

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: 017475**

**In the matter between:**

The Competition Commission

Applicant

and

Stefanutti Stocks Holdings Ltd

Respondent

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Panel: A Wessels (Presiding Member), T Madima  
(Tribunal Member) and A Roskam (Tribunal  
Member)

Heard on: 14 August 2013

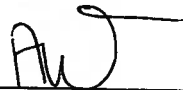
Decided on: 14 August 2013

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**Order**

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The Tribunal hereby confirms as an order in terms of section 58(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998) the settlement agreement reached between the Competition Commission and the respondent which is attached hereto as "Annexure A".

  
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Presiding Member  
A Wessels

**Concurring: T Madima and A Roskam**

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

**CT Case No.**

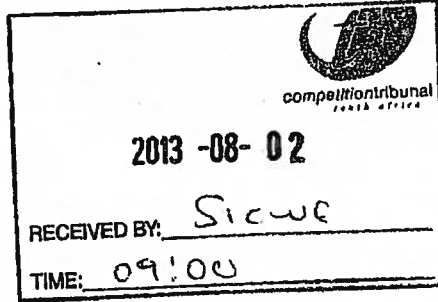
**CC Case No. 2009May4447/2009May4448**

In the matter between

**COMPETITION COMMISSION**

and

**STEFANUTTI STOCKS HOLDINGS LIMITED**



**Applicant**

**Respondent**

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

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**Preamble**

The Commission and Stefanutti Stocks Holdings Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this consent agreement as an order of the Competition Tribunal in terms of section 49D read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998 (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 set out 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 Gazette Notice no. 628 of 23 May 2008) published in Government Gazette no.31064;
- 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 Mulayo Building (Block C), the DTI 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 **"Complaints"** means the complaint initiated by the Commissioner in terms of section 49B of the Act against Stefanutti Stocks Holdings Limited ("Stefanutti"), Hochtief Solutions AG ("Hochtief"), Concor (Pty) Limited ("Concor"), Group Five Limited, Dura Soletanche-Bachy (Pty) Limited ("Dura"), Nishimatsu Construction Co Ltd ("Nishimatsu"), and Grinaker LTA Ltd ("Grinaker"), under case number 2009May4447; as well as the complaint initiated by the Commissioner in terms of section 49B of the Act against Grinaker LTA Ltd ("Grinaker") and Stefanutti under case number 2009May4448;
- 1.6 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Stefanutti;
- 1.7 **"Parties"** means the Commission and Stefanutti;
- 1.8 **"Respondent"** means Stefanutti;
- 1.9 **"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;



1.10 "*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 Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

## 2. The Commission's Investigation and Findings

2.1. On 22 July 2009 the Commissioner initiated a complaint in terms of section 49B(1) of the Competition Act, 1998 (as amended) ("the Act"), into alleged prohibited practices relating to collusive conduct in contravention of section 4(1)(b)(iii) of the Competition Act, 1998 (as amended) ("the Act"), in relation to the construction of a new colliery known as Goedgevonden Colliery against Stefanutti and Grinaker.

2.2. In addition, on 18 August 2009 the Commissioner initiated a complaint against Stefanutti, Hochtief, Concor, Group Five, Dura, Nishimatsu, and Grinaker, for alleged conduct of collusive tendering or alternatively price fixing of the construction of the Durban Undersea Tunnel project, in contravention of section 4(1)(b)(ii) and/or section 4(1)(b)(i) of the Act.

2.3. The complaints were initiated pursuant to leniency applications received by the Commission from Grinaker a subsidiary of Aveng (Africa) Limited ("Aveng"), in terms of the Commission's Corporate Leniency Policy ("CLP").

### *The Goedgevonden Colliery Project*

2.4. The Commission conducted its investigation and found that on or about 7 August 2007, Stefanutti reached agreement with Grinaker in relation to the project for the construction of a new colliery known as Goedgevonden Colliery. In terms of the agreement Stefanutti and Grinaker agreed that Grinaker would submit an uncompetitive bid to ensure that Stefanutti won the tender. Grinaker also contacted Stefanutti to confirm whether its price was safe to ensure that Grinaker



would not be awarded the tender. Stefanutti confirmed that the price was safe.<sup>1</sup> Stefanutti was awarded the tender in line with the collusive agreement. The Commission found that this conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

2.5. The client for the Goedgevonden Colliery project was Xstrata Coal, a business unit of Xstrata plc. The project was completed in July 2008.

*The Durban Undersea Tunnel Project*

2.6. The Commission's investigation established that during 2004, the eThekweni Municipality put out a tender for the Durban Undersea Tunnel project, which involved the construction of a new tunnel which carries pipelines to transfer the sewage generated by Durban to a wastewater treatment works which is situated at an area called the Bluff.

2.7. The Commission found that the eThekweni municipality only invited pre-qualified tenderers to submit bids for this contract, which included: Stefanutti which was in joint venture with Nishimatsu, Dura and Group Five which joined the joint venture later, Grinaker, and Hochtief which was in a joint venture with Concor.

2.8. The Commission's investigation revealed that on or about February 2005, representatives of Stefanutti along with the other prequalified tenderers, met and agreed to add a fixed margin in the amount of R3 million to their respective bid prices, in respect to the Durban Undersea Tunnel tender. They also agreed that the firm which won the bid would pay a fixed sum of R1 million to the losing bidders.

2.9. The Hochtief/Concor joint venture was awarded the tender and Hochtief which was the joint venture leader, paid the agreed sum to some of the losing bidders during 2006, in accordance with the collusive agreement. The Commission found

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<sup>1</sup> "Safe price" in this context is the same as cover price which is provided by a firm that wishes to win a tender to a firm that does not wish to win the tender, in order that the firm that does not wish to win the tender may submit a higher price.

that this conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The Durban Undersea Tunnel project was completed on 27 June 2007.

### 3. Admission

Stefanutti admits that it engaged in collusive tendering in respect of the Goedgevonden Colliery Project and the Durban Undersea Tunnel Project in contravention of section 4(1)(b)(iii) of the Act, as set out in paragraphs 2.4 to 2.9 above.

### 4. Cooperation

Stefanutti agrees to fully cooperate with the Commission in its investigation and prosecution of the remaining respondents in the Durban Undersea Tunnel Project complaint. This cooperation includes, but is not limited to:

- 4.1. 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 Consent Agreement; and
- 4.2 testify in the complaint referral in respect of alleged contraventions covered by this Consent Agreement.

### 5. Future Conduct

Stefanutti agrees to:

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



- 5.2 refrain from engaging in collusive tendering in contravention of section 4 (1)(b)(III) of the Act, and from engaging in prohibited conduct in future;
- 5.3 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;
- 5.4 submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Competition Tribunal; and
- 5.5 undertakes henceforth to engage in competitive bidding.

#### **6. Administrative Penalty**

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, Stefanutti is liable for and has agreed to pay an administrative penalty in the amount of R55 864 536 ( fifty five million eight hundred and sixty four thousand five hundred and thirty six rand) which represents 2.1% of Stefanutti's annual turnover for the civil engineering subsector for the financial year ended 2010. In addition Stefanutti will pay interest at the rate of 10% per annum on the fourth payment as set out in paragraph 7.1.4 below.

#### **7. Terms of Payment**

7.1 Stefanutti will pay the administrative penalty to the Commission in four payments over three years as follows:

A handwritten signature in black ink, appearing to be 'MR' followed by a stylized flourish.

- 7.1.1. the first payment of R12 550 000 (twelve million five hundred and fifty thousand rand) to be made within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.
- 7.1.2 the second payment of R12 550 000 (twelve million five hundred and fifty thousand rand) to be made on the anniversary of the first payment;
- 7.1.3 the third payment of R12 564 536 (twelve million five hundred and sixty four thousand five hundred and thirty six rand) to be made on the anniversary of the second payment; and
- 7.1.4 the fourth payment of R20 020 000 (twenty million and twenty thousand rand) comprising of R18 200 000 (eighteen million and two hundred thousand rand) being the final installment plus 10% per annum interest on the this amount, in the sum of R1 820 000 (one million eight hundred and twenty thousand rand), to be made on the anniversary of the third payment.
- 7.2 The penalty shall be paid into the Commission's bank account which is as follows:
- NAME: THE COMPETITION COMMISSION FEE ACCOUNT**
- BANK: ABSA BANK, PRETORIA**
- ACCOUNT NUMBER: 4050778576**
- BRANCH CODE: 323 345**
- 7.3 The penalty shall be paid over by the Commission to the National Revenue Fund in accordance with the provisions of section 59(4) of the Act.

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**8. Full and Final Settlement**

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Stefanutti relating to the contraventions of section 4(1)(b)(iii) of the Act that are the subject of the Commission's investigations under Commission Case No. 2009May4447 and Commission Case No. 2009May4448.

Dated and signed at KEMPTON PARK on the 31<sup>st</sup> day of JULY 2013

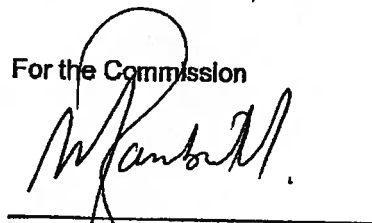
For Stefanutti



Chief Executive Officer

Dated and signed at Pretoria on the 31 day of July 2013

For the Commission



Competition Commissioner