practice.

4.5 The seven (7) [i.e. the six (6) (8-less 2) referred to in para 4.3 and the one (1) referred to in para 4.4) prohibited practices or contraventions by Basil Read of section 4(1)(b)(iii) of the Act which are the subject of this Consent Agreement are set out below. The prohibited practices (meetings and projects) which Basil Read

has been found to have contravened the Act, fall under the Civil Engineering sub-sector.

5. Disclosed Projects

5.1 Bayhead Road Extension Khangela Bridge Project (Tender No. 1R-1010)

Basil Read in joint venture with Stefanutti reached agreement with Group Five Ltd, on or about September 2006, in that they agreed that Group Five should submit a cover price in respect of the Bayhead Road Extension Khangela Bridge project to ensure that the joint venture between Basil Read and Stefanutti is awarded the tender. The Basil Read/Stefanutti joint venture further agreed with Group Five that they will share the profit for the project. In order to implement the profit sharing agreement, the Basil Read/Stefanutti joint venture sub-contracted portion of the project to Group Five. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The Basil Read/Stefanutti joint venture was awarded the tender. This project was for the construction of Khangela Bridge and extension of Bayhead road in Durban, for the Ethekwini Municipality. The project was completed in January 2010.

5.2 Civil works for Tati Activox Project (Tender No.H324250-CC002 & CC004)

Basil Read reached an agreement with the Grinaker-LTA/ Stefanutti joint venture on or about 22 June 2007 in respect of the Civil Works for the Tati Activox tender. In terms of the agreement, Basil Read agreed to provide a cover price to the Grinaker/Stefanutti joint venture in order for the Grinaker/Stefanutti joint venture to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b) (iii) of the Act. The project was awarded to Grinaker/Stefanutti joint venture in accordance with the cover price arrangement. This project was for civil works at Tati Activox Project near Francistown in Botswana. The client for the project was Botswana Metal Refinery (Proprietary) Limited ("BMR"). The project was completed in September 2008.

5.3 N1 Section 16 Glen Lyon/ Zandkraal (Tender No. NRAN001-156-2007/1)

Basil Read reached an agreement with WBHO and Raubex on or about 2006/2007 in respect of the N1 Section 15 Glen Lyon/ Zandkraal tender. In terms of the agreement Raubex and WBHO agreed to inflate their bid prices in order to enable Basil Read to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b) (iii) of the Act. The tender was awarded to Basil Read. The project was for upgrading of section 16 of the N1 highway between Glen Lyon and Zandkraal. The client was the South African National Road Agency Limited (SANRAL). The tender was completed in September 2009.

5.4 N1 Section 15 and 16 Glen Lyon/ Zandkraal (Tender No. N001-156-2007/1)

Basil Read reached an agreement with WBHO and Raubex on or about 2006/2007 in respect of the N1 Section 15 and 16 Glen Lyon/ Zandkraal tender. In terms of the agreement Basil Read and WBHO agreed to inflate their bid prices in order to enable Raubex to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b) (iii) of the Act. The tender was awarded to Raubex in accordance with the cover price arrangement. The project was for upgrading of section 15 and 16 of the N1 highway between Glen Lyon and Zandkraal. The client was SANRAL. The project was completed on 15 November 2009.

5.5 R40 Barberton Reconstruction Project (Tender No. NRAN040-020-2006/1)

Basil Read reached an agreement with WBHO and Raubex on or about 2006/2007 in respect of the R40 Barberton Reconstruction tender. In terms of the agreement Basil Read and Raubex agreed to inflate their bid prices in order to enable WBHO to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b) (iii) of the Act. The tender was awarded to WBHO in accordance with the arrangement. The project relates to the reconstruction of the R40 Section 2 between Hilltop and Barberton. The client for the project was SANRAL. The project was completed on 10 June 2009.

5.6. 2006 Road Contractors Meetings

Basil Read reached an agreement with Concor, Haw & Inglis, Grinaker LTA, and Raubex on or about 2006 at the Road Contractors Meetings. In terms of the agreement, the firms that attended the meetings agreed to allocate tenders for the construction of roads. The firms further agreed that firms which were not interested in winning a tender or were not allocated a project would submit cover bids to cover those that were interested in winning a particular tender. This conduct is collusive tendering in contravention of section 4(1)(b) (iii) of the Act.

6. Non-disclosed Projects

Berg River Dam (Tender No: TCTAB2020)

- Basil Read, which was in a joint venture agreement with Ceccon (Pty) Limited ("Ceccon") & Oderbrecht (Pty) Ltd ("Oderbrecht") ("the BCR Joint Venture") reached an agreement in respect of the Berg River Dam project on or about 29 March 2004 with competitors in two other joint ventures, namely,
 - the HCI Berg River Contractors Joint Venture consisting of Hochtief Solutions AG ("Hochtief"), Concor Holdings (Pty) Limited ("Concor") and Idama Building Contractors and;
 - the Berg River Dam Joint Venture ("BRP JV") consisting of Grinaker-LTA, Group Five, WBHO and Western Cape Empowerment.

In terms of the agreement, the three joint ventures agreed on a losers' fee in terms of which the winning joint venture would pay the losing joint ventures a losers' fee. The tender was awarded to the joint venture of Grinaker-LTA/ Group Five/ WBHO/ and Western Cape empowerment. However, no losers' fee was paid by the winning joint venture to the losing joint ventures. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This tender was for the construction of a dam at the Berg River. The project was completed on 19 September 2009. The client was the Trans Caledon Channel Authority.

7. Admission

Basil Read admits that it entered into the agreements detailed in paragraphs 5.1 to 5.6 and 6 above with its competitors in contravention of section 4(1)(b) (iii) of the Act.

8. Co-operation

In so far as the Commission is aware, and in compliance with the requirements as set out in the Invitation, Basil Read:

8.1 has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its control, relating to the prohibited practices;

8.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practices;

8.3 has provided a written undertaking that it has immediately ceased to engage in, and will not in the future engage in, any form of prohibited practice;

8.4 has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices;

8.5 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.

9. Agreement Concerning Future Conduct

9.1 In compliance with the requirements as set out in the Invitation, Basil Read agrees and undertakes to provide the Commission with full and expeditious co-operation from the time that this Consent Agreement is concluded until the subsequent proceedings in the Competition Tribunal or the Competition Appeal Court are completed. This includes, but is not limited to:

9.1.1 to the extent that it is in existence and has not yet been provided,

providing (further) evidence, written or otherwise, which is in its possession or under its control, concerning the contraventions contained in this Consent Agreement;

9.1.2 availing its employees and former employees to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement.

9.2 Basil Read shall develop, implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the monitoring and detection of any contravention of the Act.

9.3 Basil Read shall 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 Competition Tribunal.

9.4 Basil Read shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Basil Read within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

9.5 Basil Read will not in the future engage in any form of prohibited conduct and will not engage in collusive tendering which will distort the outcome of tender processes but undertakes henceforth to engage in competitive bidding.

10. Administrative Penalty

10.1 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, and as envisaged in paragraph 10.2 read with paragraphs 19-28 of the Invitation, Basil Read accepts that it is liable to pay an administrative penalty ("penalty").

10.2 According to the Invitation, the level of the penalty is to be set on the basis of a percentage of the annual turnover of Basil Read in the relevant sub-sector in the Republic and its exports from the Republic for the financial year preceding the

date of the Invitation.

10.3 The prohibited practices (meetings and projects) which Basil Read has been found to have contravened the Act, fall under the Civil Engineering sub-sector.

10.4 Accordingly, Basil Read is liable for and has agreed to pay an administrative penalty in the sum of R94 936 248 (Ninety Four Million, nine hundred and thirty six thousand, two hundred and fourty eight rand) which penalty is calculated in accordance with the Invitation.

11. Terms of payment

11.1 Basil Read shall pay the amount set out above in paragraph 10.4 to the Commission in two payments; the first payment of R 47 468 124 within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal and a second payment of R 47 468 124 exactly six months after the first payment.

11.2 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 number: 4050778576

Account type: Current Account

Branch Code: 323 345

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


A handwritten signature, possibly 'MR', is written over a circular official stamp. The stamp contains some illegible text and a central emblem.

12. Full and Final Settlement

This agreement is entered into in full and final settlement of the specific conduct listed in paragraphs 5 and 6 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Basil Read in respect of this conduct only.

Dated and signed at Pretoria on the 18th day of June 2013.

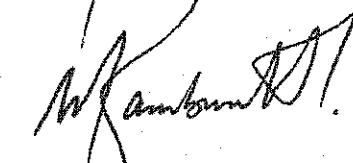
For Basil Read



M. Heyns (CEO)
[FILL IN NAME AND POSITION OF PERSON THAT IS SIGNING]

Dated and signed at Pretoria on the 21 day of June 2013.

For the Commission



Shan Ramburuth
Commissioner

"B"

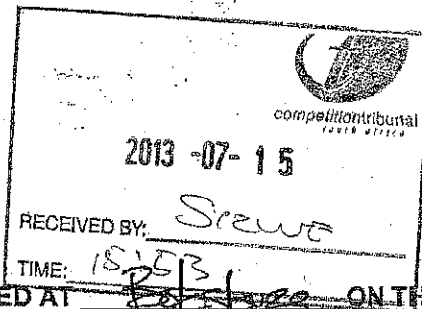
**ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMMISSION AND
BASIL READ, RELATING TO TERMS OF PAYMENT**

1. The Commission and Basil Read agree that Basil Read shall pay the amount set out in paragraph 10.4 of the consent agreement as follows:

1.1 The first payment of R47 468 124 (forty seven million four hundred and sixty eight thousand one hundred and twenty four rand), payable within 30 days from date of the Tribunal's order; and

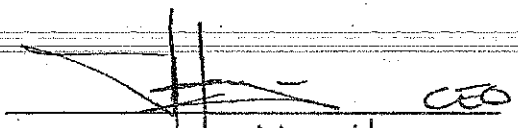
1.2 The second payment of R47 468 124 (forty seven million four hundred and sixty eight thousand one hundred and twenty four rand), payable on the anniversary of the first payment.

2. The above terms substitute the terms stipulated in paragraph 11.1 of the consent agreement.

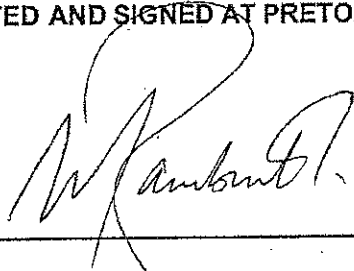


DATED AND SIGNED AT Bathurst ON THE 11th DAY OF JULY 2013

BASIL READ HOLDINGS LTD AUTHORISED SIGNATORY


M.L. HEYNS

DATED AND SIGNED AT PRETORIA ON THE 15 DAY OF JULY 2013

A handwritten signature in black ink, appearing to read 'Shan Ramburuth', is written over a horizontal line.

Shan Ramburuth

Competition Commissioner