



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR212Feb15/SA181Dec16

In the matter between:

The Competition Commission

Applicant

And

Phambili Pipelines (Pty) Ltd

Respondent


Panel : N Manoim (Presiding Member)
A Wessels (Tribunal Member)
M Mokuena (Tribunal Member)

Heard on : 21 December 2016

Decided on : 21 December 2016

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Phambili Pipelines (Pty) Ltd annexed hereto marked "A".



**Presiding Member
Mr Norman Manoim**

21 December 2016
Date

Concurring: Mr Andreas Wessels and Ms Medi Mokuena

"A"

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

CT CASE NO: CPA2Feb15/SA181Dec16

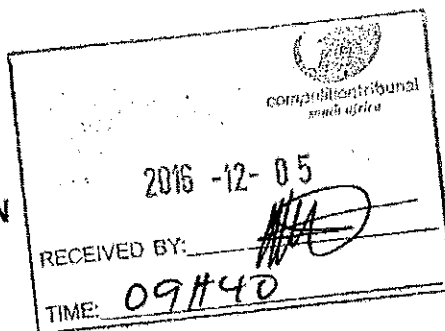
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

And

PHAMBILI PIPELINES (PTY) LTD



APPLICANT

RESPONDENT

FILING SHEET

TAKE NOTICE THAT the Applicant files herewith the following documents –

1. CT6 Form; and
2. Settlement agreement between the Competition Commission and Phambili Pipelines (Pty) Ltd.

DATED AT PRETORIA ON 5 DECEMBER 2016

COMPETITION COMMISSION

Block C, The dti Campus

Mulayo Building

77 Meintjies Street

Sunnyside, Pretoria

Tel: 012 394 3231/3527

Ref: Nelly Sakata/

Kriska-Leila Goolabjith

Email: NellyS@compcom.co.za/

KriskaG@compcom.co.za

TO: THE REGISTRAR
THE COMPETITION TRIBUNAL

Block C, The dti Campus

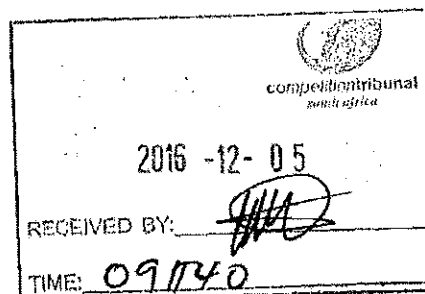
Mulayo Building

77 Meintjies Street

Sunnyside, Pretoria

Ref: Lerato Motaung

Email: leratom@comptrib.co.za / ctsa@comptrib.co.za



AND TO: PHAMBILI PIPELINES (PTY) LTD

RESPONDENT

C/O

FASKEN MARTINEAU

Inanda Greens,

54 Wierda Road West,

Sandton,

Johannesburg,

2196

Ref: Mr S. Langbridge / Mr N MacKenzie / Ms I. Rogers

Email: slangbridge@fasken.com / nmackenzie@fasken.com
irogers@fasken.com

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

CT CASE NO: _____

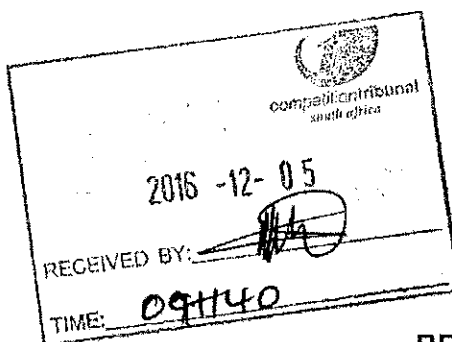
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

And

PHAMBILI PIPELINES (PTY) LTD



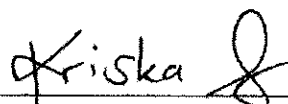
APPLICANT

RESPONDENT

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DATED AT PRETORIA ON 5 DECEMBER 2016



COMPETITION COMMISSION

Block C, The dti Campus

Mulayo Building

77 Meintjies Street

Sunnyside, Pretoria

Tel: 012 394 3231/3527

Ref: Nelly Sakata/

Kriska-Leila Goolabjith

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AND TO: PHAMBILI PIPELINES (PTY) LTD

RESPONDENT

C/O

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54 Wierda Road West,

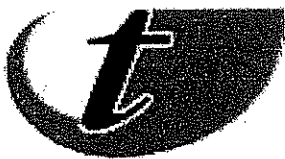
Sandton,

Johannesburg,

2196

Ref: Mr S. Langbridge / Mr N MacKenzie / Ms I. Rogers

Email: slangbridge@fasken.com / nmackenzie@fasken.com
irogers@fasken.com



competitiontribunal south africa

Form CT 6

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).

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

Notice of Motion

Date: 5-Dec-2016 File # CR212Feb15

To: The registrar of the Competition Tribunal

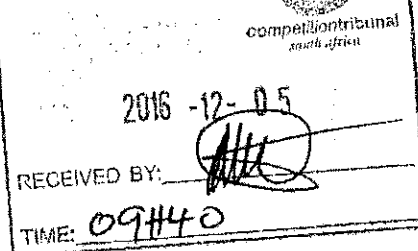
Concerning the matter between:

The Competition Commission (Applicant)

and Phambili Pipelines (Pty) Ltd and Others (Respondent)

Take notice that the Competition Commission intends to apply to the Tribunal for the following order:

CONFIRMATION OF THE SETTLEMENT AGREEMENT, ATTACHED TO THIS APPLICATION, IN TERMS OF SECTION 27(1)(d) READ WITH SECTION 58(1)(a) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED.



Name and Title of person authorised to sign:
BUKHOSIBAKHE MAJENGE, MANAGER: LEGAL SERVICES

Authorised Signature:

Date:

[Signature]

05/12/2016

For Office
Use Only:

Tribunal file number:

Date filed:

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

CT CASE NO: _____

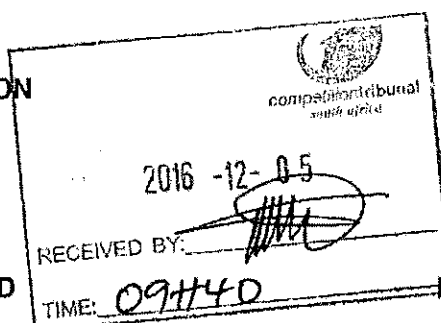
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

and

PHAMBILI PIPELINES (PTY) LTD



APPLICANT

RESPONDENT

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
PHAMBILI PIPELINES (PTY) LTD IN RESPECT OF A CONTRAVENTION OF
SECTION 4(1)(b)(iii) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED

PREAMBLE

The Competition Commission ("**Commission**") and Phambili Pipelines (Pty) Ltd, hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 27(1)(d) read with section 58(1)(a)(v) of the Competition Act no. 89 of 1998, as amended ("**the Act**"), in respect of a contravention of section 4(1)(b)(iii) of the Act, on the terms set out below:

1 DEFINITIONS

For the purposes of this Settlement Agreement the following definitions shall apply:

- 1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 "Andrew David Toy" means Andrew David Toy in his capacity as a trustee of the Andrew Toy Family Trust;
- 1.3 "Andrew Toy Family Trust" means the Andrew Toy Family Trust, a trust duly registered in terms of the laws of the Republic of South Africa under trust deed number 2638/04;
- 1.4 "ATPD" means ATPD Properties Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province;
- 1.5 "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);
- 1.6 "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;
- 1.7 "Commissioner" means the Commissioner of the Competition

Commission, appointed in terms of section 22 of the Act;

- 1.8 "Complaint" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Sep4641 initiated against, *inter alia*, the Respondents for alleged contraventions of section 4(1)(b);
- 1.9 "Cycad Pipelines" means Cycad Pipelines Proprietary Limited, a private company duly incorporated in terms of 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;
- 1.10 "Delatoy Group" means collectively Delatoy Investments, Delatoy Group Holdings, ATPD, Dream World 344, Dream World 345, Patrick Donovan Delamere, Francois Koch, Tonya Elizabeth Delamere, Andrew David Toy, Patrick James Rowan Toy, Hilton Somah Gordon;
- 1.11 "Delatoy Group Holdings" means Delatoy Group Holdings Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province. At all material times, Delatoy Group Holdings traded under the registered name of Shearwater Group Holdings Proprietary Limited until it changed its name to Delatoy Holdings in 2009;
- 1.12 "Delatoy Investments" means Delatoy Investments Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province. At

all material times, Delatoy Investments traded under the registered name of Shearwater Construction Proprietary Limited until it changed its name to Delatoy Investments in 2009;

- 1.13 **"Dream World 344"** means Dream World Investments Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, South Africa;
- 1.14 **"Dream World 345"** means Dream World Investments 345 Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, South Africa;
- 1.15 **"Francois Koch"** means Francois Koch in his capacity as trustee of the P.D.D Family Trust;
- 1.16 **"Hilton Somah Gordon"** means Hilton Somah Gordon in his capacity as a trustee of the Andrew Toy Family Trust;
- 1.17 **"Invitation"** means the Invitation to Firms in the Construction Industry to Engage in Settlement in Contraventions of the Act, as published on the website of the Commission on 1 February 2011;
- 1.18 **"Loser's fee"** means a fee paid by the successful tenderer to the unsuccessful tenderer(s) as compensation for engaging in collusive tendering;
- 1.19 **"Patrick Donovan Delamere"** means Patrick Donovan Delamere in



his capacity as a trustee of the P.D.D Family Trust;

- 1.20 **"Patrick James Rowan Toy"** means Patrick James Rowan Toy in his capacity as trustee of the Andrew Toy Family Trust;
- 1.21 **"P.D.D Family Trust"** means the P.D.D Family Trust, a trust duly registered in terms of the laws of the Republic of South Africa under the trust deed number IT2647/04(T);
- 1.22 **"Phambili Pipelines"** means Phambili Pipelines Proprietary Limited, a wholly-owned subsidiary of Basil Read Holdings Limited, with its principal place of business at the Basil Read Campus, 7 Romeo Street, Hughes, Boksburg, Gauteng, South Africa;
- 1.23 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and Phambili Pipelines;
- 1.24 **"Shearwater Construction"** means Shearwater Construction Proprietary Limited, a private company incorporated under the laws of the Republic of South Africa which changed its name to Delatoy Investments in 2009;
- 1.25 **"Thabazimbi Pipeline Project"** means the project for the construction of a steel pipeline of approximately 30,4 kilometres in length between Padda Junction and Tuschenkomst for the Pilanesberg Platinum Mine at Northarm;
- 1.26 **"Tonya Elizabeth Delamere"** means Tonya Elizabeth Delamere in her capacity as trustee of the P.D.D Family Trust; and

Handwritten signature and initials in the bottom right corner of the page.

- 1.27 "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 dtl Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2 BACKGROUND

- 2.1 On 10 February 2009, the Commissioner initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in possible contraventions of sections 4(1)(a) and 4(1)(b) of the Act, in the construction of the stadia for the 2010 FIFA Soccer World Cup against Grinaker-LTA, Group Five, Basil Read, WBHO, Murray & Roberts, Stefanutti, Interbeton Abu Dhabi nv llc and Bouygues Construction SA, under case number 2009Feb4279 ("**February 2009 Initiation**").
- 2.2 Following the February 2009 Initiation, the Commission conducted an investigation that indicated that there was pervasive anti-competitive conduct in the construction industry which extended beyond the scope of the February 2009 initiation. On 1 September 2009, the Commissioner therefore initiated a further complaint into alleged collusive conduct in contravention of sections 4(1)(b)(i), (ii) and (iii) of the Act, in the construction industry, which included several firms and joint ventures in the construction industry, under case number 2009Sep4641 ("**September 2009 Initiation**").
- 2.3 Pursuant to the September 2009 Initiation, and in consequence of its investigation of the complaints, it became evident to the Commission that the construction industry was characterised by entrenched and ubiquitous co-operation and endemic practices of collusive tendering conduct.



- 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 the construction firms that were involved in collusive conduct to apply to engage in settlement on favourable terms.
- 2.5 On 1 February 2011 the Commission issued the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act ("**the Invitation**"). 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. In the context of the Invitation, the collusive conduct engaged in included collusive tendering or 'bid rigging', in some instances through a 'Loser's fee'.
- 2.6 The Invitation required firms to apply for settlement by disclosing all construction projects that were the subject of prescribed and non-prescribed practices. The closing date to apply for settlement in terms of the Invitation was 15 April 2011.
- 2.7 In response to the Invitation and in terms of the Commission's CLP, Phambili Pipelines was first to apply for leniency for its role in the collusive tendering in relation to the Thabazimbi Pipeline Project.
- 2.8 Cycad Pipelines concluded a settlement agreement with the



Commission on 14 July 2014 in respect of the collusive tendering in relation to the Thabazimbi Pipeline Project. This settlement agreement between Cycad Pipelines and the Commission was made an order of the Tribunal on 19 August 2014.

- 2.9 The Delatoy Group did not apply to engage in settlement under the Invitation.
- 2.10 Pursuant to the process under the Invitation, the Commission further investigated the alleged involvement of the Delatoy Group in collusive tendering relating to the Thabazimbi Pipeline Project. The Commission's findings are set out below.

3 COMMISSION'S INVESTIGATION AND FINDINGS

- 3.1 Following its investigation, the Commission found that in or about February 2008, Phambili Pipelines entered into a collusive agreement in contravention of section 4(1)(b)(iii) of the Act with Cycad Pipelines and the Delatoy Group in relation to the Thabazimbi Pipeline Project.
- 3.2 During February 2008, Boynton Investments Proprietary Limited and Barrick Platinum South Africa Proprietary Limited invited bids for the construction of a 750mm diameter cement mortar-lined, fusion bonded medium density polyethylene coated, steel pipeline of approximately 30,4 kilometres in length between Padda Junction and Tuschenkomst for the Pilanesberg Platinum Mine at Northarm.
- 3.3 The Thabazimbi Pipeline Project was a closed tender in that specific companies were invited to tender for the project by no later than 28 February 2008 and the price of the winning tender was not made public.

- 3.4 The Commission's investigation found that before the closing date (28 February 2008) for the submission of the bids for the Thabazimbi Pipeline Project, Phambili Pipelines, Cycad Pipelines and the Delatoy Group entered into a Loser's fee arrangement in terms of which they agreed to inflate their bid prices and for the winner to pay a Loser's fee to each of the two companies that lost the bid.
- 3.5 Cycad Pipelines was awarded the tender on or about May 2008 and paid a Loser's fee in the amount of R1 140 000 to Phambili Pipelines in instalments between August 2008 and December 2008.
- 3.6 Cycad Pipelines also paid a Loser's fee in the amount of R1 143 420,00 to ATPD acting under the direction of Delatoy Investments in five equal instalments of R228 684,00 each between August 2008 and December 2008.
- 3.7 On the basis of the above, the Commission concluded that Phambili Pipelines, Cycad Pipelines and the Delatoy Group had engaged in collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The Commission accordingly decided to refer the Complaint to the Tribunal in terms of section 50 of the Act.

4 REFERRAL PROCEEDINGS IN THE TRIBUNAL

- 4.1 On 25 February 2015, the Commission referred the Complaint against the Delatoy Group to the Tribunal under Tribunal case number 020834, now CR212Feb15.
- 4.2 Following the Tribunal's decision issued on 14 April 2016 in relation to an interlocutory application concerning whether the Delatoy Group constituted a firm for purposes of the Act as well as whether the



complaint had prescribed in terms of section 67(1) of the Act, the Delatoy Group and the Commission concluded a settlement agreement. This settlement agreement was made an order of the Tribunal on 13 July 2016.

5 CONDITIONAL IMMUNITY

- 5.1 The Commission granted Phambili Pipelines conditional immunity from an administrative penalty before the Tribunal from its involvement in the prohibited practice described in paragraph 3 above.
- 5.2 In exchange for conditional immunity, Phambili Pipelines agreed to cooperate 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 3 above to be a contravention of section 4(1)(b)(iii) of the Act.
- 5.3 In order to discharge its mandate of ensuring that findings are obtained against all participants to a cartel, the Commission sought to conclude consent agreements with the leniency applicants at the conclusion of the fast track settlement process. This was done in order to safeguard and preserve the rights of affected third parties to bring civil damages claims against the leniency applicants.
- 5.4 The Commission and Phambili Pipelines have agreed to settle on the terms as set out in this Settlement Agreement.

6 ADMISSION

Phambili Pipelines admits that it was involved in the collusive tendering as

detailed in paragraph 3 above with its competitors, Cycad Pipelines and the Delatoy Group, in contravention of section 4(1)(b)(iii) of the Act.

7 FUTURE CONDUCT

Phambili Pipelines agrees and undertakes to:

- 7.1 prepare and circulate a statement summarising the content of this Settlement Agreement to its employees, managers and directors within 14 (fourteen) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal;
- 7.2 refrain from engaging in collusive tendering in contravention of section 4(1)(b)(iii) of the Act, and from engaging in any contravention of the Act in future;
- 7.3 develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, in particular such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act; and
- 7.4 submit a copy of such compliance programme to the Commission within ninety (90) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal.

8 FULL AND FINAL SETTLEMENT

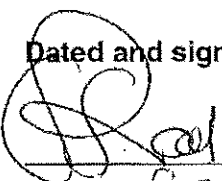
- 8.1 This Settlement Agreement is entered into in full and final settlement



of the complaint against Phambili Pipelines under Commission case number 2009Sep4641 and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and Phambili Pipelines in respect of the Complaint.

For the Respondent

Dated and signed at Boksburg on the 24 day of October 2016

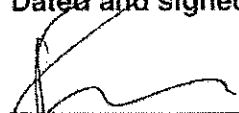


Name: Susanna M du Rand

Designation: Legal advisor

For the Commission

Dated and signed at PRETORIA on the 23rd day of November 2016



TEMBINKOSI BONAKELE
COMMISSIONER



