



COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CR107Mar11/SA020Apr18

In the matter between:

The Competition Commission

Applicant

And

Rodio Geotechnics (Pty) Ltd

Respondent

Panel : Y Carrim (Presiding Member)
AW Wessels (Tribunal Member)
M Mokuena (Tribunal Member)

Heard on : 10 April 2018
Decided on : 13 April 2018

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Rodio Geotechnics (Pty) Ltd annexed hereto marked "A".

Presiding Member
Ms Yasmin Carrim

13 April 2018
Date

Concurring: Mr Andreas Wessels and Mrs Medi Mokuena

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

CT CASE NO: CR107Med1/SA020Apr18

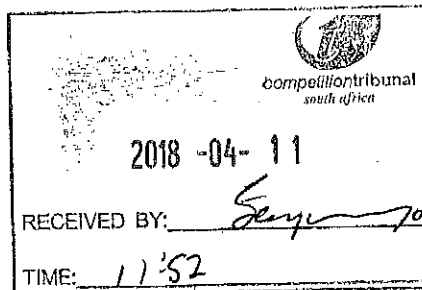
CC CASE NO: 2009May4445, 2010Feb4925

In the matter between:

COMPETITION COMMISSION

And

RODIO GEOTECHNICS (PTY) LTD



APPLICANT

RESPONDENT

**CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
RODIO GEOTECHNICS (PTY) LTD**

Preamble

The Competition Commission ("**Commission**") and Rodio Geotechnics (Pty) Ltd ("**Rodio**") hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58(1)(b) of the Competition Act 89 of 1998, as amended (the "**Act**"), in respect of contraventions of section 4(1)(b) of the Act, on the terms 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 Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 2008);
- 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 "**Consent Agreement**" means this agreement duly signed and concluded between the Commission and Rodio;
- 1.6 "**Cover Price**" means, generally, a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so, but may wish to remain on the tender list, in order that the firm that does not wish to win the tender may submit a higher price; or alternatively a price that is provided by a firm that does not wish to win a tender, but may wish to remain on the tender list, to a firm that does wish to win that tender in order that the firm that wishes to win the tender may submit a lower price;
- 1.7 "**Days**" means business days;
- 1.8 "**Diabor**" means Diabor (Pty) Ltd a private company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 63 Topaas Street, Klerksoord, Pretoria ;

- 1.9 "**Dura**" means Dura Solétanche-Bachy Proprietary Limited a private company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 104 Aeroton Road, Aeroton, Extension 2, Johannesburg;
- 1.10 "**Esorfranki**" means Esorfranki Limited a public company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 30 Activia Road, Activia Park, Germiston, Dunswart;¹
- 1.11 "**Geomechanics**" means Geomechanics CC a close corporation duly incorporated in terms of the Close Corporation Act and has its principal place of business is situated at 12 Broad Acres Avenue, Fourways, Gauteng;
- 1.12 "**GEL**" means Ground Engineering Limited, a division of the civil engineering business unit of Grinaker LTA;
- 1.13 "**Grinaker LTA**" means Grinaker LTA, an operating division of Aveng (Africa) Limited, a public company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Block A, Grinaker LTA Park, Jurgens Street, Jet Park, Boksburg;
- 1.14 "**Parties**" means the Commission and Rodio;

¹ On 1 November 2006, Esor Limited ("**Esor**") acquired Franki Africa (Pty) Ltd ("**Franki**"). Reference to Esorfranki in this agreement, includes Esor and all its associated companies at the time and/or Franki and all its associated companies before November 2006.

- 1.15 **"Rodio"** means Rodio Geotechnics (Pty) Ltd a private company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Unit 39 Midrand Industrial Park, 3rd Street, 1685;
- 1.16 **"Rogel"** means an unincorporated Joint Venture between GEL and Rodio for the purposes of undertaking and executing those Contracts where referred to in this Consent Agreement.
- 1.17 **"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**

Piling projects

- 2.1 On 29 May 2009, the Commissioner initiated a complaint (case no. 2009May4445) against, *inter alia*, Rodio for certain alleged collusive arrangements (comprising certain formal arrangements and *ad hoc arrangements*) in the market for piling, lateral support, grouting and geotechnical drilling investigation services with competitors where projects were routinely divided amongst the cartelists in accordance with a "scorecard" largely corresponding to their market share. The complaint alleged that such conduct was in contravention of section 4(1)(b) of the Act.
- 2.2 On 11 February 2010, the Commissioner initiated a further complaint (case no. 2010Feb4925) against, *inter alia*, Rodio for certain alleged collusive

tendering relating to the market for geotechnical drilling investigation services in contravention of section 4(1)(b) of the Act.

- 2.3 Given that the above two complaints related, largely, to the same respondents, the Commission consolidated them in accordance with Rule 17(2) of the Rules for the Conduct of Proceedings in the Competition Commission.

3 COMMISSION'S INVESTIGATION AND FINDINGS

- 3.1 Following its investigation of the above complaints the Commission found the following:

- 3.2 Esorfranki, Geomechanics, Dura, Diabor and Grinaker LTA (collectively the "Firms"), agreed on a formal arrangement to allocate work in or about 1994. Rodio was not part of the formal arrangement when it started in or about 1994 and was unaware of the details of the formal arrangement between the Firms. This formal arrangement governed how tendering processes should be conducted by each of these Firms, *inter alia*, by setting out procedures to be followed by these Firms once a tender is advertised in order to ensure that the tender is awarded to a participant whose turn it was to get the work.

- 3.3 Representatives of the Firms, *inter alia*, compiled and managed the scorecards in accordance with an agreed percentage of the market share allocated to each of these Firms. The scorecards were kept and managed for piling, grouting and lateral support services.

Rodio's involvement through Rogel

- 3.4 In respect of various projects Rodio became a Joint Venture (JV) partner in Rogel, together with GEL in or about 2003/2004. In respect of such projects Rodio held 50% in the JV, whilst GEL held the other 50%. Rodio was involved in the collusive conduct through Rogel. GEL (and not Rodio), on behalf of Rogel, represented the JV in the various meetings in order to collude on various projects which are set out below.

Mercure Hotel

- 3.4.1 This tender closed on 14 December 2005 and related to piling and lateral support services for the Mercure Hotel in Johannesburg. In or about November 2005, Dura, Esorfranki and GEL agreed to allocate this tender to Rogel and agreed that the other firms would either not bid or would submit Cover Prices.
- 3.4.2 In accordance with this agreement, Rogel was awarded the tender for the Mercure Hotel project.

Centurion Gate 1(c)

- 3.4.3 This tender closed on 20 January 2006 and involved grouting and lateral support services for the Centurion Gate 1(c) project in Pretoria/Centurion. In or about November 2005, Dura, Esorfranki and GEL allocated this tender to Rogel and agreed that the other firms would either not bid or would submit Cover Prices.

- 3.4.4 In accordance with this agreement, Rogel was awarded the tender for the Centurion Gate 1(c) project.

Centurion Gate 1(d)

- 3.4.5 This tender closed in August 2007 and related to grouting services for the Centurion Gate 1(d) in Pretoria/Centurion. In or about November 2005, Dura, Esorfranki and GEL allocated this tender to Rogel and agreed that the other firms would either not bid or would submit Cover Prices.

- 3.4.6 In accordance with this agreement, Rogel was awarded the tender for the Centurion Gate 1(d) project.

Lusip Dam

- 3.4.7 In 2005, GEL, Esor, Franki and Dura agreed to allocate the Lusip Dam project to Rogel. In terms of this agreement, Dura submitted a higher tender price to enable Rogel to win the tender.

- 3.4.8 In accordance with this agreement, the grouting services for the project was awarded to Rogel.

- 3.5 In addition to the formal arrangement outlined in 3.2 0 above, the Commission found that from 2006 the formal arrangement took the form of informal *ad hoc* arrangements also involving the allocation of projects set out below and in which Rodio had an involvement through Rogel:

Lesotho Highlands Water Project

- 3.5.1 In early 2007, GEL, Geomechanics, Rogel, Dura, Diabor and Esorfranki colluded in relation to bidding for the geotechnical drilling investigation services in relation to the Polihale Dam and Transfer Tunnel in Lesotho.
- 3.5.2 In terms of this arrangement, GEL, Geomechanics, Dura, Diabor and Esorfranki bid at a higher price than Rogel i.e. Cover Price, in order to ensure that Rogel wins the tender.
- 3.5.3 The reason that Geomechanics, Esorfranki and Diabor agreed to submit a Cover Price for the Polihale Dam and Transfer Tunnel projects in Lesotho is because Rogel would, in return, provide a Cover Price for the Gautrain Rapid Rail Link project.

Gautrain Rapid Rail Link

- 3.5.4 In 2006, GEL, Esorfranki and Dura attempted to form a consortium to bid for all the geotechnical work for the construction of the Gautrain Rapid Rail Link ("**Gautrain**"). They failed to do this because the Bombela Concession Company (Pty) Ltd, that operates the Gautrain, was not interested in their proposal of forming a consortium and submitting a joint bid.
- 3.5.5 After this unsuccessful attempt to form a consortium, certain *ad hoc* agreements relating to the Gautrain project were concluded between GEL, Rogel, Esorfranki and Dura.

3.5.6 It was agreed that Rogel and Esorfranki would give a Cover Price of R50 million on the Section DP 6 of the Gautrain in order to assist the Dura-Geomechanic joint venture to win the contract. In accordance with this arrangement, the Dura-Geomechanic joint venture was awarded the tender.

It was further agreed that Rogel and Dura would provide a Cover Price to a joint venture between Diabor, Geomechanics and Soiltech (being Esorfranki's geotechnical drilling division) ("**DGS**") in relation to the O.R.Tambo/Malboro drilling investigation project for the Gautrain in order to ensure that the DGS joint venture won the contract. In accordance with this arrangement, the DGS joint venture was awarded this tender.

Braamhoek Dam

3.5.7 In or about June 2007, Rogel entered into a collusive arrangement with Dura regarding the tender for grouting services for the second phase of the Braamhoek Dam project.

3.5.8 In terms of this arrangement, Dura agreed to submit a Cover Price for this tender to ensure that Rogel won the contract.

3.5.9 In accordance with this arrangement, Rogel was awarded the tender on 10 July 2008, for the grouting services for the second phase of the Braamhoek Dam project.

Coega Harbour diaphragm wall

- 3.5.10 In or about June 2007, Rogel and Dura reached a collusive arrangement for the Coega Harbour diaphragm wall project relating to lateral support and grouting services.
- 3.5.11 In exchange for Dura submitting a Cover Price for the Second Phase Braamhoek Dam project, GEL agreed with Dura that GEL and/or Rogel would not submit a bid for the Coega Harbour diaphragm wall project, to ensure that Dura won the tender.
- 3.5.12 In accordance with this arrangement, Rogel did not submit a bid for this project and a joint venture between Concor and Hochtief Solutions A.G was awarded the tender on 29 October 2007, who subsequently appointed Dura as a subcontractor on the project.

Olifantsfontein Treatment plant

- 3.5.13 The tender involved grouting work in Johannesburg and the tender closed on 31 March 2006. GEL and/or Rogel and Esorfranki entered into a collusive agreement for this tender. In terms of this agreement, these firms agreed that Esorfranki would submit Cover Prices to ensure that GEL and/or Rogel was awarded the tender.
- 3.5.14 Esorfranki was, nevertheless, awarded the tender and Rogel performed the grouting work under this Contract.

4 ADMISSION

Rodio admits that it, through Rogel and represented by GEL, entered into the agreements detailed in paragraph 3 above with its competitors, in contravention of section 4(1)(b)(i), (ii) or (iii) of the Act.

5 COOPERATION

5.1 Rodio agrees to fully cooperate with the Commission in its investigation and prosecution of the remaining respondents in the above collusive conduct.

This cooperation includes, but is not limited to:

5.1.1 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

5.1.2 To the extent that it is able, testify in the complaint referral in respect of the alleged contravention covered by this Consent Agreement.

6 FUTURE CONDUCT

Rodio agrees and undertakes to:

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

- 6.2 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 to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Settlement Agreement as an order by the Competition Tribunal.
- 6.4 refrain from engaging in collusive tendering in contravention of section 4(1)(b)(i), (ii) or (iii) of the Act, and from engaging in any prohibited practice under section 4 of the Act in future; and
- 6.5 undertake henceforth to engage in competitive bidding.

7 ADMINISTRATIVE PENALTY

- 7.1 Rodio agrees to pay an administrative penalty in the sum of R885 963 (eight hundred and eighty five thousand, nine hundred and sixty three Rand).² This administrative penalty constitutes approximately 5% of Rodio's total South African revenue in its last completed financial year ended 2010.

² This figure was calculated using the Commission's "Legacy Methodology" for determining a settlement amount for construction firms: 1.25% of the *Firm's relevant turnover in affected subsector x number of cartelised projects = Fine for that affected subsector*.

7.2 Rodio agrees to pay the administrative penalty within a period of 1 (one) month from the date of confirmation of this consent agreement as an order of the Tribunal.

7.3 Payment of the amount referred to in paragraph 7.1 above shall be made into the Commission's bank account, details of which are as follows:

Bank name:	Absa Bank
Account holder:	The Competition Commission
Account number:	4087641778
Branch Code:	632005
Reference:	2009May4445, 2010Feb4925 (Rodio)

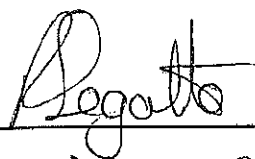
7.4 The amount referred to in paragraph 7.1 above shall be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8 FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 above and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and Rodio in respect of this conduct contemplated under Commission case numbers 2009May4445, 2010Feb4925.

For Rodio

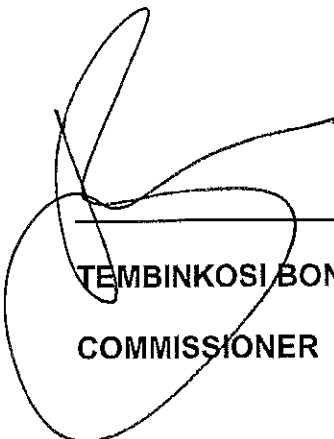
Dated and signed at Pretoria on the 10 day of April 2018


Name: PAOLO SEGATTO

Designation: M.D.

For the Commission

Dated and signed at Pretoria on the 10 day of April 2018


TEMBINKOSI BONAKELE
COMMISSIONER