



COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CR107Mar11/SA108Sep16

In the matter between:

The Competition Commission

Applicant

and

Geomechanics CC

First Respondent

Geomech Africa (Pty) Ltd

Second Respondent

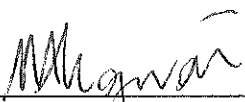
Panel : M Mazwai (Presiding Member)
M Mokuena (Tribunal Member)
I Valodia (Tribunal Member)

Heard on : 19 October 2016

Decided on : 19 October 2016

Settlement Agreement

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


Presiding Member
Ms Mondo Mazwai

19 October 2016
Date

Concurring: Ms Medi Mokuena and Prof. I Valodia

ANNEXURE "A"

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

CT CASE NO: _____

CC CASE NO: 2009May4445/2010Feb4925

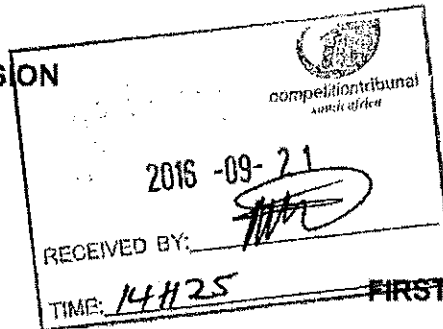
In the matter between:

THE COMPETITION COMMISSION

and

GEOMECHANICS CC

GEOMECH AFRICA (PTY) LTD



APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE RESPONDENTS IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED

Preamble

The Competition Commission ("Commission"), Geomechanics CC ("Geomechanics") and Geomech Africa Proprietary Limited ("Geomech Africa") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D read with sections 58(1)(a)(iii) and 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 Settlement 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 "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;

- 1.6 "Days" means business days;
- 1.7 "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;
- 1.8 "Diabor" means Diabor Proprietary Limited 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 "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, Dunswart¹;
- 1.10 "Geomechanics" means Geomechanics CC, a close corporation duly incorporated in terms of the Close Corporation Act and had its principal place of business is situated at 12 Broad Acres Avenue, Fourways, Gauteng²;
- 1.11 "Geomech Africa" means Geomech Africa Proprietary Limited, a private

¹ On 1 November 2006, Esor Africa Proprietary Limited ("Esor") acquired Franki Africa Proprietary Limited ("Franki") and was renamed Esorfranki Limited. Reference to Esorfranki in this settlement agreement, includes Esor and/or Franki before November 2006.

² Geomechanics CC (1990/021732/23) was converted into a private company on 8 October 2012 and accordingly changed its name to Geomechanics Proprietary Limited. Geomechanics Proprietary Limited has its principal place of business at Plot 28, Central Road, Sunrella, Lanseria, Johannesburg, Gauteng.



company duly incorporated in terms of the laws of the Republic of South Africa with its principal place of business at Plot 28, Central Road, Sunrella, Lanseria, Johannesburg, Gauteng;

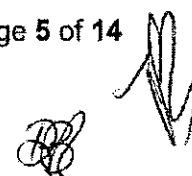
- 1.12 "GEL" means Ground Engineering Limited, a division of the civil engineering business unit of Grinaker LTA;
- 1.13 "Grinaker LTA" means Grinaker LTA, an operating division of Aveng (Africa) Limited, a public company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Block A, Grinaker LTA Park, Jurgens Street, Jet Park, Boksburg;
- 1.14 "Parties" mean the Commission, Geomechanics and Geomech Africa;
- 1.15 "Quarter" means a period of 3 (three) months calculated with reference to the Commission's financial year which begins on 1 April each year and ends on 31 March the following year;
- 1.16 "Respondents" mean Geomechanics and Geomech Africa;
- 1.17 "Rodio" means Rodio Geotechnics Proprietary Limited a private company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 1685 West Road, Midrand, Gauteng;
- 1.18 "Settlement Agreement" means this agreement duly signed and concluded between the Commission, Geomechanics and Geomech Africa; and
- 1.19 "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*, Geomechanics for certain alleged collusive arrangements in contravention of section 4(1)(b) of the Act in the markets for piling, grouting, lateral support services as well as related markets for geo-technical site investigation works.
- 2.2 On 11 February 2010, the Commissioner initiated a further complaint (case no. 2010Feb4925) against, *inter alia*, Geomechanics for alleged conduct involving collusive tendering in contravention of section 4(1)(b) of the Act in the market for the provision of geotechnical site investigations.
- 2.3 The substance of the aforementioned complaints is that Esorfranki, Rodio, Dura and Grinaker entered into arrangements in terms of which they divided/allocated projects/tenders amongst themselves in accordance with a scorecard largely corresponding to their market shares. Esorfranki, Rodio, Dura, Geomechanics, Diabor and Grinaker further entered into *ad hoc* arrangements from time to time that went beyond the formalized scorecard arrangements, in terms of which they divided/allocated projects/tenders amongst themselves.



- 2.4 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:

3.1.1 Geomechanics, together with Esorfranki, Dura, Rodio, Diabor and Grinaker LTA (collectively the "Firms"), agreed on a formal arrangement to allocate work. This 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

3.1.2 In order to achieve the allocation scheme Esorfranki, Rodio, Dura, Geomechanics, Diabor and Grinaker (through formal arrangements, which excluded Dura and Geomechanics, or *ad hoc* arrangements in which Esorfranki, Rodio, Dura, Geomechanics, Diabor and Grinaker were all involved), would, in addition to allocating tenders in accordance with the agreed proportions or percentage of the market share –

- (a) Pay each other off or otherwise compensate others, to stay out of a tender allocated to a particular party. These pay offs (payment for losing tenders) were called 'add-ons'.
- (b) Provide each other with cover prices in order to ensure that the tender is awarded to a particular respondent whose turn it was to win the tender in terms of the scorecard.

3.2 The Commission found the following *ad hoc* collusive arrangements involving Geomechanics and Geomech Africa:

Gautrain Rapid Rail Link Projects

- 3.2.1 In 2006, GEL, Rodio (represented by 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 Proprietary Limited, the company that operates the Gautrain, was not interested in their proposal of forming a consortium.
- 3.2.2 After this unsuccessful attempt to form a consortium, certain *ad hoc* agreements relating to the Gautrain project were concluded as follows –

Gautrain Rapid Rail Link Project – Section DP 6

3.2.3 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 ensure that the Dura-Geomech Africa joint venture would win the contract.

3.2.4 In accordance with this arrangement, the Dura-Geomech Africa joint venture was awarded the tender.

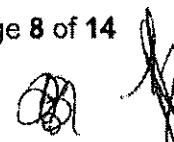
Gautrain Rapid Rail Link Project – O.R. Tambo Drilling Investigation Project

3.2.5 It was agreed that Rogel and Dura would provide a Cover Price to a joint venture between Diabor, Geomech Africa and Solltech (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.

3.2.6 In accordance with this arrangement, the DGS joint venture was awarded this tender.

Braamhoek Dam Grouting Project

3.2.7 In June 2007, Rogel, the joint venture between GEL and Rodio, entered into a collusive arrangement with Dura regarding the tender for grouting services for the second phase of the Braamhoek Dam Grouting Project.

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3.2.8 In terms of this arrangement, Dura and Geomech Africa, through a joint venture, agreed to submit a Cover Price for this tender to ensure that Rogel won the contract.

3.2.9 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.

Lesotho Highlands Water Project

3.2.10 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.

3.2.11 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.

3.2.12 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.

4 ADMISSION

4.1 Geomech Africa admits that it entered into agreements with its competitors, in contravention of sections 4(1)(b)(i), (ii) and (iii) of the Act,



in respect of the following projects –

4.1.1 Gautrain Rapid Rail Link Project - O.R. Tambo/Marlboro drilling investigation;

4.1.2 Gautrain Rapid Rail Link Project – Section DP 6; and

4.1.3 Braamhoek Dam Grouting Project.

4.2 Geomechanics admits that it entered into an agreement in respect of the Lesotho Highlands Water Project with its competitors, in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act.

5 COOPERATION

The Respondents agree to fully cooperate with the Commission in its investigation and prosecution of the remaining respondents in the above-referenced collusive conduct. This cooperation includes, but is not limited to:

5.1 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the contraventions contained in this Settlement Agreement; and

5.2 to the extent that it is able, testify in the complaint referral in respect of the contraventions covered by this Settlement Agreement.

6 FUTURE CONDUCT

The Respondents agree and undertake to:

- 6.1 prepare and circulate a statement summarising the content of this Settlement Agreement to its managers and directors within 14 (fourteen) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal;
- 6.2 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 contravention of the Act in future;
- 6.3 implement and monitor a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management and directors 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; and
- 6.4 submit a copy of such compliance programme to the Commission within 90 (ninety) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal.

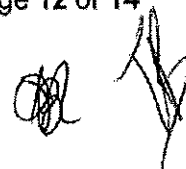
7 ADMINISTRATIVE PENALTY

- 7.1 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, the Respondents agree to pay an administrative penalty in the sum of R1 650 503,18 (One Million Six Hundred Fifty Thousand Five Hundred and Three Rands and Eighteen Cents), jointly and severally, the one paying the other to be absolved. This administrative penalty constitutes approximately 2,8% of Geomechanics' total South African revenue in its last completed financial year ended 28 February 2015 and approximately 4% of Geomech Africa's total South African revenue in its last completed financial year ended 28 February 2015.

7.2 The Respondents agree to pay the above administrative penalty in 20 (twenty) quarterly instalments of not less than R 82 525,16 (eighty two thousand five hundred and twenty five rands and sixteen cents). The first installment must be paid at the end of the quarter that follows the date of confirmation of this agreement as an order of the Tribunal and subsequent installments must be paid at the end of each subsequent quarter.

7.3 No interest will be levied upon the administrative penalty for the first year from the date on which this Settlement Agreement is made an order of the Tribunal. Thereafter interest will be levied on the remaining outstanding balance at the prevailing interest rate on debts owing to the State prescribed by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act No. 1 of 1999 as amended. At the time of signature of this Settlement Agreement, the applicable interest rate

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is 10,5%.

- 7.4 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 Business Bank
Branch name:	Pretoria
Account holder:	The Competition Commission
Account number:	4087641778
Account type:	Current Account
Branch Code:	632005
Reference:	Case number 2009Sep4641/Geomechanics/Geomech Africa

- 7.5 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 the Respondents in respect of this conduct contemplated under Commission case numbers 2009May4445 and 2010Feb4925.

For the Respondents

Dated and signed at Johannesburg on the 15 day of September 2016

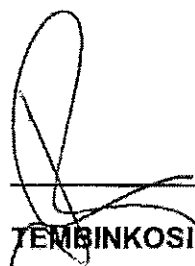


Name: D. B. ROSSITER.

Designation: C.E.O.

For the Commission

Dated and signed at PRETORIA on the 20th day of September 2016



TEMBINKOSI BONAKELE
COMMISSIONER

