

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CO142Sep15

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

STEFANUTTI STOCKS HOLDINGS LIMITED

Respondent

Panel : N Manoim (Presiding Member), F Tregenna (Tribunal Member) and A Roskam (Tribunal Member)

Heard on : 14 October 2015


Last submission : 05 February 2016

Decided on : 08 February 2016

VARIATION ORDER

The Tribunal hereby Orders, that the Consent Agreement dated 9 September 2015 and confirmed by the Tribunal by way of a Consent Order dated 14 October 2015 (annexed hereto marked "A"), be varied in terms of section 66(c) of the Competition Act, 1998 (Act No. 89 of 1998), to include the amendments effected by the signed Addendum dated 5 February 2016 (annexed hereto marked "B"), as follows:

1. Clause 1.2 be deleted; and
2. Clause 1.7 be replaced with *“Esorfranki means Esorfranki Limited.”*



Presiding Member
Mr Norman Manoim

08 February 2016

Date

Concurring: Prof F Tregenna and Mr A Roskam

"A"



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CO142Sep15

In the matter between:

The Competition Commission

Applicant

And

Stefanutti Stocks Holdings Limited

Respondent

Panel : N Manoim (Presiding Member)
F Tregenna (Tribunal Member)
A Roskam (Tribunal Member)

Heard on : 14 October 2015

Decided on : 14 October 2015

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Stefanutti Stocks Holdings Limited annexed hereto marked "A".



Presiding Member
Mr N Manoim

14 October 2015
Date

Concurring: Prof F Tregenna and Mr A Roskam

ANNEXURE "A"

2

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: _____

CC CASE NO: 2009Sep4641

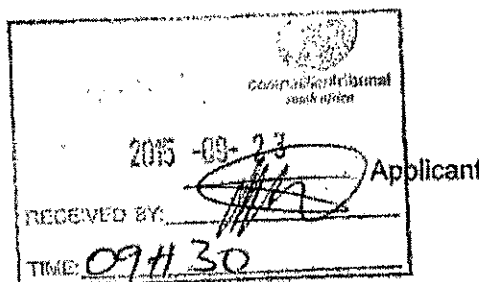
In the matter between:

THE COMPETITION COMMISSION

and

STEFANUTTI STOCKS HOLDINGS LIMITED

Respondent



CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND STEFANUTTI STOCKS HOLDINGS LIMITED, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT

The Competition Commission ("Commission") and Stefanutti Stocks Holdings Limited ("Stefanutti") 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 read with section 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 "Afristruct" means Afristruct Projects (Pty) Ltd;
- 1.3 "CE&B" means Inhlanihla Civils (Pty) Ltd trading as Civil Engineering & Build cc;
- 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 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Stefanutti;
- 1.7 "Esorfranki" means Esorfranki (Pty) Ltd;
- 1.8 "Invitation" means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act dated 1 February 2011;
- 1.9 "Parties" means the Commission and Stefanutti;



- 1.10 "Stefanutti" means Stefanutti Stocks Holdings Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Protec Park, corner Zuurfontein Avenue and Oranjerivier Drive, Chloorkop Kempton Park, East Rand; and
- 1.11 "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 1 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 respect of numerous construction projects, by the firms listed below. This complaint concerned alleged contraventions of section 4(1)(b) of the Act with regard to price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Stefanutti Stocks Holdings Limited, Aveng (Africa) Limited, 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, Diabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC, Wilson Bayly Holmes-Ovcon LTD and other construction firms, including joint ventures.



2.2 The Commission's investigation of the above complaint, 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. 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 settle with the Commission on favourable terms. This Invitation was 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. The Invitation specifically provided that it was open to firms to also apply for leniency in terms of the CLP.

2.3 In response to the Invitation and in terms of the Commission's CLP, Stefanutti was first to apply for leniency in respect of the conduct described in paragraph 4 below.

3 CONDITIONAL IMMUNITY

3.1 The Commission granted Stefanutti conditional immunity from prosecution before the Tribunal for its involvement in the prohibited practices described in paragraph 4 below.

3.2 In exchange for conditional immunity, Stefanutti, *inter alia*, agreed to co-operate with the Commission in respect of any steps that the Commission



may deem necessary to obtain an order from the Tribunal declaring the conduct set out in paragraph 4 below to be a contravention of section 4(1)(b)(iii) of the Act.

4 CONDUCT IN CONTRAVENTION OF THE ACT

Stefanutti disclosed its participation in the following prohibited practices in contravention of section 4(1)(b)(iii) of the Act:

4.1 The Rainbow Farms Building Tender: Tender Reference No. 2005/13

In or about December 2005 Stefanutti reached an agreement with CE&B in terms of which Stefanutti and CE&B agreed to add a loser's fee to their respective tenders in relation to the Rainbow Farms Building project.

In terms of the agreement, Stefanutti agreed to pay R56 985.18 to CE&B as a loser's fee in the event that Stefanutti won the tender.

Stefanutti was awarded the tender and paid the loser's fee to CE&B on 4 October 2006.

4.2 Lanxess Groundwater Remediation Project: Tender Reference No. 05-922-100

In or about June 2006 Stefanutti reached an agreement with Esorfranki in terms of which Stefanutti and Esorfranki agreed that Stefanutti would submit a bid higher than that of Esorfranki in order to ensure that Esorfranki won the tender. It was further agreed that Esorfranki would



pay a loser's fee to Stefanutti in the amount of approximately R1 million in the event that it won the tender.

Esorfrankl was awarded the tender and paid the loser's fee during the period June, August, September and October 2007.

5 ADMISSION

Stefanutti admits that the conduct set out in paragraph 4 above is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

6 CO-OPERATION

6.1 In so far as the Commission is aware, and in compliance with the requirements as set out in the CLP, Stefanutti:

6.1.1 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;

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

6.1.3 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;

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



6.1.5 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.

7 FUTURE CONDUCT

7.1 Stefanutti confirms that it no longer engages in the conduct set out in paragraph 4 above.

7.2 In compliance with the requirements as set out in the CLP, Stefanutti 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, if any, in the Competition Tribunal or the Competition Appeal Court are completed. This includes, but is not limited to:

7.2.1 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;

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

7.3 Stefanutti shall continue to 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.

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

7.5 Stefanutti 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.


For the Commission

Dated and signed at PRETORIA on the 09 day of Sept 2015


TEMBINKOSI BONAKELE
Commissioner

For Stefanutti

Dated and signed at Kempton Park on the 31 day of August 2015

W. M. M. M. M.
Name: 
Chief Executive Officer



"B"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: C014ZSEP15

CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

STEFANUTTI STOCKS HOLDINGS LIMITED

Respondent

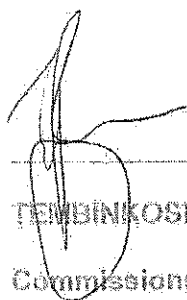
AMENDMENT TO THE CONSENT AGREEMENT BETWEEN THE COMPETITION
COMMISSION AND STEFANUTTI STOCKS HOLDINGS LIMITED

The Competition Commission and Stefanutti Stocks Holdings Limited hereby agree
that their Consent Agreement dated 9 September 2015, be amended in the following
manner:

1. Clause 1.2 be deleted; and
2. Clause 1.7 be replaced with "Esorfranki" means Esorfranki Limited;"

For the Commission

Dated and signed at PRETORIA on the 5th day of February 2016

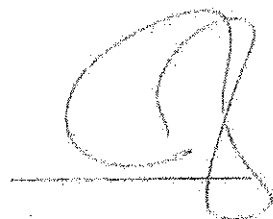


TEMBINKOSI BONAKELE

Commissioner

For Stefanutti

Dated and signed at KEMPTON PARK on the 6 day of April 2015



Name:

Chief Executive Officer