# COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

**Case No: 017020**

**In the matter between:**

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|---|---|
| The Competition Commission | Applicant |
| and | |
| Rumdel Construction Cape (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".

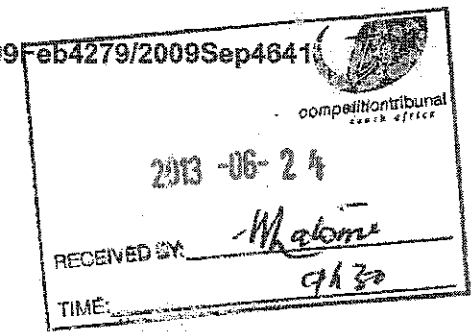
Presiding Member
N Manoim

**Concurring:** Y Carrim and T Madima

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

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




Application for confirmation of a consent agreement

In the matter between:

**THE COMPETITION COMMISSION** **Applicant**

and

**RUMDEL CONSTRUCTION (CAPE) (PTY) LTD** **Respondent**

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**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 RUMDEL CONSTRUCTION (CAPE) (PTY) LTD. IN REGARD TO CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998**

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**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** Rumdel Construction (Cape) (Pty) Ltd has accepted this invitation and has agreed to settle in accordance with the terms of the Invitation;

**NOW THEREFORE** the Competition Commission and Rumdel Construction (Cape) (Pty) Ltd 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 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. "**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;

1.8. "**Consent Agreement**" means this agreement duly signed and concluded between the Commission and Rumdel Construction (Cape) (Pty) Ltd ("Rumdel");

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 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;

1.10. "**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;

1.11. "**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;

1.12. "**Parties**" means the Commission and Rumdel;

1.13. "**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;

1.14. "**Respondent**" means means Rumdel;

1.15. "**Rumdel**" means Rumdel Construction (Cape) (Pty) Ltd, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 7 Ray Craib Crescent, Beacon Bay, East London.

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-sectors 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 (Pty) Ltd, 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 (Pty) 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, disrupting cartels and incentivising competitive behaviour 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 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 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.

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

**4. Applications by Rumdel**

4.1. Rumdel applied for leniency and Settlement in terms of the Invitation. Rumdel is a privately owned engineering company operating in multi-disciplinary civil engineering construction.

4.2. Rumdel applied on 14 April 2011 and disclosed three (3) prohibited practices. These

three (3) prohibited practices are non-prescribed prohibited practices.

4.3. Rumdel is not first to apply for these non-prescribed prohibited practices.

4.4. The three (3) non-prescribed prohibited practices are projects in the Civil Engineering subsector.

4.5. Rumdel is not implicated in any project which it did not disclose.

4.6. The three (3) prohibited practices or contraventions by Rumdel of section 4(1)(b)(iii) of the Act which are the subject of this Consent Agreement are set out below.

**5. Disclosed Projects**

**5.1. Phase III – Langeni Sawmill to R61 (Tender no. SCMU10-06/07-0055)**

Rumdel reached an agreement with Haw & Inglis (Pty) Ltd ("Haw & Inglis") on or about August 2006 in respect of the Langeni Sawmill to R61 – Phase III project, in that Rumdel requested Haw & Inglis to provide it with a cover price to enable Rumdel to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project was for the upgrading of the existing gravel road to a black top surfaced road. The client for the project was the Department of Roads and Transport of the Eastern Cape Province. The tender was awarded to Rumdel in accordance with cover price arrangement. The project was completed in July 2009.

**5.2. Upgrading of Trunk Road 57/3 from Alice to Middledrift (Tender no. NRA P.002-030-2006/1)**

Rumdel reached an agreement with Haw & Inglis on or about August 2006 in respect of the SANRAL Trunk Road 57/3 from Alice to Middledrift Project, in that Rumdel received a cover price from Haw & Inglis to enable Haw & Inglis to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The tender was for the upgrading of Trunk Road 57/3 from Alice to Middledrift. The client was SANRAL. The tender was awarded to Haw & Inglis in accordance with the cover price arrangement. The project was completed on 16 November 2008.

**5.3. Upgrading of T15 Mount Frere (Tender no. SCMU10-06/07-0043)**

Rumdel reached an agreement with Haw & Inglis on or about August 2006 in respect of the T15 Mount Frère upgrading project, in that Rumdel provided a cover price to Haw & Inglis to ensure that both of them do not win the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project was for the ugrading of district road DR0815 Mount Frere to R56 T junction section 1, from gravel to surfacing inclusive earthworks, paving, structure and drainage. The client was SANRAL. The tender was awarded to WBHO and the project was completed in 14 July 2010.

**6. Admission**

Rumdel admits that it entered into the agreements detailed in paragraphs 5.1 to 5.3 above with its competitors 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, Rumdel:

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, Rumdel 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. availing 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. Rumdel 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.

8.3. Rumdel 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.

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

8.5. Rumdel 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.

## 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, Rumdel 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 Rumdel 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 projects in respect of which Rumdel has been found to have contravened the Act, fall under the Civil Engineering subsector.

9.4. Accordingly, Rumdel is liable for and has agreed to pay an administrative penalty in the sum of R17 127 465 (Seventeen Million One Hundred and Twenty Seven Thousand Four Hundred and Sixty Five Rand) which penalty is calculated in accordance with the Invitation.

## 10. Terms of payment

10.1. Rumdel 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 |
| Account number: | 4050778576 |
| Account type: | Current Account |
| Brach 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 paragraphs 5.1 to 5.3 of this Consent Agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Rumdel in respect of this conduct only.

**Dated and signed at** PRETORIA **on the** 15 **day of** APRIL **2013.**

For RUMDEL PETER HENRY DE LACY

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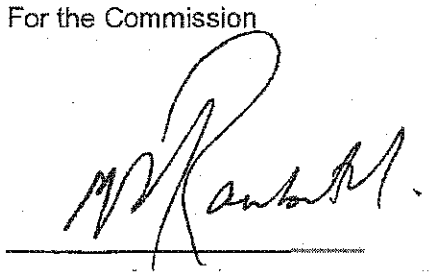
**[FILL IN NAME AND POSITION OF PERSON THAT IS SIGNING]**

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

For the Commission



**Shan Ramburuth**

**Commissioner**