



competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR206Feb15/SA149Oct20

In the matter between:

The Competition Commission

Applicant

And

Pretoria Portland Cement Company Ltd

Respondent

Panel : M Mazwai (Presiding Member)
: Y Carrim (Tribunal Member)
: F Tregenna (Tribunal Member)

Heard on : 06 November 2020

Decided on : 06 November 2020

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Pretoria Portland Cement Company Ltd annexed hereto.

Presiding Member
Ms Mondo Mazwai

09 November 2020

Date

Concurring: Ms Yasmin Carrim and Prof. Fiona Tregenna

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

CC Case No: 2008NOV3769

CT Case No: 020776

In the matter between

THE COMPETITION COMMISSION

Applicant

and

PRETORIA PORTLAND CEMENT COMPANY LTD

Respondent

SETTLEMENT 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 PRETORIA PORTLAND CEMENT (PTY) LTD, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(i) and (ii) OF THE COMPETITION ACT

The Competition Commission and Pretoria Portland Cement Company Ltd hereby agree that an application be made to the Competition Tribunal for 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 89 of 1998, as amended ("Act"), in respect of contravention of sections 4(1)(b)(i) and (ii) of the Act, on the terms set out below.

1


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. **“Afrisam”** means AfriSam (South Africa) Limited, a company duly registered and incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at Corner 14th Avenue and Hendrik Potgieter, Constantia Office Park, Weltevredenpark, Johannesburg;
- 1.3. **“C&CI”** means the Cement and Concrete Institute of South Africa;
- 1.4. **“CLP”** means the Commission’s Corporate Leniency Policy in Government Gazette number: 31064 of 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. **“Complaint”** means the complaint initiated by the Commissioner in terms of section 49B(1) of the Act under CC case number: 2007Jun3769;
- 1.7. **“Days”** means business days;
- 1.8. **“Lafarge”** means Lafarge South Africa (Pty) Limited, a company duly registered and incorporated in accordance with the applicable laws of the Republic of South

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- Africa, with its principal place of business at 21 Woodlands Drive, Woodmead, Johannesburg;
- 1.9. **“NPC”** means Natal Portland Cement Cimpor (Pty) Limited, a company duly registered and incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 199 Coedmore Road, Bellai, Durban South, KwaZulu Natal;
- 1.10. **“Parties”** means the Commission and PPC;
- 1.11. **“PPC”** means Pretoria Portland Cement Company Limited, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 32 Markstraat, Paarl, Cape Town, Western Cape;
- 1.12. **“Respondents”** means Afrisam, Lafarge, NPC and PPC;
- 1.13. **“SACPA”** means the South African Cement Producers Association;
- 1.14. **“Settlement Agreement”** means this agreement duly signed and concluded between the Commission and PPC;
- 1.15. **“Slagment”** means Slagment (Pty) Limited, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 9 Delfos Blvd, Vanderbijlpark N. W. 7, Vanderbijlpark, 1911; and
- 1.16. **“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

Commission's Complaint Initiation

- 2.1 On 02 June 2008, the Commissioner initiated a complaint against the five main cement producers in South Africa, namely PPC, Afrisam, NPC, Lafarge and Slagment for alleged contraventions of sections 4(1)(b)(i), 4(1)(b)(ii), 5(1) and 8(c) of the Act. The allegations relating to section 8(c) of the Act related to PPC only. The allegations relating to section 5(1) of the Act were based on vertical arrangements between the respondents and Slagment (which was wholly owned and controlled by Afrisam from 2004) for the supply of slag.
- 2.2 Pursuant to the complaint initiation, the Commission conducted a search and seizure operation ("raid") on 24 June 2009 at the premises of PPC, Afrisam, Lafarge and NPC. Subsequent to the raids, on 07 August 2009 PPC applied for leniency in terms of the Commission's Corporate Leniency Policy ("CLP"). In its leniency application, PPC admitted to engaging in collusive conduct and implicated Afrisam, Lafarge and NPC in the collusive conduct. On 5 November 2009, the Commission granted PPC conditional immunity from prosecution for participating in the cement cartel. On 20 November 2010, on the basis of information received from PPC's leniency applications as well as its own investigation, the Commission expanded its

investigation into the cement cartel to include an alleged contravention of section 4(1)(a) of the Act by the respondents.

Commission's investigation findings

2.3 The Commission's investigation revealed that in the period following the demise of the lawful cartel in September 1996, the respondents entered into collusive agreements and/or arrangements in respect of the supply of cement. Representatives of the respondents attended various meetings in which they reached agreements in contravention of sections 4(1)(b)(i) and (ii) of the Act which:

2.3.1. indirectly fixed prices for cement in contravention of section 4(1)(b)(i) of the Act; and

2.3.2. divided the cement market through, inter alia, the allocation of market shares in contravention of section 4(1)(b)(ii) of the Act.

Commission's Referral

2.4 On 19 February 2015, the Commission referred the complaint against the respondents who carry on the businesses of manufacturing and supplying cement in the Republic of South Africa, and are parties in a horizontal relationship (competitors) as envisaged by section 4 of the Act.

2.5 The Commission did not seek any relief against PPC save in the event of its failure to fulfil the conditions of their conditional immunity from prosecution in terms of the



Commission's CLP. The Commission also sought no relief against Slagment as the Commission did not pursue the section 5(1) allegation against the respondents and Slagment in its complaint referral. Further, Afrisam and Lafarge admitted their participation in the collusive conduct and concluded consent agreements with the Commission under section 49D (1) of the Act on 01 November 2011 and 08 March 2012, respectively.

2.6 This Settlement Agreement seeks to finalize the matter against PPC by confirming its conduct as a contravention of the Act and grant PPC final immunity from prosecution and an administrative penalty.

3. CONDUCT IN CONTRAVENTION OF THE ACT

3.1 The respondents had operated under the auspices of a lawful cartel for decades. However, the Competition Board, the predecessor to the present Commission, withdrew the exemption in September 1994 and afforded the respondents a grace period of 2 years until the end of September 1996 to terminate the lawful cartel arrangements. Cartel conduct amongst the respondents commenced in the period following the demise of the lawful cartel in 1995 when the respondents collusively concluded an agreement on 15 December 1995 ("1995 agreement") after the Competition Board had ordered the disbandment of the lawful cartel. This collusive conduct continued until at least 2009.

3.2 In May 1995, there were various multilateral discussions among the respondents that took place in SACPA meetings. These meetings culminated in an agreement

 6 

among the respondents to allocate market shares. The 1995 agreement was aimed at agreeing, allocating and targeting market shares as agreed amongst the respondents. In terms of this agreement, the respondents agreed to target market shares as follows:

3.2.1. PPC was allocated a market share of 42 – 43%

3.2.2. AfriSam was allocated a market share of 35 – 36%; and

3.2.3. Lafarge was allocated a market share of 22 – 23%.

3.3 The 1995 agreement was short lived as it collapsed in 1996 as a consequence of, *inter alia*, PPC's aggressive expansion and usurping of market shares from its competitors, which caused its competitors to retaliate and thereby thrusting the cement industry into a price war. Following the price war, the respondents met in several occasions and concluded further collusive agreements in order to stabilize the industry. There are similarities between the lawful cartel and the one which PPC is granted immunity against in that in both cartels: (i) the respondents allocated geographic markets amongst each other, (ii) the respondents targeted market shares, (iii) an information exchange framework operated in both cartels.

Port Shepstone Meeting and Agreement

3.4 Prior to the conclusion of the collusive agreement at Port Shepstone ("Port Shepstone agreement"), representatives of PPC attended meetings which started around 1997 that took place at hotels in Johannesburg. These preliminary meetings

 7 

were not documented but they were aimed at returning stability in the market, restoring confidence and trust between the respondents. The meetings were attended by representatives of PPC and various representatives of PPC's competitors.

3.5 PPC's representatives attended a particular meeting that culminated in a two day meeting at a hotel in the South Coast of KwaZulu Natal, near Port Shepstone, close to NPC's Simuma factory. This meeting has been termed the Port Shepstone meeting. In this meeting, the discussions also centered around PPC's breach of the market share agreement and PPC's disturbance of the market through the branding of its products. However, the main aim of this meeting was to restore stability in the market.

3.6 There were also discussions on market share, targets by province, generic pricing levels by province, limitation on marketing activities and discussions on products. There was no minute or formal agreement reflecting the matters that were agreed at this meeting. However, the Port Shepstone meeting was a critical forum at which the cartel consensus was formulated. The Port Shepstone meeting culminated in an agreement on the following:

3.6.1. market share allocation in line with the market share allocation under the lawful cartel for the SACU market, being all of South Africa, Lesotho, Botswana, Namibia and Swaziland, although often loosely referred to by the respondents as the "national" market;

- 3.6.2. the target market shares of the cement producers under the 1995 agreement were refined;
- 3.6.3. market shares for each company per province, with provincial market shares added up to the previous SACU cartel market shares. Under the cartel, market shares were not kept on a provincial basis. There was an understanding that this could not happen overnight but that this would be accomplished more by price increases rather than by price decreases;
- 3.6.4. the scaling back of each respondent's marketing and distribution activities including the closure of certain offices and depots in various regions (in particular, PPC and Lafarge undertook to withdraw from NPC's territory, in Southern KZN);
- 3.6.5. an agreement not to offer special discounts on higher quality cements, which had led to them being priced at the level of lower quality cements; and
- 3.6.6. the pricing parameters for different types of cement;
- 3.7 Representatives of the respondents met regularly in the period between 1999 to 2002 to discuss the implementation of the Port Shepstone agreement. PPC participated and implemented agreements or arrangements made in the Port Shepstone meeting as the product of a unilateral strategy which was effective. Price increases were put through and the competitors increased their prices as well. Following the Port Shepstone agreement, by June 1999 PPC shed its market share and its reverted to the upper limit of its target range 43%, as specified in the 1995 agreement.

Other Meetings

3.8 There were a number of follow up meetings between PPC and its competitors where they agreed subsequent price increases and also reported back on how the various agreements were being implemented. According to PPC's representatives, these meetings ended in 1999 but there is a possibility that they continued for a longer period into 2000.

3.9 PPC's representatives were also having regular discussions and meetings with its competitors at a more senior level. These high-level meetings discussed, *inter alia*, market shares, pressure of other competitors to enter the PPC's Western Cape market, PPC's apparent honouring of agreements and new entrant into the market. PPC continued to engage with its competitors at a high level. These engagements included meetings in Paris in November 1998 and March 1999. The March 1999 meeting in Paris discussed the following issues:

3.9.1. PPC requested assurance that its competitors would not enter into the Western Cape market, and this was agreed;

3.9.2. There was an agreement that the January price increases had been successful and Lafarge wanted its agreed market share managed to 2 decimal places;

3.9.3. PPC was in favour of stability but could not mechanically be managed to 2 decimal places; and

3.9.4. PPC and its competitors were to agree on price increases for July.

- 3.10 A further meeting was held in Zurich in June 1999 between PPC and its competitors. The meeting discussed market shares of the respondents in terms of which Afrisam had 35,3%, Lafarge 22,3% and PPC had 42,33%. There were also discussions on matters including Lafarge's suggested purchase of NPC, Lafarge's pressure to secure its desired market share by December 1999, uniting against the blenders and PPC entering the Readymix market. PPC's competitors were keen for PPC to enter the Readymix market as it would be very easy to regulate market shares on a formula basis if all cement competitors owned significant Readymix operations.
- 3.11 The concept of managing market share has been an important part of PPC's strategy since 1999 and never changed in any material way. The understanding was that PPC would not increase market share beyond its cartel level: it would grow its margin by increasing prices and decreasing costs, and would not aggressively pursue new customers. PPC maintained this strategy because of the knowledge of the price war and that things got better when the price war stopped. PPC passed on this strategy to onto its General Managers and Area Managers to manage their market share in their areas of operation and not to increase it.
- 3.12 PPC closed its regional offices as part of the agreed strategy of managing the respective competitors' market shares following the Port Shepstone meeting. In particular, PPC gave up its depot in Richards Bay because Lafarge had entered that market and put up a grinding depot there. In exchange, Lafarge shut down its depot in Francistown, Botswana, which was taken over by PPC. PPC gave up its Northern Kwa-Zulu Natal market for the Northern Botswana market for strategic reasons.

3.13 There were other meetings held in July 1999 in which it was agreed that Lafarge would go into Western Cape and close off imports, and that PPC could not ratchet down its sales and marketing until there was an agreement on long term issues.

Maintenance and monitoring of agreed market shares

3.14 In or about 1996, as part of maintaining and monitoring the targeted market shares, and thereby restraining price competition, the respondents agreed to submit detailed cement sales data to an audit firm, Deloitte, appointed by the C&CI which replaced SACPA. The audit firm, on a monthly basis, aggregated the sales data across the firms and disseminated the aggregated data to the respondents. The respondents were on this basis able to measure their own market shares for the SACU market as a whole, as well as for defined sub-regions, product categories and customer categories, and monitor if their competitors were abiding by the agreements.

3.15 The C&CI was a central mechanism in enabling the respondents to target market shares. The respondents reached a series of agreements on the format of templates used for submitting monthly sales data to the C&CI. The information exchange through the C&CI ended in 2009 following the Commission's decision that the information exchange should be changed to reflect only national aggregated sales data.

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

4. ADMISSION

PPC admits that it engaged in the above collusive conduct, which is in contravention of sections 4(1)(b)(i) and (ii) of the Act.

5. CO-OPERATION

As far as the Commission is aware, and in compliance with the requirements as set out in the CLP, PPC:

- 5.1 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 which are the subject of this agreement;
- 5.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practices which are the subject of this agreement;
- 5.3 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;
- 5.4 has confirmed that it has not wilfully destroyed or falsified or concealed information, evidence and documents relating to the prohibited practices which are the subject of this agreement;
- 5.5 has confirmed that it has not wilfully or negligently made any misrepresentation concerning the material facts of any of the prohibited practices which are the subject of this agreement or otherwise acted dishonestly.

6. FUTURE CONDUCT

- 6.1 PPC confirms that it no longer engages in the conduct set out in paragraph 3 above.
- 6.2 PPC will 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.
- 6.3 PPC shall submit a copy of such compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order by the Tribunal.
- 6.4 PPC shall circulate a statement summarising the contents of this Settlement Agreement to all management and operational staff employed at PPC within 60 days from the date of confirmation of this Settlement Agreement by the Tribunal.
- 6.5 PPC will not in the future engage in any form of prohibited conduct and will not engage in price fixing conduct in contravention of the Act but undertakes henceforth to engage in competitive pricing.

7. MONITORING

All reports relating to the conditions set out in this Settlement Agreement, including but not limited to compliance programmes, shall be submitted to the Commission at this email

 14 


address: collections@compcom.co.za.

8. FULL AND FINAL SETTLEMENT

This Settlement Agreement is entered into in full and final settlement of the conduct set out in paragraph 3 above and, upon confirmation as an order of the Tribunal, concludes all proceedings between the Commission and PPC in respect of the conduct contemplated under the Commission's complaint case number: 2008Nov3769.

Dated and signed at **JOHANNESBURG** on the 18th day of **OCTOBER** 2020.



Pretoria Portland Cement Company Limited

Name in Full: Roland Van Wijnen

Authority: Chief Executive Officer

Dated and signed at **CAPE TOWN** on the 13th day of **OCTOBER** 2020.



Pretoria Portland Cement Company Limited

Name in Full: Ronel van Dijk

Authority: Chief Financial Officer

For the Commission

Dated and signed at **PRETORIA** on the 19TH day of OCTOBER 2020.



Tembinkosi Bonakele

The Commissioner: Competition Commission

