



**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: CO142Nov14/020131**

In the matter between:

The Competition Commission

**Applicant**

and

Pele Kaofela CC

**Respondent**

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|  |   |   |
|--|---|---|
| Panel  | : | Mr. A Wessels (Presiding Member)<br>Prof. I Valodia (Tribunal Member)<br>Ms. M Mazwai (Tribunal Member) |
| Heard on   | : | 10 December 2014  |
| Last submission received<br>from Competition Commission<br>and Respondent on | : | 03 June 2015  |
| Decided on   | : | 26 June 2015  |

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**Order**

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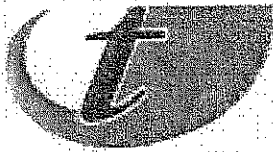
The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Pele Kaofela CC, annexed hereto marked "A", read with Addendum marked "B" and Addendum marked "C".

  
\_\_\_\_\_  
Tribunal Member  
Mr. A Wessels

26 June 2015  
Date

**Concurring: Prof. I Valodia and Ms M Mazwai**

020131

"A"  
1

# competitiontribunal south africa

## Form CT 6

## Notice of Motion

### About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Date: 25-Nov-2014

File #

To: The registrar of the Competition Tribunal

### Concerning the matter between:

COMPETITION COMMISSION (Applicant)

and PELE KAOFELA CC (Respondent)

Take notice that the COMPETITION COMMISSION intends to apply to the Tribunal for the following order:

Confirmation of the Consent Agreement entered into between the Competition Commission and the Respondent as an order of the Tribunal in terms of Section 49D read with Sections 58(1)(a)(iii) and 58(1)(b) of the competition act 89 of 1998.

2014 -11-26  
RECEIVED BY: [Signature]  
TIME: 15H40

### Contacting the Tribunal

The Competition Tribunal  
Private Bag X24  
Sunnyside  
0132  
Republic of South Africa  
tel: 27 12 394 3300  
fax: 27 12 394 0169  
e-mail: ctsa@comptrib.co.za

### Name and Title of person authorised to sign:

BUKHOSIBAKHE MAJENGE, ACTING HEAD OF LEGAL SERVICES

Authorised Signature: [Signature]

Date:

25 November 2014

For Office  
Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(HELD IN PRETORIA)

CT CASE NO: \_\_\_\_\_

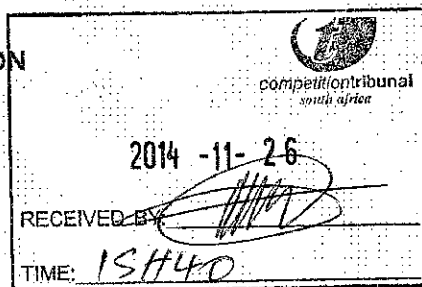
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

and

PELE KAOFELA CC



Applicant

Respondent

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 PELE KAOFELA CC, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT

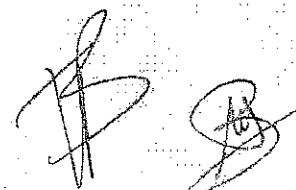
Preamble

The Competition Commission and Pele Kaofela CC hereby agree that application be made to the Competition 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, on the terms below:

## 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 1<sup>st</sup> Floor, Mulayo Building (Block C), the dli 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 "Concor" means Concor Engineering, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 22 Skeen, Boulevard, Bedfordview 2007. Concor was acquired by Murray & Roberts in 2006. Concor is a subsidiary of Murray



& Roberts Limited in the Engineering Africa Platform. Concor is a contractor to structural, mechanical, platework and piping (SMPP) solutions within the mining, minerals beneficiation, petrochemical and energy sectors as well as the pulp and paper, and sugar industries;

1.7 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Pele Kaofela;

1.8 "Grinaker LTA" means an operating business unit of Aveng. Grinaker-LTA is a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Jurgens Street Jet, Park Boksburg, 1459. Grinaker LTA is a multi-disciplinary construction and engineering unit of Aveng with expertise in a number of market sectors; Power, Mining, Infrastructure, Commercial, Retail, Industrial, Oil and Gas;

1.9 "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;

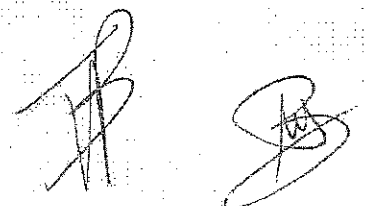
1.10 "Loser's fee" means, in the context of collusive tendering, a fee paid by the successful tenderer to the losing tenderer(s) as compensation for the costs of preparing a tender;

1.11 "Murray and Roberts" means Murray and Roberts Limited a public



company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Douglas, Roberts Centre, 22 Skeen Boulevard, Bedfordview. Murray and Roberts offers civil, mechanical, electrical, mining and process engineering, general building, procurement, construction, commissioning, operations and maintenance services;

- 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 complaint was initiated, as contemplated in section 67 of the Act;
- 1.13 "Parties" means the Commission and Pele Kaofela;
- 1.14 "Pele Kaofela" means Pele Kaofela CC, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Plot 99, 70th Street, Doornkloof Small Holdings, Olifantsfontein. Pele Kaofela is a multidisciplinary civil engineering contractor specializing in concrete structures specifically bridges, roads, mass earthworks and precast concrete members. Pele Kaofela was formerly known as Civilcon Pele Kaofela CC, the name change was effected in April 2009.
- 1.15 "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;

1.16 "Respondent" means Pele Kaofela;

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 3<sup>rd</sup> Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

## 2 BACKGROUND

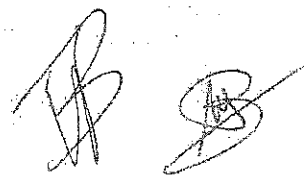
2.1 On 01 September 2009, following the receipt of applications for immunity in terms of the OLP, the Commission initiated a complaint in terms of section 49B(1) of the Act under case number 2009Sep4641 into particular prohibited practices relating to conduct in construction projects, by the firms listed 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.

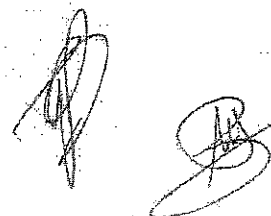
2.3 The Commission's investigation of the above complaint, as well as several others in the construction industry, led the Commission to believe that there was widespread collusion in the construction sector in contravention of section 4(1) (b) (iii) of the Act. Accordingly, in line with the purposes 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 issued in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices. It was also intended to expedite the finalisation of the investigations in a cost-effective manner.

2.4. The Invitation was published on the Commission's website on 1 February 2011. 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.

Two handwritten signatures are present at the bottom right of the page. The first signature is a stylized, cursive 'B' or 'P'. The second signature is a more complex, cursive signature, possibly 'S' or 'B'.

- 2.5 The Commission received settlement applications from 21 (twenty-one) firms that disclosed a total number of three hundred 300 projects which were the subject of collusive conduct. Of the 300 (three hundred) projects disclosed, 160 (one hundred and sixty) projects involved prescribed prohibited practices and 140 (one hundred and forty) non-prescribed prohibited practices.
- 2.6 The 21 firms that responded to the Invitation implicated 25 (twenty-five) firms which did not respond to the Invitation. Of the 21 (twenty one) firms, 15 (fifteen) concluded consent agreements with the Commission, which agreements were confirmed as orders of the Tribunal on 22 and 23 July 2013. This phase of the investigation of the complaint was termed "Phase 1".
- 2.7 Upon completion of Phase 1, the Commission proceeded to investigate the 25 (twenty five) firms that did not respond to the Invitation and were implicated by those that applied. Pele Kaofela is one of the 25 (twenty five) implicated firms. Pele Kaofela has agreed to settle the project it is implicated in.

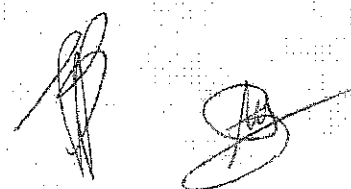
### 3 CONDUCT IN CONTRAVENTION OF THE ACT

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### **Hartebeesfontein Water Care Works Project**

- 3.1. In or about May 2004, Pele Kaofela (formerly known as Civilcon Pele Kaofela) reached an agreement with Grinaker, Murray and Roberts / Dlamini Joint Venture, and Concor/Masscrete Joint Venture in respect of the Hartebeesfontein Water Care Works project.
- 3.2. In terms of the agreement, Pele Kaofela, Grinaker, Murray and Roberts/Dlamini JV, and Concor / Masscrete JV agreed that the winning bidder will pay a loser's fee of R500 000 to each of the losing bidders.
- 3.3. Grinaker was awarded the tender and was liable to pay Murray and Roberts/Dlamini JV, Pele Kaofela and Concor / Masscrete JV a loser's fee of R500 000 each. This conduct is collusive tendering in contravention of section 4(1) (b) (iii) of the Act.
- 3.4. The project was for the extension of the existing water treatment works at Hartebeesfontein. The client for the project was East Rand Water Care Company. The project was completed on 28 September 2007.

### **4 ADMISSION**

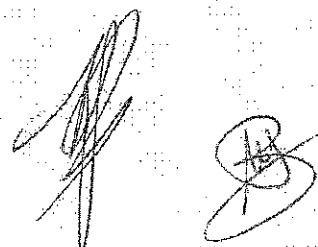


Pele Kaofela admits that it entered into the agreement detailed in paragraph 3 above with its competitors, in contravention of section 4(1) (b) (iii) of the Act.

## 6 FUTURE CONDUCT

Pele Kaofela agrees and undertakes to:

- 6.1. prepare and circulate a statement summarising the content of this agreement to its employees, managers and directors within 14 (fourteen) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;
- 6.2. refrain from engaging in collusive tendering in contravention of section 4(1)(b)(iii) of the Act, and from engaging in any prohibited practice under the Act in future;
- 6.3. 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;
- 6.4. submit a copy of such compliance programme to the Commission



within 60 (sixty) days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

6.5. 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, Pele Kaofela agrees that it is liable to pay an administrative penalty in the sum of R437 623.68 (Four Hundred and Thirty Seven Thousand, Six Hundred and Twenty Three Rand and Sixty Eight Cents) which represents 2% of Pele Kaofela's annual turnover for the financial year ended 28 February 2013.

7.2. Pele Kaofela shall pay the amount set out above in paragraph 7.1 to the Commission over a period of 24 months as set out below. The first instalment of R18 234.32 (eighteen thousand two hundred and thirty four rand and thirty two cents) shall be payable within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal. Thereafter, the balance of the penalty shall be paid as follows:

7.2.1. R18 234.32 (eighteen thousand two hundred and thirty four rand and thirty two cents) per month for the first 6 (six) (R18 234.32 x 6 months = R109 405.92) payable on or before the 30<sup>th</sup> of each month;

7.2.2. R20 057.75 (twenty thousand and fifty seven rand and seventy five

cents) per month for the remainder of the 18 months. These payments comprise the balance of the penalty plus 10% interest thereon.  $(R18\,234.32 \times 18 \text{ months} = R328\,217.76 \text{ plus } R32\,821.78 \text{ (10\% interest)} = R361\,039.54)$  (Three Hundred and Sixty One Thousand, Thirty Nine Rands and Fifty Four Cents). Each such instalment shall be payable on or before the 30<sup>th</sup> of each month;

7.3. In the event of default in the payment of any of the abovementioned instalments on due date the Commission shall, without notice or a letter of demand, declare the entire principal sum then unpaid immediately due and payable;

7.4. The payments shall be made into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

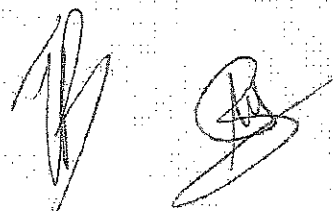
Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345



Reference: Case number 2009Sep4641 Pele Kaofela

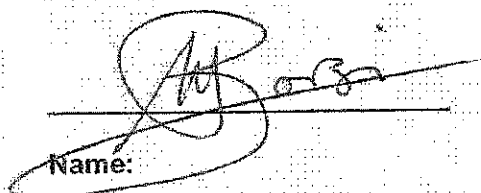
- 7.5. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

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 Pele Kaofela in respect of this conduct only.

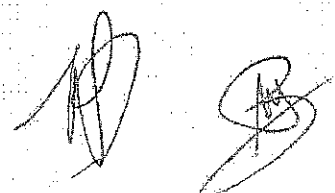
For Pele Kaofela CC

Dated and signed at CENTURION on the 13 day of NOVEMBER 2014

  
Name:

Designation: MANAGING MEMBER

For the Commission



Dated and signed at PRETORIA on the 18<sup>th</sup> day of NOV 2014



TEMBINKOSI BONAKELE  
COMMISSIONER



"B"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(HELD IN PRETORIA)

CT CASE NO: 020131

CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

PELE KAOFELA CC

Respondent

---

ADDENDUM TO THE CONSENT AGREEMENT ENTERED INTO BETWEEN THE  
COMPETITION COMMISSION AND PELE KAOFELA CC, IN RESPECT OF A  
CONTRAVENTION OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT

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1. Introduction

This is an addendum to the Consent Agreement concluded between the Competition Commission ("Commission") and Pele Kaofela CC ("Pele Kaofela") (collectively referred to as "the parties") on 18 November 2014 in respect of a contravention of section 4(1)(b)(iii) of the Competition Act no. 89 of 1998, as amended ("the Act").

2. Recordal

- 2.1. On 26 November 2014, the Commission filed an application to the Competition Tribunal ("the Tribunal") for an order confirming the Consent



Agreement referred to above.

- 2.2. Following the filing of the consent agreement, the Commission noted that clause 7.2.1 of the consent agreement did not correctly record the parties' agreement with regard to the payment terms. In light of this error, the parties have agreed to amend clause 7.2.1 as set out below.

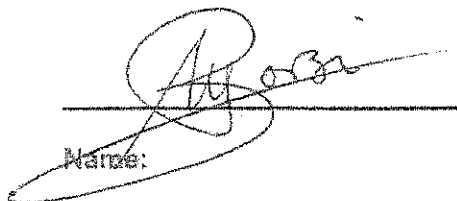
3. Clause 7.2.1

- 3.1. The parties agree that the contents of clause 7.2.1 of the consent agreement be deleted and replaced with the following wording:

- 3.1.1. "R18 234.32 (eighteen thousand two hundred and thirty four rand and thirty two cents) per month for the next 5 (five) months ( $R18\,234.32 \times 5 = R91\,171\,60$ ) payable on or before the 30<sup>th</sup> of each month."

For Pele Kaofela CC

Dated and signed at CENTURION on the 10 day of DECEMBER 2014

  
Name:

Designation: MANAGING MEMBER



For the Commission

Dated and signed at Pretoria on the 9<sup>th</sup> day of December 2014

  
\_\_\_\_\_  
TEMBINKOSI BONAKELE  
COMMISSIONER

## IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO.: 020131

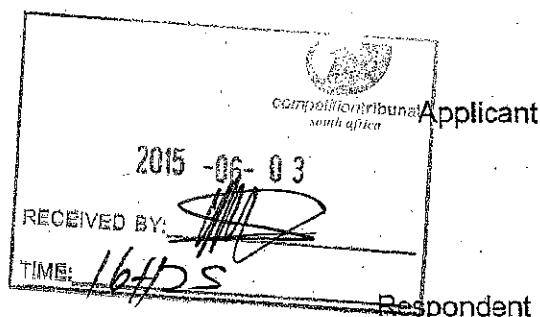
CC CASE NO.: 2009Sep4641

In the matter between:

COMPETITION COMMISSION

and

PELE KAOFELA CC



## FILING NOTICE

BE PLEASED TO TAKE NOTICE that the applicant hereby files the following document:

1. Addendum to the consent agreement entered into between the Competition Commission and Pele Kaofela CC.

SIGNED at PRETORIA on this 3<sup>rd</sup> day of June 2015.



**COMPETITION COMMISSION**

Applicant

77 Meintjies Street

Sunnyside

Pretoria

Tel: 012 394 3032

E-mail: [NellyS@compcom.co.za](mailto:NellyS@compcom.co.za)

**TO: THE REGISTRAR**

Competition Tribunal

3rd Floor, Mulayo

The DTI Campus

77 Meintjies Street

Sunnyside

Pretoria

Tel: (012) 394-3300/55

E-mail address: [Leratom@comptrib.co.za](mailto:Leratom@comptrib.co.za)

**AND TO:**

**COUZYN, HERTZOG & HORAK**

321 Middel Street

Brooklyn

Pretoria

Ref: Mr Oosthuizen/jvs/C465

Email: [oosthuizen@couzyn.co.za](mailto:oosthuizen@couzyn.co.za)

Tel: (012) 460-5090

Fax: (012) 346-7473

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(HELD IN PRETORIA)

CT CASE NO: 020131

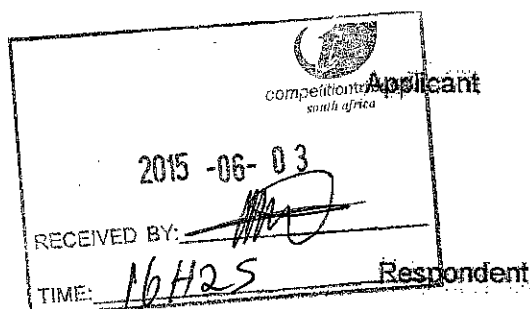
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

and

PELE KAOFELA CC



---

ADDENDUM TO THE CONSENT AGREEMENT ENTERED INTO BETWEEN THE  
COMPETITION COMMISSION AND PELE KAOFELA CC, IN RESPECT OF A  
CONTRAVENTION OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT 89 OF  
1998, AS AMENDED

---

1. Introduction

This is an addendum to the Consent Agreement concluded between the Competition Commission ("Commission") and Pele Kaofela CC ("Pele Kaofela") (collectively referred to as "the parties") on 18 November 2014 in respect of a contravention of section 4(1)(b)(iii) of the Competition Act no. 89 of 1998, as amended ("the Act").

2. Recordal

2.1. On 28 November 2014, the Commission filed an application to the

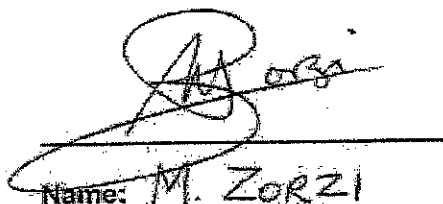
Competition Tribunal ("the Tribunal") for an order confirming the Consent Agreement referred to above.

2.2. Following the filing of the consent agreement, it was noted that the name of the respondent was misspelt as "Peke Kaofela" in the Filing Notice and Index of the application to the Tribunal.

2.3. In light of this error, the parties hereby clarify that the correct name of the respondent is Pele Kaofela. Accordingly, any reference to "Peke Kaofela" should be replaced by "Pele Kaofela."

For Pele Kaofela CC

Dated and signed at PRETORIA on the 29 day of MAY 2015



Name: M. ZORZI

Designation: MANAGING MEMBER

For the Commission

Dated and signed at PRETORIA on the 03/06 day of 2015



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**TEMBINKOSI BONAKELE**  
**COMMISSIONER**

