

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 24/CR/Feb09

In the matter between:

Competition Commission

Applicant

and

Aveng (Africa) Ltd

Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and Y Carrim (Tribunal Member)

Heard on : 25 February 2009

Decided on : 25 February 2009

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A", in terms of section 49D(2)(a) of the Competition Act .



D Lewis

Concurring: N Manoim and Y Carrim

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

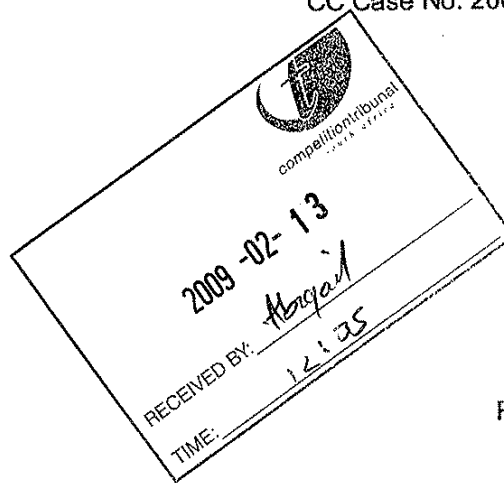
CC Case No: 2008Mar3595

In the matter between:

THE COMPETITION COMMISSION

and

AVENG (AFRICA) LIMITED



Applicant

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND AVENG (AFRICA) LIMITED IN REGARD TO A CONTRAVENTION OF SECTION 4(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED)

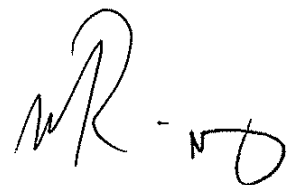
The Competition Commission and Aveng (Africa) Limited hereby agree that application be made to the Competition Tribunal for an order in terms of section 58(1)(a)(iii) of the Competition Act, No. 89 of 1998 (as amended), on the terms set out more fully below.

1 Definitions

For the purposes of this Consent Agreement the following definitions shall apply –

- 1.1 "Act" means the Competition Act, No. 89 of 1998 (as amended);
- 1.2 "Aveng" means Aveng (Africa) Limited;
- 1.3 "Cape Concrete" means Cape Concrete (Pty) Ltd;

- 1.4 "Cobro" means Cobro (Pty) Ltd;
- 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 Building C, Mulayo Building, dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.6 "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.7 "Concrete Units" means Concrete Units (Pty) Ltd;
- 1.8 "Concrite Walls" means Concrite Walls (Pty) Ltd;
- 1.9 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Aveng;
- 1.10 "Complaint" means the complaint initiated by the Commissioner of the Commission in terms of section 49B of the Act under case number 2008Mar3595 into possible contraventions of the Act;
- 1.11 "Days" means calendar days;
- 1.12 "Empowa-Grinaker" means Empowa-Grinaker Lta (Pty) Ltd;
- 1.13 "Grallio" means Grallio (Pty) Ltd;
- 1.14 "Infraset" means the Infraset business unit of Aveng Manufacturing, a subsidiary of Aveng (Africa) Ltd;
- 1.15 "Parties" means the Commission and Aveng;
- 1.16 "Rocla" means Rocla (Pty) Ltd
- 1.17 "SPC" means Southern Pipeline Contractors

A handwritten signature in black ink, consisting of stylized letters, likely 'MR' followed by a surname, and a small mark to the right.

- 1.18 "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 Building C, Mulayo Building, dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2 Complaint investigation and the Commission's findings

- 2.1 During December 2007, the Commission received an application for leniency under its corporate leniency programme from Rocla regarding its involvement in a cartel in the precast concrete market within South Africa. In its leniency application, Rocla advised the Commission that it, together with SPC, Concrete Units, Cape Concrete, Cobro, Grallio, Empowa Grinaker, Craig Concrete, Concrete Walls and D&D Concrete had engaged in the following conduct:

- 2.1.1 fixing the selling price of pipes, culverts and manholes;
- 2.1.2 dividing the markets for the production and distribution of pipes, culverts and manholes; and
- 2.1.3 collusive tendering in respect of the supply of precast concrete products and precast concrete sleepers to certain suppliers.

- 2.2 The Commissioner initiated an investigation into this alleged cartel activity on 19 March 2008.

- 2.3 The Commission's investigation found the following:

- 2.3.1 *Price fixing and fixing of trading conditions*

- 2.3.1.1 During the period 1973 until September 2007 ("the relevant period"), Infraset, Concrete Units, Rocla, and Southern Pipeline Contractors ("SPC") ("competitors"), competitors in the same line of business i.e. the business of manufacture and sale of precast concrete pipes ("pipes") and precast concrete culverts ("culverts") in South Africa, acting through their respective representatives in meetings:

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- 2.3.1.1.1 Directly fixed prices of culverts and pipes sold to their customers by agreeing on prices that each would quote to customers/contractors allocated to each other; and
- 2.3.1.1.2 Directly fixed prices of culverts and pipes by agreeing on price increases and discounts to be offered to their customers;
- 2.3.1.1.3 Directly fixed credit terms to be granted to their customers.
- 2.3.1.2 Discussions on price increases, prices to be quoted to customers, discounts and credit terms occurred between Infraset and its competitors during meetings held during the relevant period. These discussions were confirmed in written documentation such as price lists and *modus operandi* documentation generated and exchanged between Infraset and its competitors during the relevant period. This conduct constitutes price fixing and fixing of trading conditions in contravention of section 4(1)(b)(i) of the Act.
- 2.3.1.3 Through these price fixing arrangements, Infraset and its competitors prevented and/or limited price competition amongst themselves in relation to pricing of precast concrete pipes and culverts.
- 2.3.2 *Market Division*
- 2.3.2.1 During the relevant period, Infraset, Concrete Units and Rocla being competitors in the market for the manufacture and sale of pipes and culverts in South Africa, agreed not to compete with Rocla outside designated regions of the Western Cape, KwaZulu-Natal ("Natal") and Gauteng, and agreed on certain market shares within the designated regions.
- 2.3.2.2 During the relevant period, Infraset, Concrete Units and Rocla being competitors in the market for the manufacture and sale of culverts in South Africa, acting through their respective representatives in meetings, divided the *Western Cape* market for culverts by:

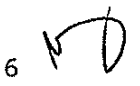
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- 2.3.2.2.1 Allocating customers/contracts amongst themselves in accordance with agreed upon percentage share of the Western Cape market for culverts;
- 2.3.2.2.2 Allocating specific territories within which each firm would supply culverts;
- 2.3.2.2.3 Agreeing that Cape Concrete would not compete with Infraset, Concrete Units and Rocla in relation to precast concrete culverts thereby allocating specific types of goods.
- 2.3.2.3 Further, during the relevant period, Infraset, Rocla and Cape Concrete, being competitors in the manufacture and sale of pipes in South Africa, acting through their respective representatives in meetings divided the *Western Cape* market for pipes by:
- 2.3.2.3.1 allocating customers/contracts amongst themselves in accordance with agreed upon percentage shares of the Western Cape market for pipes;
- 2.3.2.3.2 allocating specific territories within which each firm would supply pipes.
- 2.3.2.4 During the relevant period, Craig Concrete, Rocla, and Infraset being competitors in the manufacture and sale of precast concrete culverts in South Africa, acting through their respective representatives in meetings, divided the *Gauteng* market for culverts by:
- 2.3.2.4.1 Allocating customers/contracts amongst themselves in accordance with agreed upon percentage share of the *Gauteng* market for culverts;
- 2.3.2.4.2 Allocating specific territories within which each firm would supply culverts.
- 2.3.2.5 During the relevant period, Concrete Units, Craig Concrete, SPC, Rocla, and Infraset, being competitors in the business of manufacturing



and selling of precast concrete pipes in South Africa, acting through their respective representatives in meetings divided the *Gauteng* market for pipes by:

- 2.3.2.5.1 Allocating customers/contracts amongst themselves in accordance with agreed upon percentage share of the Gauteng market for pipes;
- 2.3.2.5.2 Allocating specific territories within which each firm would supply pipes.
- 2.3.2.6 During the relevant period, Rocla, Cobro and Infraset, being competitors in the market for manufacture and sale of pipes, acting through their respective representatives in meetings divided the *Natal* market for pipes by:
 - 2.3.2.6.1 Allocating customers/contracts amongst themselves in accordance with agreed upon percentage share of the Natal market for pipes;
 - 2.3.2.6.2 Allocating specific territories within which each firm would supply pipes.
- 2.3.2.7 Furthermore, during the relevant period, Concrete Units, Rocla, Cobro and Infraset, being competitors in the manufacture and sale of culverts in South Africa, acting through their respective representatives in meetings agreed that the *Natal* market for culverts will be allocated to Rocla only.
- 2.3.2.8 The aforementioned market sharing arrangements were confirmed in documents such as customer allocation lists, schedules and *modus operandi* documentation generated and exchanged between Infraset and its competitors. Through these market sharing arrangements, Infraset and its competitors prevented competition in the specified regions.

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2.3.2.9 In addition, the effect of the agreements has been to prevent or limit competition between Infraset and its competitors in relation to the manufacture and sale of pipes and culverts in the market.

2.3.3 *Collusive Tendering*

2.3.3.1 The Commission found that certain or specific contracts or customers allocated to each other in meetings held between Infraset, Concrete Units, Rocla, SPC, Cobro and Cape Concrete during the relevant period, related primarily to tenders/contracts available in the market. The Commission found that Infraset and its Competitors being in the business of manufacture and sale of culverts and pipes in South Africa, acting through their respective representatives in meetings, engaged in collusive tendering by agreeing to allocate/share contracts amongst themselves in accordance with agreed upon percentage shares of the market and coordinating quotations offered to contractors in order to secure such contracts.

2.3.3.2 In addition, the Commission found that during 2002, Infraset and Rocla, acting through their respective representatives in meetings engaged in collusive tendering in relation to a Portnet Contract to supply precast concrete pipes by agreeing that Rocla would quote higher prices than Infraset in order ensure that the contract is awarded to Infraset.

2.3.3.3 Furthermore, the Commission found that, during 2005, Infraset and Rocla tendered collusively in relation to the Gautrain pre-stressed concrete sleepers contract to supply sleepers by discussing and agreeing prior to the submission of their respective bids, not to bid individually or independently of each other but rather to bid/tender jointly through a joint venture called "the railway sleepers joint venture" in order to ensure that they share the contract, in circumstances wherein they could have staged independent bids.

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2.3.3.4 Through these collusive arrangements, Infraset and its competitors allocated contracts/tenders amongst themselves in order to prevent competition in relation to contracts advertised in the market.

2.3.3.5 In addition, the effect of the agreement has been to prevent or limit competition between Infraset and its competitors in relation to the contracts awarded to contractors through a tendering process.

2.4 *Agreements outside the Republic of South Africa*

2.4.1 The Commission found that Infraset and Rocla agreed, including through numerous bilateral meetings in the period 2002 to 2006, on the allocation of markets, products and contracts, in the southern African region, including in Botswana, Swaziland, Namibia, Zambia, Tanzania and Mozambique.

2.4.2 In this respect, the Commission found that Infraset agreed with Rocla that the latter would have 100% of the pipe market in Mozambique. In addition, a company called Swazi Fyfe, controlled by Aveng, agreed to and provided cover prices in order to ensure that the contracts for pipes was allocated to Rocla in Mozambique.

2.4.3 Further, Infraset, Rocla and Swazi Fyfe agreed that the culvert market in Mozambique will be split on a 60/40 basis between Rocla and Swazi Fyfe.

3 **Admission**

Aveng admits that Infraset has contravened section 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act by engaging in the following conduct:

3.1 Fixing prices and trading conditions as recorded in 2.3.1 above in that Infraset and its competitors agreed in Gauteng (and surrounding areas), KwaZulu-Natal (Natal) and the Western Cape, to:

3.1.1 Fix the prices and/or price increases and/or price discounts of pipe and culverts which they quoted and/or charged to customers allocated to each of them;

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3.1.2 Fix credit terms in respect of the sale of pipes and culverts to be granted to customers allocated to each of them.

3.2 Dividing markets as recorded in 2.3.2 above in that Infraset and its competitors agreed to divide the market for pipes and culverts in the respective areas (Western Cape, Gauteng and KwaZulu-Natal) by:

3.2.1 Allocating customers/contracts among themselves in accordance with agreed upon percentage shares of the Western Cape, KwaZulu-Natal and Gauteng market for pipes and culverts;

3.2.2 Allocating specific territories within which only Rocla could supply pipes.

3.2.3 Agreeing that Cape Concrete would not compete with Infraset, Concrete Units and Rocla in relation to culverts, thereby allocating specific type of goods among themselves.

3.3 Collusive tendering in that:

3.3.1 Infraset agreed to allocate/share contracts between itself and its competitors in accordance with agreed upon percentage shares of the markets for pipes and culverts and fixing the prices at which quotations were offered to contractors in order to secure such contracts as recorded in 2.3.3.1 above.

3.3.2 Infraset engaged in collusive tendering with Rocla during 2002 in relation to a Portnet Contract to supply pipes by agreeing to fix the tender prices submitted by each of them as recorded in 2.3.3.2 above.

4 Agreement concerning future conduct

4.1 Aveng agrees to cooperate fully with the Commission in relation to the prosecution of any other firm arising from the Commission's investigation of the Complaint. Without limiting the generality of the above, Aveng specifically agrees to:

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- 4.1.1 testify in support of the Commission's case regarding the contraventions in this consent agreement; and
- 4.1.2 provide evidence, written or otherwise, concerning the contraventions contained in this consent agreement.
- 4.2 Aveng agrees to develop and implement a formal compliance programme incorporating corporate governance designed to ensure that employees, management and directors within Aveng, its subsidiaries and business units do not engage in any contraventions of section 4(1)(b) of the Act, a copy of which programme shall be submitted to the Commission within 60 days of the date of confirmation of this consent order by the Tribunal.

5 Administrative Penalty

- 5.1 Having regard to the provisions of section 58(1)(a)(iii), read with sections 59(1)(a), 59(2) and (3) of the Act, Aveng accepts that it is liable to pay an administrative penalty.
- 5.2 The parties have agreed that Aveng will pay an administrative penalty in the amount of R46 277 000 (forty six million two hundred and seventy-seven thousand rand), being 8% of the turnover attributable to Infraset in the previous financial year, less the turnover attributable to paving products.
- 5.3 Aveng will pay the penalty amount to the Commission in three equal annual payments, the first such payment to be made within 30 days of the date of confirmation of this Consent Agreement by the Tribunal. The remaining two payments will be due on 28 February 2010 and 28 February 2011 respectively.
- 5.4 The Commission will pay these sums to the National Revenue Fund in terms of section 59(4) of the Act.

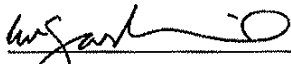
6 Full and final resolution

This Consent Agreement is entered into in full and final settlement of all proceedings between the parties, and upon confirmation as an order by the Tribunal, concludes all

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proceedings between the Commission, and Aveng relating to any alleged contravention by Aveng of section 4(1)(b) of the Act that is the subject of, or was investigated pursuant to, the Complaint under case number 2008Mar3595.

Dated and signed in *Johannesburg* on this the *12th* day of *February* 2009.



WR Jardine

Aveng (Africa) Limited

Dated and signed in *Pretoria* on this the *12th* day of *February* 2009.



Shan Ramburuth

The Commissioner, Competition Commission