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COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CR093Jan07/SA004Apr18

In the matter between:

The Competition Commission **Applicant**

And

Cape Gate (Pty) Ltd **Respondent**

Panel	:	A Ndoni (Presiding Member) M Mokuena (Tribunal Member) I Valodia (Tribunal Member)
Heard on	:	06 June 2018
Decided on	:	06 June 2018

Settlement Agreement

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

Presiding Member
Ms Andiswa Ndoni

06 June 2018
Date

Concurring: Mrs Medi Mokuena and Prof. Imraan Valodia

ANNEXURE 'A'

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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).

Notice of Motion

Date: 4-Apr-2018 **File #**_____

To: The registrar of the Competition Tribunal

Concerning the matter between:

Competition Commission (Applicant)

and Cape Gate (Pty) Ltd (Respondent)

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

Confirmation of the settlement agreement between the Competition Commission and Cape Gate (Pty) Ltd, dated 26 March 2018, as an order of the Tribunal in terms of section 58(1)(b) of the Competition Act 89 of 1998.

Name and Title of person authorised to sign:

Bakhe Majenge, Divisional Manager, Legal Services

Authorised Signature: **Date:** 5 April 2018

For Office Use Only: Tribunal file number: Date filed:

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT CASE NO: 09/CR/Jan07; 63/CR/SEP09

In the matter between:

THE COMPETITION COMMISSION Applicant

and

CAPE GATE (PTY) LTD Respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND CAPE GATE (PTY) LTD

The Competition Commission ("**Commission**") and Cape Gate (Pty) Ltd ("**Cape Gate**") 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 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) of the Act.

1 DEFINITIONS

For 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 "**AMG**" means Allens Meshco (Pty) Ltd, Hendok (Pty) Ltd, Wireforce Steelbar (Pty) Ltd, Agriwire (Pty) Ltd, Agriwire North (Pty) Ltd, Agriwire Upington (Pty) Ltd, Cape Wire (Pty) Ltd, Forest Wire (Pty) Ltd, Independent Galvanising (Pty) Ltd and Associated Wire Industries (Pty) Ltd;

1.3 "**Cape Gate**" means Cape Gate (Pty) Ltd, a private company which has is principal place of business at Nobel Boulevard, Vanderbijlpark, Gauteng;

1.4 "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its offices at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.5 "**CWI**" means Consolidated Wire Industries Limited;

1.6 "**Settlement Agreement**" means this agreement duly signed and concluded between the Commission and Cape Gate;

1.7 "**Parties**" means the Commission and Cape Gate;

1.8 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its offices at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; and

2 BACKGROUND

2.1 On 28 July 2008, CWI applied for corporate leniency for its involvement in certain cartel activity in the wire industry. Based on this information, the Commission initiated a complaint against various firms, including Cape Gate, and began investigating the matter.

2.2 On 7 September 2009, the Commission concluded its investigations and referred its findings to the Tribunal that AMG, CWI and Cape Gate had contravened section 4(1)(b) of the Act ("**Referral**").[1]

2.3 In answer to the Referral, Cape Gate admitted its involvement in the alleged conduct but disputed the quantum of its penalty. Notwithstanding this narrow dispute with the Commission, Cape Gate provided documentary evidence as well as witness testimony in support of the Commission's litigation against AMG.

2.4 Unfortunately, the litigation of the Referral has been protracted by numerous legal challenges which has taken the parties through the Courts, including the Supreme Court of Appeal.[2] Cape Gate has on many occasions assisted the Commission in these processes by supporting the

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[1] Tribunal case 63/CR/SEP09. This referral was later consolidated with an older referral relating to similar conduct (Older referral-CT: 09/CR/JAN07).
[2] *AgriWire (Pty) Ltd v Commissioner of the Competition Commission* 2012 (SCA).

Commission's arguments on the merits of the matter.[3]

3 CONDUCT IN CONTRAVENTION OF THE ACT

3.1 The Referral reflects the Commission's findings that from 2001 to about 2008, Cape Gate had met and corresponded with CWI and AMG, on numerous occasions, to fix their selling prices in South Africa of wire and wire related products.[4] Prices were fixed by agreeing on a common national price list and certain discounts that may be deducted from the national price list.[5]

3.2 In addition, the Commission found that from 2006 to 2008, Cape Gate, CWI and AMG allocated customers for wire and wire related products by agreeing to share customers or not compete for each other's "traditional" customers.[6]

3.3 Finally, the Commission found that from 2001 to 2008, Cape Gate, AMG and CWI tendered collusively by coordinating their respective bids to supply cable armouring. These firms coordinated their bids to ensure that an allocated respondent was awarded certain tenders. In relation to Cape

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[3] For example, the Commission's application to reopen its case against AMG (CT:CR093Jan07/OTH058Jul16).
[4] Including products such as diamond mesh fencing, nails and barbed wire. For further detail, please see Annex NN2 to the Referral.
[5] Para 28 of the Referral.
[6] Para 29 of the Referral.

Gate, these tenders were the Malasela Technologies tender as well as the 2001 Harmony Gold tender.

3.4 The Commission found that the above conduct contravened sections 4(1)(b)(i), (ii) and (iii) of the Act.

4 ADMISSION

4.1 Cape Gate admits that it engaged in conduct that contravenes section 4(1)(b) of the Act.

5 CO-OPERATION

5.1 Cape Gate agrees to fully cooperate with the Commission in its prosecution of the remaining respondents in the above collusive conduct. This cooperation includes, but is not limited to:

5.1.1 To the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Settlement Agreement;

5.1.2 Avail employees of Cape Gate, and using reasonable endeavours to contact past employees of Cape Gate, to assist the Commission in the prosecution of the alleged contraventions covered by this Settlement Agreement; and

5.1.3 To the extent that it is able, testify in respect of the alleged contravention covered by this Settlement Agreement.

6 FUTURE CONDUCT

Cape Gate agrees and undertakes to:

6.1 prepare and circulate a statement summarising the content of this agreement to its, managers and directors within 14 (fourteen) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal;

6.2 if not already doing so, 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. This programme will be submitted to the Commission within thirty days of this settlement being confirmed by the Tribunal; and

6.3 refrain from engaging in any contraventions of the Act.

7 ADMINISTRATIVE PENALTY

7.1 After considering the factors in section 59(3), the parties agree that Cape Gate pay an administrative penalty of R40 million (forty million rand).

7.2 Cape Gate will pay the administrative penalty in five equal installments of R8 000 000 (eight million rand). The first installment will be paid within 12 months from the date of the Tribunal's order with subsequent instalments on the anniversary of the Tribunal's order. Interest on outstanding amounts will accrue from the first anniversary of the Tribunal's order using the interest rate contemplated in terms of section 80(1)(b) of the Public Finance Administration Act 1999, as amended.

7.3 Payment of the amount referred to in paragraph 7.1 above 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: 63/CR/SEP09(Cape Gate)

7.4 The amount referred to in paragraph 7.1 above shall 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

8.1 This Settlement Agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and Cape Gate in respect of this conduct in relation to referral under Tribunal number 63/CR/SEP09.

For **Cape Gate**

Dated and signed at VANDERBIJLPARK **on the** 26 **day of** MARCH **2018**

Name: B. N. COETZEE

Designation: JOINT CEO.

For the **Commission**

Dated and signed at PRETORIA on the 26th day of MARCH 2018

TEMBINKOSI BONAKELE

Commissioner