

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016956

In the matter between:

The Competition Commission

Applicant

and

Esorfranki 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".



Presiding Member
N Manoim

Concurring: Y Carrim and T Madima

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No:

CC Case No: 2009Feb4279/2009Sep164

Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

ESORFRANKI (PTY) LIMITED

Respondent

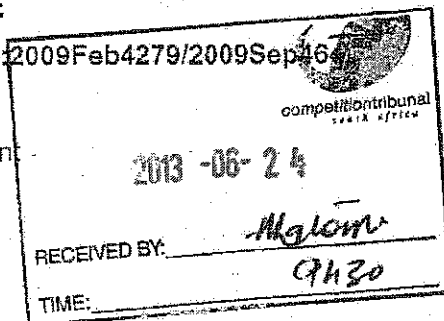
CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND ESORFRANKI ~~(PTY)~~ LIMITED ("ESORFRANKI"), IN REGARD TO CONTRAVENTIONS OF SECTION 4(1)(b)(iii)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

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;



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WHEREAS Esorfranki (Pty) Limited ("Esorfranki") has accepted the invitation and has agreed to settle in accordance with the terms of the Invitation;

NOW THEREFORE the Competition Commission and Esorfranki 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 "CIDB" means the Construction Industry Development Board;
- 1.3 "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);
- 1.4 "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 Melntjies 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 "Complaints" means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under

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case number 2009Feb4279 and 2009Sep4641;

- 1.8 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Esorfranki;
- 1.9 **"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 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.
- 1.10 **"Esorfranki"** means, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 130 Aberdare Drive, Phoenix Industrial Park, Durban;
- 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 Esorfranki;
- 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 Esorfranki;
- 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;


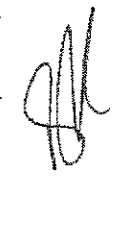
1.17 "Subsector" refers to the classes of construction work defined in Schedule 3 of the CIDB Regulations, substituted by Government Notice No. 8986 of 14 November 2008, published in Government Gazette No. 31603 of 14 November 2008; and

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 dli Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Complaints

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 (Pty) Ltd, WBHO Construction (Pty) Ltd, Murray & Roberts Limited, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv llc and Bouygues Construction SA.

2.2. On 01 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated the complaint in terms of section 49B(1) of the Act into prohibited practices relating to collusion in the construction industry. 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, Glurcich 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

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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 others 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 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. Furthermore section 4 dealing with the prohibition of restrictive horizontal practices provides that:

(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

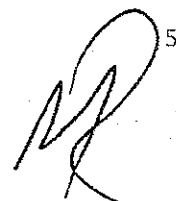
(b) it involves any of the following restrictive horizontal practices

(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."

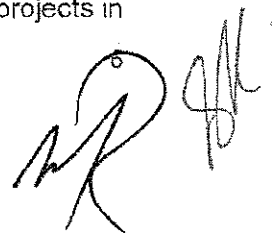
3.3 The collusive conduct engaged in, in the context of the Invitation and this Consent Agreement, was collusive tendering or "bid-rigging". Collusive tendering involves particular conduct by firms whereby as

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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 of the Republic of South Africa, 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, disrupting cartels and incentivising competitive behavior in the construction industry 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 tendering in the form of bid-rigging of projects in

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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 the alleged contraventions of the Act, if they would:

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

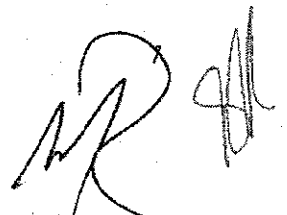
3.7.2 agree to pay an administrative penalty or penalties determined by the Commission as envisaged in paragraph 10.2 read with paragraphs 19-28 of the Invitation; and

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 This agreement sets out the details of the non-prescribed prohibited practices only, which the respondent is liable to settle regard being had to the provisions of section 67(2) of the Act and the penalty is calculated taking into account only the said non-prescribed prohibited practices.

- 3.9 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.

- 3.10 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.

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

4. Applications by Esorfranki

4.1 Esorfranki applied for leniency and Settlement in terms of the Invitation on 15 April 2011 and disclosed one (1) non-prescribed prohibited practice (1 project). Esorfranki was not first to disclose that project which falls in the civil engineering subsector, and is therefore liable to settle it under this Consent Agreement.

4.2 Esorfranki is a civil engineering and construction group providing specialist geotechnical services, roads, earthworks and pipeline construction;

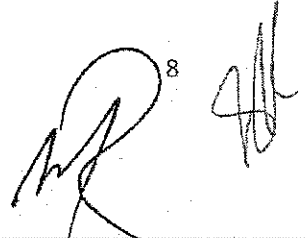
4.3 The contravention by Esorfranki of section 4(1)(b)(iii) of the Act which is the subject of this Consent Agreement is set out below.

5. Disclosed Project

Lanxess Groundwater Remediation Project (Tender Ref no 05-922-001)

Esorfranki reached agreement with Stefanutti and Bressan Holdings Ltd on or about June 2006 in that they agreed that Stefanutti and Bressan should submit a higher bid than that of Esorfranki in order to ensure that Esorfranki won the bid. It was also agreed that Esorfranki would pay a losers' fee in the amount of approximately R1 million to Stefanutti and Bressan, which amount was paid during the period June, August, September and October 2007. Esorfranki was awarded the tender in accordance with the collusive agreement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project related to the removal of fuel contaminated ground water together with minor civil and building works. Lanxess (Pty) Limited was the client. The project was completed in July 2007.

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6. Admission

Esorfrankl admits that it entered into an agreement detailed in paragraph 5 above with its competitors mentioned therein in contravention of section 4(1)(b)(iii) of the Act

7. Co-operation

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

7.1. 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;

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

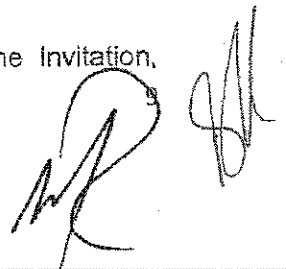
7.3 has provided a written undertaking that it has immediately ceased to engage in, and will not in the future engage in, any form of prohibited practice;

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

7.5 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.



8. Agreement Concerning Future Conduct

8.1 In compliance with the requirements as set out in the Invitation,

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Esorfranki 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:

- 8.1.1 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;
- 8.1.2 Esorfranki shall avail its employees and former employees to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement.
- 8.2 Esorfranki 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.
- 8.3 Esorfranki 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; and
- 8.4 Esorfranki shall circulate a statement summarising the contents of this consent agreement to all management and operational staff employed at Esorfranki within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.
- 8.5 Esorfranki 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.

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9. Administrative Penalty

- 9.1 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, Esorfranki accepts that it is liable to pay an administrative penalty ("penalty").
- 9.2 According to the Invitation, the level of the penalty is to be set on the basis of a percentage of the annual turnover of Esorfranki in the relevant subsector in the Republic and its exports from the Republic for the financial year preceding the date of the Invitation.
- 9.3 The project which Esorfranki has been found to have contravened the Act, falls under the Civil Engineering CIDB sub-sector.
- 9.4 Accordingly, Esorfranki is liable for and has agreed to pay an administrative penalty in the sum R 155 850 (One Hundred and Fifty Five Thousand Eight Hundred and Fifty Rand) which penalty is calculated in accordance with the Invitation.



10. Terms of payment

- 10.1 Esorfranki shall pay the amount set out above in paragraph 9.4 to the Commission within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.
- 10.2 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

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Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

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

11. Full and Final Settlement

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

Dated and signed at GERMISTON on the 20th day of MAY 2013.

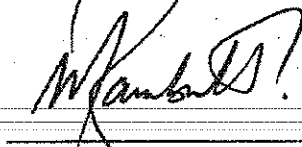
For Esorfranki

 BERNARD KRONE (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)

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