



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO119Sep16

In the matter between:

The Competition Commission

Applicant

and

Aveng (Africa) (Pty) Ltd

Respondent

Panel: N Manoim (Presiding Member)
M Mazwai (Tribunal Member)
I Valodia (Tribunal Member)

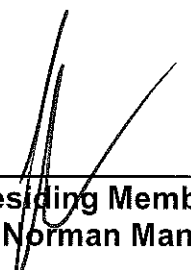
Heard on: 19 October 2016

Last submission: 26 October 2016

Decided on: 26 October 2016

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A" and the addendum thereto marked "B".



Presiding Member
Mr Norman Manoim

26 October 2016
Date

Concurring: Ms Mondo Mazwai and Prof. Imraan Valodia

"B"

ADDENDUM

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

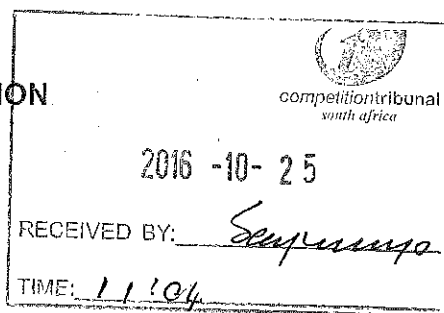
CT CASE NO: CO/119/Sep16

In the matter between:

THE COMPETITION COMMISSION

and

AVENG (AFRICA) (PTY) LTD



Applicant

Respondent

AMENDMENT

- 1 The above parties agree that paragraph 4.24 of the consent agreement between them, dated 16 September 2016, be replaced with the following:

"In terms of the agreement, Haw & Inglis and Raubex provided a cover price to Rand Roads, a business of Grinaker-LTA. This was done to enable Rand Roads to win the tender.

For Aveng

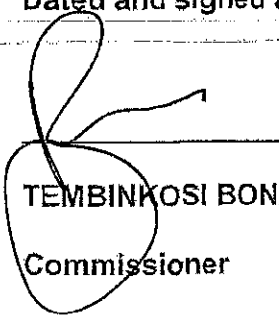
Dated and signed at Boksburg on the 19th day of Oct 2016

Name: HJ Verster

Designation: CEO

For the Commission

Dated and signed at PRETORIA on the 24th day of October ~~September~~ 2016



TEMBINKOSI BONAKELE

Commissioner

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: CO119Sep16

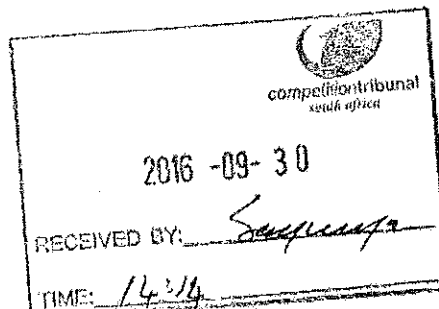
CC CASE NO: 2009Sep4641, 2014 Aug 0465

In the matter between:

THE COMPETITION COMMISSION

And

AVENG (AFRICA) (PROPRIETARY) LIMITED



Applicant

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
AVENG (AFRICA) (PROPRIETARY) LIMITED

The Competition Commission and Aveng (Africa) (Proprietary) Limited hereby agree that application be made to the Competition Tribunal for the confirmation of this Consent 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, in respect of contraventions of section 4(1)(b)(iii) of the Act.

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;

1.1 "Aveng" means Aveng (Africa) (Proprietary) Limited, a company

incorporated under the laws of the Republic of South Africa with its principal place of business at Aveng Park, 1 Jurgens Street, Jet Park, Boksburg, South Africa;

- 1.2 **"Grinaker-LTA"** means an operating business unit of Aveng. Grinaker-LTA is a multi-disciplinary construction and engineering unit of Aveng, anchored in South Africa and focused on selected infrastructure, energy and mining opportunities in Africa;
- 1.3 **"Civcon"** means Civcon Construction (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 18 Industry Road, Clayville, Olifantsfontein, Gauteng, 1665;
- 1.4 **"CLP"** means the Commission's Corporate Leniency Policy (Government Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 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 dtf Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.6 **"Concor"** means Concor Roads and Earthworks, a division of Murray & Roberts;
- 1.7 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Aveng;



- 1.8 "G Liviero" means G Liviero & Son Building (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at cnr Dytchley & Marcius Road, Barbeque Downs, Kyalami, Johannesburg;
- 1.9 "Group Five" means Group Five (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at No. 9 Country Estate Drive, Waterfall Business Estate, Jukskei View, Johannesburg, 1662;
- 1.10 "Haw & Inglis" means Haw & Inglis Civil Engineering (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Hillcrest Estate, Race Course Road, Durbanville;
- 1.11 "Infraset" means an operating business unit of Aveng;
- 1.12 "Invitation" means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act dated 1 February 2011;
- 1.13 "Lennings" means Lennings Rail Services (Proprietary) Limited, a subsidiary of Aveng, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 1 Lily van Niekerk Road, Dunswart, Boksburg, Gauteng. Lennings was formerly known as Lennings DEC Rail Services Proprietary Limited, the name change was effected in June 2010;
- 1.14 "Murray & Roberts" means Murray & Roberts Limited, a company



incorporated under the laws of the Republic of South Africa with its principal place of business at Douglas Roberts, 22 Skeen Boulevard, Bedfordview;

- 1.15 **"Norvo"** means Norvo Construction (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 5 Klinker Place, Briardene Park, Durban, Kwazulu Natal;
- 1.16 **"Parties"** means the Commission and Aveng;
- 1.17 **"Pele Kaofela"** means Pele Kaofela CC, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Plot 99, 70th Street, Doornkloof Small Holdings, Olifantsfontein. Pele Kaofela was formerly known as Civilcon Pele Kaofela CC, the name change was effected in April 2009;
- 1.18 **"Plasser"** means Plasser Railway Machinery (SA) (Proprietary) Limited a company incorporated under the laws of the Republic of South Africa with its principal place of business at 20 Lautre Road, Stormill, Roodepoort, Gauteng;
- 1.19 **"Raubex"** means Raubex (Proprietary) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Heike Ernst, Building 1 Highgrove Office Park, 50 Tegel Avenue, Centurion;
- 1.20 **"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;

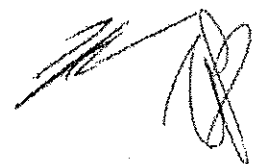
1.21 **"Transnet"** means Transnet (SOC) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Carlton Centre, 150 Commissioner Street, Johannesburg, Gauteng;

1.22 **"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; and

1.23 **"WBHO"** means WBHO Construction Proprietary Limited a company incorporated under the laws of the Republic of South Africa with its principal place of business at 53 Andries Street, Wynberg, Sandton.

2 BACKGROUND

2.1 On 1 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated a complaint in terms of section 49B(1) of the Act into particular prohibited practices relating to conduct in respect of numerous construction projects, by the firms listed below. This complaint concerned alleged contraventions of section 4(1) (b) of the Act with regard to price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Stefanutti, Aveng,



Group Five, Murray & Roberts, Concor , G. Liviero, Giuricich Coastal Projects (Proprietary) Limited, Hochtief Construction AG, Dura Soletanche-Bachy (Proprietary) Limited, Nishimatsu Construction Co Limited, Esorfranki Limited, VNA Piling CC, Rodio Geotechnics (Proprietary) Limited, Diabor Limited, Gauteng Piling (Proprietary) Limited, Fairbrother Geotechnical CC, Geomechanics CC, WBHO and other construction firms, including joint ventures.

2.2. The Commission's investigation of the above complaint, as well as several other of the Commission's investigations in the construction industry, led the Commission to believe that there was widespread collusion in contravention of section 4(1)(b)(iii) of the Act in the construction industry. Accordingly, in line with the purpose of the Act as well as the Commission's functions, the Commission decided to invite construction firms that were involved in collusive conduct to settle with the Commission on favourable terms. This Invitation was published on the Commission's website on 1 February 2011. This was also done in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices, as well as in order to expedite finalisation of the investigations, under a fast track process. The Invitation specifically provided that it was open to firms to also apply for leniency in terms of the CLP.

2.3 In response to the Invitation and in terms of the Commission's CLP, Aveng was first to apply for leniency in respect of the conduct described below.

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- 2.4 In addition, on 11 February 2014, the Commissioner initiated a complaint against Aveng, Lennings and Plasser for collusive conduct relating to railway maintenance tenders issued by Transnet.¹

3 CONDITIONAL IMMUNITY

- 3.1 The Commission granted Aveng conditional immunity from an administrative penalty before the Tribunal for its involvement in the prohibited practices described in paragraph 4 below.
- 3.2 In exchange for conditional immunity, Aveng agreed to co-operate with the Commission in respect of any steps that the Commission may deem necessary to obtain an order from the Tribunal declaring the conduct set out in paragraph 4 below to be a contravention of section 4(1)(b)(iii) of the Act.

4 CONDUCT IN CONTRAVENTION OF THE ACT

- 4.1 After investigating Aveng's, as well as other firms', responses to the Invitation the Commission found the following prohibited practices in contravention of section 4(1)(b)(iii) of the Act:

The Goedgevonden Crushing Project (Tender Ref N0: 6447-RLS-0GE100-C108)

¹ This complaint was subsequently amended to include Railway Mechanised Maintenance Company (Proprietary) Limited, which the Commission subsequently found fell within the same corporate entity as Plasser.



- 4.2 In or about 2007, Grinaker - LTA reached an agreement with Stefanutti, in terms of which, they agreed on a cover price in relation to this project.
- 4.3 The project was for the development of land for a crushing quarry as well as for a rail loop for Xstrata.
- 4.4 In terms of the agreement, the parties agreed that Stefanutti would submit a cover price to enable Grinaker - LTA to win the tender. In turn, Grinaker - LTA would add a margin of R1 million to its tender price, which it would later pay to Stefanutti as a loser's fee.
- 4.5 Xstrata, however, decided to cancel this project. As a result, the loser's fee was not paid to Stefanutti.

The BKM Processing Plant Project (Tender Ref NO: ASS/BKM/6/0023)

- 4.6 In or about March 2006, Grinaker - LTA reached an agreement with Concor, in terms of which, they agreed to allocate the BKM Processing Plant Project to Grinaker - LTA.
- 4.7 To give effect to the agreement, they also agreed on a cover price to be submitted by Concor to ensure that Grinaker - LTA was awarded the tender. Grinaker - LTA and Concor further agreed on a mark-up of 12.5% to their respective bid prices to ensure that their mark-ups were not out of the norm.
- 4.8 The BKM Processing Plant Project involved the construction of a processing plant and product load-out facility. The client for the project was
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Assmang Iron Ore.

- 4.9 Despite this agreement, the project was awarded to Concor and completed on 27 April 2007.

The BKM Export Rail Line Project (Tender Ref NO: ASS/BKM/060025)

- 4.10 In or about March 2006, Grinaker - LTA reached an agreement with Concor, in terms of which, they agreed to allocate the BKM Export Rail Line Project to Concor.
- 4.11 To give effect to the agreement, they also agreed on a cover price to be submitted by Grinaker - LTA to ensure that Concor was awarded the tender. Grinaker - LTA and Concor further agreed on a mark-up of 12.5% in relation to their bid prices for the project to ensure that their mark-ups were not out of the norm.
- 4.12 The BKM Export Rail Line Project was for the construction of a rail line at the Sishen Mine, in the Northern Cape. The client for the project was Assmang Iron Ore.
- 4.13 In accordance with the agreement, the tender was awarded to Concor and was completed on 24 February 2007.

The Tambothi Project

- 4.14 The Commission has found that, in or about 2004, Grinaker - LTA, WBHO, Norvo and G Liviero reached an agreement to add a loser's fee to their
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respective bids in respect of a project at Tambothi, Ballito.

- 4.15 Most likely as a result of the agreement, Grinaker-LTA raised an invoice on or about 1 November 2006 against the winner of the bid, G Liviero, in respect of a loser's fee. The loser's fee was paid to Grinaker - LTA on 13 November 2006.

Pansy Cove Blocks of Flats (Tender No: T6/04)

- 4.16 In or about August 2004, Grinaker - LTA reached an agreement with WBHO in respect of the Pansy Cove project in Mossel Bay, South Africa.
- 4.17 In terms of the agreement, Grinaker - LTA provided a cover price to WBHO for WBHO to submit as its bid price.
- 4.18 The project was for the construction of a block of flats in Mossel Bay. The client for the project was Leonpont 279 Properties Proprietary Limited. The tender was awarded to Grinaker - LTA, and the project was completed in May 2007.

The Komati Chimney Project (Tender Ref NO: 4600007468)

- 4.19 On or about November 2006, Grinaker - LTA reached an agreement with Concor on a cover price in respect of this project.
- 4.20 In terms of the agreement, Grinaker - LTA gave Concor a cover price so that Concor could submit a non-competitive bid. This was done to enable Grinaker - LTA to win the tender.



- 4.21 The project was for the design and construction of a single chimney with two steel flues. The client for the project was Eskom Holdings Limited.
- 4.22 Grinaker - LTA was awarded the tender and the project was completed on 30 November 2008.

Sanral Tender: N2 Gamtoos to Van Stadens Bridge (Tender N0: NRA N.002-100-2005/1)

- 4.23 On or about 30 June 2006, Grinaker - LTA reached a cover price agreement with Haw & Inglis and Raubex in respect of this project.
- 4.24 In terms of the agreement, Haw & Inglis provided a cover price to Rand Roads, a business unit of Grinaker - LTA. This was done to enable Rand Roads to win the tender.
- 4.25 The tender was for the rehabilitation of the national route 2, Section 10, from Gamtoos to van Stadens River, for the South African National Roads Agency Limited ("Sanral").
- 4.26 The tender was, however, awarded to Koelro Construction, which was not a party to the cover price arrangement which completed the project on 1 August 2007.

The Sanral Tender: Colesberg to Springfontein (Tender Ref N00:-130-2004/1)

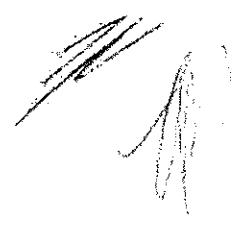
- 4.27 In or about June 2006, Grinaker - LTA reached an agreement with Haw & Inglis, in terms of which, the parties agreed not to submit tenders for this



project. The purpose of not tendering was to, essentially, boycott the tender as these firms were unhappy with Sanral's consulting engineer for the tender. By boycotting, these firms sought to have this engineer removed from the tender or future tenders.

- 4.28 The project was for the rehabilitation of a national road for Sanral in Colesberg - Springfontein. The project was awarded to Blacktop Surfaces Proprietary Limited. The client for the project was Sanral.

The South Deep Mine (Tender Ref N0: ED06082100)

- 4.29 Infraset reached an agreement with Civcon on or about 15 September 2006, in terms of which, they agreed on a loser's fee in respect of the South Deep Mine project.
- 4.30 In terms of the agreement, Civcon gave Infraset a cover price in order to enable Infraset to win the tender. The parties further agreed that in exchange for the cover price, Infraset would pay Civcon a loser's fee in the amount of R500 000.00 should Infraset win the tender.
- 4.31 Despite this arrangement, Civcon was awarded the tender. Although it was agreed that the successful bidder would pay the loser an amount of R500 000.00, Infraset received a total amount of R171 000.00 from Civcon as compensation for not being awarded the tender.
- 4.32 The project involved the supply, manufacture and delivery of pre-cast concrete brattice wall panels at the South Deep Twin Vent Shaft Storage
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Area and was completed at the end of March 2007.

The Hartbeesfontein Water Works Project (Tender Ref NO: TE04/38)

- 4.33 In or about May 2004 Grinaker - LTA reached an agreement with Murray & Roberts, Concor and Pele Kaofela, in terms of which, they agreed on a loser's fee in respect of this project.
- 4.34 In terms of the agreement Grinaker - LTA agreed to pay Murray & Roberts, Concor and Pele Kaofela a loser's fee in the amount of R500 000.00 each.
- 4.35 The project involved the construction of a concrete wall on the Hartbeesfontein Water Care Centre for the East Rand Water Care company.
- 4.36 The tender was awarded to Grinaker - LTA and was completed on 28 September 2007.

Transnet Railway Maintenance Tenders

- 4.37 From 1997 to 2006, Lennings, agreed with Plasser to allocate certain tenders issued by Transnet amongst them. For this purpose, a firm not allocated a tender would submit a cover bid higher than the bid submitted by the firm allocated the tender.
- 4.38 The Commission found that at least 10 rail maintenance tenders were allocated between Lennings and Plasser during this time. Of the ten projects that the Commission is aware of, the Commission found that nine



had prescribed by the time the matter was initiated and therefore only one tender was investigated and referred to the Tribunal. The tender that was investigated is the Dynamic Stabilizer Continuous Action Tampers tender, issued on 11 April 2006 and completed in April 2013 with the first phase being awarded to Plasser and the second phase awarded to Lennings.

5 ADMISSION

- 5.1 Aveng admits that the conduct set out in paragraph 4 above is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

6 CO-OPERATION

- 6.1 In so far as the Commission is aware, and in compliance with the requirements as set out in the CLP, Aveng:

6.1.1 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;

6.1.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practices;

6.1.3 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;



6.1.4 has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices; and

6.1.5 has confirmed that it has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

6.2 Aveng agrees to fully cooperate with the Commission in its prosecution of the conduct described from 4.37 to 4.38. This cooperation includes, but is not limited to:

6.2.1 To the extent that it is in existence, provide evidence, written or otherwise, which is in their possession or under their control; and

6.2.2 To the extent that they are able, testify in the complaint referral in respect of the conduct from 4.37 to 4.38.

7 FUTURE CONDUCT

Aveng shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Aveng within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

8 FULL AND FINAL SETTLEMENT

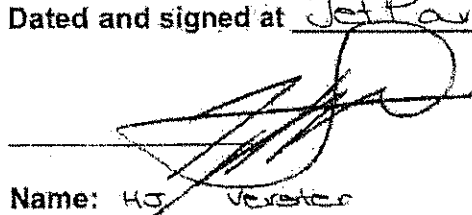
This Consent Agreement is entered into in full and final settlement of the specific conduct set out in 4 above, subject to the possible Tribunal proceedings

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contemplated in 6.2.

For Aveng

Dated and signed at Jet Park on the 6th day of Sept. 2016


Name: H.J. Verster

Designation: CHIEF EXECUTIVE OFFICER

For the Commission

Dated and signed at Pretoria on the 16 day of September 2016


TEMBINKOSI BONAKELE

Commissioner

