

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 37/CR/Apr08

In the matter between:

The Competition Commission

Applicant

and

The New Reclamation Group (Pty) Ltd

Respondent

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

Heard on : 07 May 2008

Decided on : 07 May 2008

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A", subject to the amendment to paragraph 7, annexed hereto marked "B", 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

Held at Pretoria

CT Case No:

CC Case No: 2006Aug2447

CC Case No: 2007Aug3121

In the matter between:

The Competition Commission

Applicant

and

The New Reclamation Group (Pty) Ltd

Respondent

AGREEMENT

**BETWEEN THE COMPETITION COMMISSION AND THE NEW RECLAMATION
GROUP (PROPRIETARY) LIMITED IN REGARD TO ALLEGED
CONTRAVENTIONS OF SECTION 4(1) AND 5(1) OF THE COMPETITION ACT,
1998 (ACT NO. 89 OF 1998), AS AMENDED**

The applicant and the respondent hereby agree that application be made to the Competition Tribunal for a consent order in terms of section 49D of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below.

1. Definitions

For the purposes of this consent order agreement the following definitions shall apply:

- 1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 "Cisco" means Cape Town Iron & Steel Works (Proprietary) Limited;



- 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 1st Floor, 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 complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case numbers 2006Aug2447 (as extended by the Commission on 6 July 2007) and 2007Aug3121 and any other complaints of prohibited conduct arising from the conduct described in the Report or this Consent Order Agreement;
- 1.6 "Consent Order Agreement" means this agreement duly signed and concluded between the Commission and Reclam;
- 1.7 "designated area" means the Western Cape, Northern Cape and Namibia;
- 1.8 "DTI" means the Department of Trade and Industry;
- 1.9 "NSM" means National Scrap Metal (Cape Town) (Proprietary) Limited, in which Reclam has a 40% shareholding;
- 1.10 "Parties" means the Commission and Reclam;
- 1.11 "Reclam" means The New Reclamation Group (Proprietary) Limited;
- 1.12 "Report" means the report on the investigation conducted by Reclam into its scrap metal activities, dated 31 January 2008;
- 1.13 "SAM" means SA Metal & Machinery Company (Proprietary) Limited;

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- 1.14 "suppliers" means suppliers of scrap metal to consumers of scrap metal, such as mills and foundries;
- 1.15 "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.

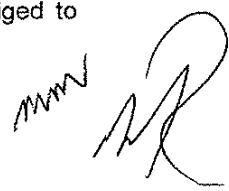
2. **Background**

Proposed merger

- 2.1 On 21 October 2005, Reclam and SAM submitted a large merger filing to the Commission in respect of the proposed acquisition by Reclam of the businesses of SAM and an associated company, Waste Control (Proprietary) Limited.
- 2.2 On 9 June 2006, the Commission recommended the prohibition of the merger.
- 2.3 Reclam filed a notice of abandonment of the merger on 7 August 2006.

First complaint: case number 2006Aug2447

- 2.4 On 11 August 2006, the Commission initiated a complaint against SAM, NSM, Reclam and Cisco under case number 2006Aug2447. It alleged that certain arrangements submitted to the Commission during the course of the merger investigation constituted market allocation, price fixing and fixing of trading conditions in contravention of section 4(1)(b)(i) and (ii) and restrictive vertical practices in contravention of section 5(1) of the Act in relation to ferrous and non-ferrous scrap metal.
- 2.5 The Commission alleged that NSM and Cisco had concluded an exclusive supply agreement in terms of which Cisco was obliged to

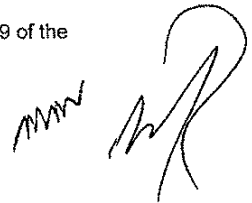
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purchase all of its scrap metal requirements from NSM in contravention of section 5(1). The Commission alleged further that in terms of the agreement between SAM, NSM, Reclam and Cisco:

- 2.5.1 SAM was required to exclusively supply all ferrous scrap sourced within the designated area to NSM for onward supply to Cisco or to SAM's smelter thus preventing SAM from supplying other customers within and outside the designated area;
- 2.5.2 NSM was required to buy scrap exclusively from SAM
- 2.6 The Commission alleged that the agreement between SAM, NSM, Reclam and Cisco allocates territories in contravention of section 4(1)(b)(ii) in that:
 - 2.6.1 Reclam and SAM agreed not to compete with each other in respect of the purchase of ferrous scrap from the designated area unless Reclam acquired such scrap for export purposes;
 - 2.6.2 SAM agreed not to purchase ferrous scrap outside the designated area;
 - 2.6.3 Reclam and SAM agreed to compete only on non-ferrous scrap that was delivered outside the designated area by Namibian supplier Dresselhaus ¹
- 2.7 The Commission alleged that in contravention of section 4(1)(b)(i) SAM was permitted to sell any surplus not required by NSM to specific areas outside the designated areas at prices and on conditions specified by NSM. In addition, SAM was not permitted to collect or produce quantities exceeding those required by NSM for supply to Cisco.²

¹ This allegation is factually inaccurate. The correct version of the facts is set out in paragraph 9 of the Report

² This allegation is factually inaccurate. The correct version of the facts is set out in paragraph 9 of the Report.

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- 2.8 Reclam was informed of this complaint when it received a summons from the Commission on 31 January 2007. In response to the summons, Reclam, with the assistance of its legal advisers, formed a dedicated task team to collect the documents responsive to the summons and submitted to the Commission sixty three lever arch files of documents and electronic information contained on two CD-ROMs.

Extension of first complaint

- 2.9 On the basis of the documentation submitted by Reclam to the Commission, the Commission:

- 2.9.1 extended its investigation under case number 2006Aug2447 on 6 July 2007 to include collusive tendering in contravention of section 4(1)(b)(iii). The extended complaint related to Reclam, NSM, SAM, LO Rall, Universal and Fine Trading (but excluded Cisco) and alleged that these parties had engaged in conduct aimed at controlling the price of scrap metal sold at auctions by ensuring that the bidders co-ordinate their bids and the auction process by ensuring that scrap metal is sold to certain agreed bidders;

- 2.9.2 conducted a "dawn raid" at the premises of Reclam in Johannesburg, Port Elizabeth and Durban and removed hard copy documents, seven hard drives and the e-mail and data servers located at the head office of Reclam in Johannesburg. This raid was challenged by Reclam on various grounds

Second complaint: case number 2007Aug3121

- 2.10 On the basis of an e-mail submitted to the Commission by a third party (and which could not be located in Reclam's records by forensic experts), the Commission initiated a second complaint against Reclam, Abeddac Metals, Amalgamated Metals Recycling, Ben Jacobs Metals, Power Metal Recyclers, SAM and Universal Recycling under case number 2007Aug3121.

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- 2.11 Reclam was informed of the complaint by way of a summons dated 13 August 2007. The summons was issued in connection with an investigation into activities relating to price fixing and collusive tendering in contravention of section 4(1)(b)(i) and/or section 4(1)(b)(iii) of the Act in respect of products including non-ferrous metals such as millberry, heavy brass, al cast and old rolled

Reclam's investigation and Report

- 2.12 On 22 October 2007, Reclam approached the Commission with a view to settling the matter and offered the Commission its full co-operation in the ongoing investigation of the Complaints. It was also agreed that Reclam would no longer pursue its challenge of the Commission's dawn raid, subject to certain conditions. It was further agreed by the Commission and Reclam that Reclam's attorneys, with the assistance of computer forensic experts, would review the documents (hard copy and electronic) removed and submit a report to the Commission by 19 November 2007. In light of the substantial amount of work involved, this date was later changed by agreement between Reclam and the Commission to 31 January 2008.
- 2.13 On 1 February 2008, Reclam furnished a copy of the Report to the Commission. The Report, which describes the prevailing market conditions at the time of the contraventions, details :
- 2.13.1 the government's concerns to promote downstream beneficiation and value addition in the metals sector generally;
- 2.13.2 the DTI's involvement in facilitating interaction between competitors and consumers in the scrap metal industry since 1995;
- 2.13.3 the DTI's role in promoting its scrap metal export policy of 2004 in furtherance of government's objectives (with the knowledge of the Commission);



- 2.13.4 the inability of the scrap metal sector to function completely competitively while accommodating the DTI's imperative that the domestic industry's requirements be met at a price below the export parity price before exporting product.
- 2.14 The Report described the following conduct which must be viewed within the framework described above:
- 2.14.1 Reclam participated in meetings from time to time with suppliers and consumers of ferrous metal at which selling prices were discussed and agreed;
- 2.14.2 Reclam is a party to arrangements in the designated area with suppliers and consumers which are aimed at ensuring continuous and secure supply of ferrous metal to Cisco, the largest consumer in the Western Cape, at a price that equalled export achievable prices;
- 2.14.3 Reclam entered into a joint venture with other suppliers of stainless steel scrap primarily to guarantee supply to Columbus, the largest consumer of stainless steel scrap in South Africa, at a discount to export achievable prices;
- 2.14.4 Reclam participated in discussions with suppliers from time to time to agree maximum buying levels in respect of certain non-ferrous metals, specifically copper and brass;
- 2.14.5 Reclam was a party to arrangements in Durban with suppliers that:
- 2.14.5.1 suppliers would not secure scrap metal from generators where another supplier's bins were already on site; and
- 2.14.5.2 under a general understanding, suppliers would not push up the purchase prices at local auctions;

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- 2.14.6 Reclam was a party to informal understandings between suppliers not to bid against one another at three auctions in 2007, which were not implemented;
- 2.14.7 There are isolated instances of agreements between Reclam and other suppliers to allocate non-ferrous materials through tender processes

3 Commission's investigation:

- 3.1 According to the Commission's investigation, Reclam was involved in contraventions of sections 4(1)(b)(i), (ii) and (iii) of the Act in that:
- 3.1.1 Reclam and its competitors and customers agreed to fix prices for the supply of ferrous scrap metal;
- 3.1.2 Reclam and its competitors agreed to fix prices for the purchase of non-ferrous scrap metal;
- 3.1.3 Reclam and its competitors entered into exclusive agreements and other arrangements to divide markets by allocating territories and customers for the supply of ferrous and non-ferrous scrap metal

4. Admission of Liability

- 4.1 Whereas the Commission has informed Reclam of its findings as stated in 3 above, Reclam admits that it has contravened sections 4(1)(b)(i) and (ii) of the Act in that:
- 4.1.1 Reclam and its competitors and customers agreed to fix prices for the supply of ferrous scrap metal;
- 4.1.2 Reclam and its competitors agreed to fix prices for the purchase of non-ferrous scrap metal;

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4.1.3 Reclam and its competitors entered into exclusive agreements and other arrangements to divide markets by allocating territories and customers for the supply of ferrous and non-ferrous scrap metal.

4.2 Reclam reiterates that its conduct was largely motivated by the government's concerns and DTI involvement referred to in paragraph 2.13 above and described in detail in the Report.

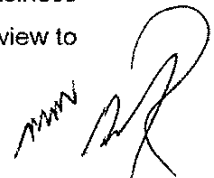
5. Future Conduct by Reclam

5.1 Reclam is no longer a party to any arrangements in the inland area with regard to ferrous or non-ferrous scrap metal, save in relation to stainless steel.

5.2 Reclam will terminate the informal arrangements in the designated area. Reclam will take steps to procure the amendment of any formal agreements to remove the restraints and exclusivity provisions that the Commission has indicated are objectionable within 60 days of the date of confirmation of this Consent Order Agreement by the Tribunal. The Commission confirms that it has no objection to the existence of an agreement between SAM and NSM for the supply of a specified volume of ferrous scrap metal and an agreement between NSM and Cisco for the supply of a specified volume of ferrous scrap metal. Such agreements may be renewable but shall not contain any exclusivity provisions and shall not be entered into for a period exceeding one year.

5.3 The stainless steel joint venture in its current form will be terminated within 60 days of the date of confirmation of this Consent Order Agreement by the Tribunal. The stainless steel joint venture will continue in future only on terms and conditions approved by the Commission.

5.4 Reclam hereby undertakes, in respect of its scrap metal business throughout South Africa, to take the steps set out below, with a view to

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preventing its employees, management and directors from engaging in any conduct which constitutes a prohibited practice in terms of the Act.

5.5 Reclam agrees to:

- 5.5.1 circulate a statement summarising the contents of this consent order to all management and operational staff employed in its scrap metal business within 30 days from the date of confirmation of this consent order by the Tribunal;
- 5.5.2 develop and implement a compliance programme incorporating corporate governance designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a prohibited practice in terms 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;
- 5.5.3 co-operate with the Commission in its ongoing investigation of the scrap metal sector and any subsequent prosecutions.

6. **Administrative Penalty**

- 6.1 Reclam is liable for an administrative penalty in terms of section 58(1)(a)(iii), 59(2) and (3) of the Act in the amount of R145 972 065 (One hundred and forty five million, nine hundred and seventy two thousand and sixty five rand). The penalty represents 6% of Reclam's annual turnover in the affected markets: namely, KwaZulu-Natal, ferrous scrap (excluding Kwazulu-Natal) and non-ferrous scrap (excluding Kwazulu-Natal) metal operations
- 6.2 The penalty will be paid by Reclam to the Commission after the date of confirmation of this consent order by the Tribunal in three equal instalments payable on 30 June 2008, 30 June 2009 and 30 June 2010 The penalty will be paid over by the Commission to the

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National Revenue Fund, referred to in section 59(4) of the Act.

7. Full and Final Settlement

This agreement, upon confirmation as a consent order by the Tribunal is entered into in full and final settlement and concludes all proceedings between the Commission and Reclam relating to any alleged contravention by Reclam of the Act, and without limiting the generality of the foregoing, from all and any conduct by Reclam of the nature that is the subject of the Commission's investigations under case numbers 2006Aug2447 (as extended by the Commission on 6 July 2007) and 2007Aug3121 or described in the Report.

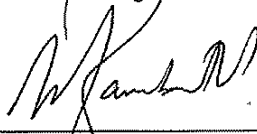
Dated and signed at *Johannesburg* on the *4th* day of *April* 2008



Chief Executive Officer

The New Reclamation Group (Pty) Ltd

Dated and signed at Pretoria on the *3rd* day of April 2008



Shan Ramburuth

Commissioner : Competition Commission



Annexure B

Annexure A is amended by the deletion of paragraph 7 and its substitution with the following paragraph 7:

7. Full and Final Settlement

This agreement, upon confirmation as a consent order by the Tribunal is entered into in full and final settlement of the Commission's investigations under case numbers 2006Aug2447 (as extend by the Commission on 6 July 2007) and 2007Aug3121 or described in the Report.