COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 017053

In the matter between:

The Competition Commission	Applicant
and	
Vlaming (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. 2009Feb4279/2009Sep4640

Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION — Applicant

and

VLAMING (PTY) LTD — 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 VLAMING (PTY) LTD ("VLAMING"), 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 Vlaming (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 Vlaming (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 2008Sep4641;

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

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 Vlaming;

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 Vlaming;

1.15. "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;

1.16. "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;

1.17. "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; and

1.18. "Vlaming" means Vlaming (Pty) Ltd.

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 Ltd, Murray & Roberts, Concor Ltd, G. Liviero & Son Building (Pty) Ltd, Gluricich 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, Diebor 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 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 Vlaming**

4.1. Vlaming applied for leniency and Settlement in terms of the Invitation. Vlaming is a construction company undertaking construction and development work in residential townhouse market as well as commercial construction projects.

4.2. Vlaming applied on 14 April 2011 and disclosed seven (7) prohibited practices. Two (2) of these are prescribed prohibited practices and five (5) are non-prescribed prohibited practices.

4.3. Out of the five (5) non-prescribed prohibited practices, Vlaming is first to apply in respect of three (3) non-prescribed prohibited practices for Conditional Immunity in terms of the CLP.

4.4. In respect of the two (2) (i.e. 5 less 3) non-prescribed prohibited practices where

Vlaming is not first to apply, these non-prescribed prohibited practices are in the General Building subsector.

4.5. Furthermore, Vlaming is implicated in one (1) non-prescribed prohibited practice which it did not disclose. Vlaming has agreed to settle it.

4.6. The three (3) prohibited practices or contraventions by Vlaming 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. The Millwood Village Residential Project (Tender no. NPK0366PBC)

Vlaming reached separate agreements with Rainbow Construction, Giuricich Bros Construction ("Giuricich Bros") and Group Five, respectively, on or about August 2005, in respect of the Millwood Village Residential project, in that:

* Vlaming agreed to provide a cover price to Rainbow Construction to enable Vlaming to win the tender. Vlaming and Rainbow Construction further agreed to add on a losers fee which was going to be paid to Rainbow Construction should Vlaming win the tender.
* Vlaming agreed to provide a cover price to Guiricich Bros to enable Vlaming to win the tender.
* Vlaming agreed with Group Five to add on losers' fee on their individual bid prices to be paid by either of them who won the tender to the losers.

The above conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project was for the construction of residential blocks at the Millwood Village in Bryanston. The client for the project was Finishing Touch Trading 55 (Pty) Ltd and the value of the project was R94 476 136.00. The tender was awarded to Group Five and the project was completed on 22 July 2007.

5.2. The Nicol Apartments Project (Tender no. BJ1139)

Vlaming reached an agreement with G Liviero & Son Building ("G Liviero"), Stefanutti Stocks Holding Limited ("Stefanutti") and Giuricich Bros, on or about November 2006 in respect of the Nicol Apartments project, in that Vlaming agreed to give the above firms cover prices to enable Vlaming to win the tender. Further, G Liviero and Giuricich Bros requested payments of R100 000.00 and R60 000.00 respectively from Vlaming to cover their costs of tendering for this project. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project was for the construction of a high-rise building comprising of 80 residential apartments. The client for this project was Precoated Metals. The tender was awarded to Vlaming and the project was completed on 3 October 2008.

6. **Non-Disclosed Projects**

Kempton City Mall

Vlaming reached an agreement with Giuricich Bros on 17 September 2006 in respect of the Kempton City Mall project, in that Vlaming agreed to give a cover price to Giuricich Bros as Guiricich Bros ,was not interested in winning the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The project was for the construction of a new complex comprising of flats and shops in Kempton Park. The client for the project was Gardiell Properties (Pty) Ltd, trading as City Property (Pty) Ltd. The tender was awarded to Trystar and the project was completed on 31 July 2010.

7. **Admission**

Vlaming admits that it entered into the agreements detailed in paragraphs 5.1 to 5.2 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, Vlaming:

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

9.5 Vlaming 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, Vlaming 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 Vlaming in the relevant subsector in the Republic and its exports from the Republic for the financial year preceding the date of the Invitation.

10.3. The projects in respect of which Vlaming has been found to have contravened the Act, fall under the General Building subsector.

10.4. Accordingly, Vlaming is liable for and has agreed to pay an administrative penalty in the sum of R 3 421 662 (Three Million Four Hundred and Twenty One Thousand Six Hundred and Sixty Two Rand) which penalty is calculated in accordance with the Invitation.

11. Terms of payment

11.1. Vlaming shall pay the amount set out above in paragraph 10.4 to the Commission within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.

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
Brach 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.

12. Full and Final Settlement

This agreement is entered into in full and final settlement of the specific conduct listed in paragraphs 5.1-5.2 and 6.1 of this Consent Agreement and, upon confirmation as an

order by the Tribunal, concludes all proceedings between the Commission and Vlaming in respect of this conduct only.

Dated and signed at Johannesburg on the 29th day of April 2013.

For Vlaming

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

Jan Cornelius Vlaming — Joint Managing Director

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

For the Commission

Shan Ramburuth

Commissioner