

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 019224

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

CYCAD PIPELINES (PTY) LTD

Respondent

Panel : N Manoim (Presiding Member), M Mokuena (Tribunal Member) and Y Carrim (Tribunal Member)

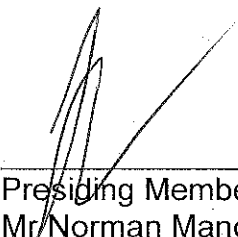
Heard on : 13 August 2014

Last submission : 19 August 2014

Decided on : 19 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

Concurring: Ms Medi Mokuena and Ms Yasmin Carrim

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**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

CYCAD PIPELINES (PTY) LTD

	
Applicant	
2014-07-16	
RECEIVED BY:	Respondent
TIME:	15:08

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 CYCAD PIPELINES (PTY) LTD, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998

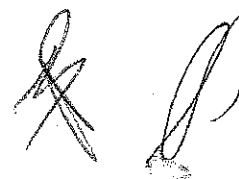
The Competition Commission ("Commission") and Cycad Pipelines (Pty) Ltd ("Cycad") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58(1)(a)(iii) and 58(1)(b) 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.



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 **"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);
- 1.3 **"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;
- 1.4 **"Commissioner"** means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.5 **"Complaint"** means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Sep4641;
- 1.6 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Cycad;
- 1.7 **"Cycad"** means Cycad Pipelines (Pty) Limited, a company duly incorporated under the laws of the Republic of South Africa with its



principal place of business at 159 Van Den Dool Road, Nuffield, Springs, Gauteng, South Africa. Cycad is involved in all aspects of pipeline construction and pipeline refurbishment in the water, gas, fuel and sewerage/effluent industries;

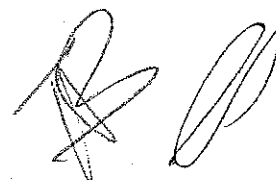
- 1.8 **"Invitation"** means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act, as published on the website of the Commission on 1 February 2011;
- 1.9 **"Loser's fee"** means a fee paid by the winner of the tender to unsuccessful tenderers or losers of the tender as a compensation for the costs of tendering;
- 1.10 **"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 complaint was initiated, as contemplated in section 67 of the Act;
- 1.11 **"Parties"** means the Commission and Cycad;
- 1.12 **"Phambili Pipelines"** means Phambili Pipelines (Pty) Ltd, a wholly owned subsidiary of Basil Read Holdings Limited ("Basil Read"), with its principal place of business at the Basil Read Campus, 7 Romeo Street, Hughes, Boksburg, Gauteng, South Africa;



- 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 complaint was initiated;
- 1.14 **"Respondent"** means Cycad;
- 1.15 **"Shearwater"** means Shearwater Construction (Pty) Ltd, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 30 Activia Road, Activia Park, Germiston, Gauteng. Shearwater provides the installation of cross country bulk order pipelines, primarily for the petrochemical and gas industry and to a lesser degree, for waste water;
- 1.16 **"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 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

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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, 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.
- 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. Cycad is one of the 25 implicated firms. Cycad has agreed to settle the project it is implicated in.

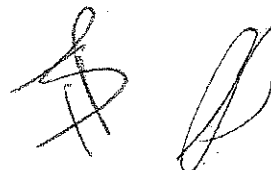
3 CONDUCT IN CONTRAVENTION OF THE ACT

The Thabazimbi (Northam) Pipeline Project

Cycad reached an agreement with Shearwater and Phambili Pipelines on or about February 2008 in that they agreed on a loser's fee in respect of the Thabazimbi (Northam) Pipeline project. In terms of the agreement, Cycad, Shearwater and Phambili Pipelines agreed that the winning bidder will pay a loser's fee to the losing bidders.

Cycad was awarded the tender and paid a loser's fee in the amount of R1 143 420 to Shearwater and R1 140 000 to Phambili in instalments between 31 August 2008 and 12 December 2008. This conduct is collusive tendering in contravention of section 4(1) (b) (iii) of the Act.

The project was for the construction of a 750 mm diameter cement mortar-lined, fusion bonded medium density polyethylene coated, steel pipe of approximately 30.4 kilometre in length between Padda Junction and Tuschenkomst required for water purification system.



The client for the project was Pilanesburg Platinum Mine at Northam. The project was completed in January 2010.

4 ADMISSION

Cycad admits that it entered into the agreement detailed in paragraph 3 above with its competitors, Shearwater and Phambili Pipelines, in contravention of section 4(1)(b) (iii) of the Act.

5 CO-OPERATION

In so far as the Commission is aware, Cycad:

- 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

Cycad agrees and undertakes to:

6.1. 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:

6.1.1. 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;

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

6.2 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;

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- 6.3 refrain from engaging in collusive tendering in contravention of section 4 (1)(b)(iii) of the Act, and from engaging in any prohibited practice in future;
- 6.4 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;
- 6.5. 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
- 6.6 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, Cycad agrees that it is liable to pay an administrative penalty in the sum of R3 394 151 [Three Million Three Hundred and Ninety Four Thousand One Hundred and Fifty One Rand] which penalty represents 2% of Cycad's annual turnover for the financial year ended 28 February 2011.
- 7.2. Cycad 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 number: 4050778576

Account type: Current Account

Branch Code: 323 345

Reference: Case number 2009Sep4641 & Cycad

- 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

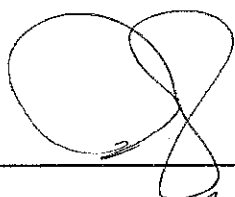
This agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and



Cycad in respect of this conduct only.

For Cycad Pipeline (Pty) Ltd

Dated and signed at LEMPON PARK on the 4 day of JULY 2014



Name: W. McBRIDE

Designation:

CEO

For the Commission

Dated and signed at PRETORIA on the 14th day of JULY 2014



TEMBINKOSI BONAKELE
COMMISSIONER