



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR107Mar11/SA164Oct15

In the matter between:

The Competition Commission

Applicant

and

Dura Solétanche-Bachy Proprietary Limited

Respondent

Panel : Y Carrim (Presiding Member)
M Mazwai (Tribunal Member)
F Tregenna (Tribunal Member)

Heard on : 18 November 2015

Decided on : 18 November 2015

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Dura Solétanche-Bachy Proprietary Limited annexed hereto marked "A".

**Presiding Member
Ms Y Carrim**

**18 November 2015
Date**

Concurring: Ms M Mazwai and Prof. F Tregenna

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

CT CASE NO: _____

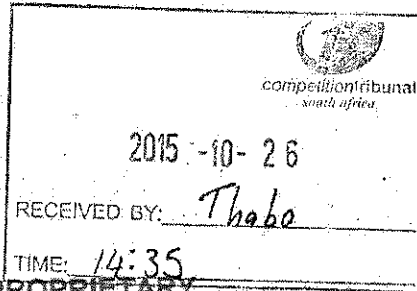
CC CASE NO: 2009May4445, 2010Feb4925, 2009May4447,

In the matter between:

COMPETITION COMMISSION

and

DURA SOLÉTANCHE-BACHY PROPRIETARY
LIMITED



APPLICANT

RESPONDENT

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND
DURA SOLÉTANCHE-BACHY PROPRIETARY LIMITED

Preamble

The Competition Commission ("Commission") and Dura Solétanche-Bachy Proprietary Limited ("Dura") 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)(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 Consent Agreement the following definitions shall apply:

19 *lms*

- 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 Dura;
- 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 "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;
- 1.9 "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 ;
- 1.10 "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

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

Republic of South Africa with its principal place of business at Block A, Grinaker LTA Park, Jurgens Street, Jet Park, Boksburg;

1.14 "Hochtief" means Hochtief Solutions A.G, a public company incorporated under the laws of Germany with its principal place of business at Opemplatz 2,45128, Essen, Germany;

1.15 "Parties" means the Commission and Dura;

1.16 "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 1685 West Road, Midrand, Gauteng;

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 alios*, Dura for certain alleged collusive 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*, Dura 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.

The Durban Undersea Tunnel project

2.4 On 18 August 2009 the Commissioner initiated a further complaint (case no. 2009May4447) against Hochtief, Concor (Pty) Ltd ("Concor"), Group Five Limited ("Group Five"), Dura, Stefanutti, Nishimatsu Construction Co Ltd ("Nishimatsu") and Grinaker LTA for alleged collusive tendering, or alternatively price fixing, relating to the Durban Undersea Tunnel Project, described below, in contravention of section 4(1)(b)(iii) and/or section 4(1)(b)(i) of the Act.

3 COMMISSION'S INVESTIGATION AND FINDINGS

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

3.2 Dura, together with Esorfranki, Geomechanics, 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.

3.3 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.

3.4 The following projects were allocated amongst the Firms in terms of this arrangement:

Inner Circle

3.4.1 This tender closed on 19 June 2006 and related to grouting and lateral support services for the Inner Circle building in Johannesburg. During a meeting in November 2005 (the "Nov 2005 Meeting"), Dura, Esorfranki, GEL and Rodio allocated this tender to Esorfranki and agreed that the other firms would either not bid or would submit cover bids.

3.4.2 In accordance with this agreement, Esorfranki was awarded the tender for the Inner Circle project.

Mercure Hotel

3.4.3 This tender closed on 14 December 2005 and related to piling and lateral support services for the Mercure Hotel in Johannesburg. During the Nov 2005 Meeting, Dura, Esorfranki, GEL and Rodio allocated this tender to GEL and Rodio's joint venture ("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 Mercure Hotel project.

Centurion Gate 1(c)

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

3.4.6 In accordance with this agreement, Rodio was awarded the tender for the Centurion Gate 1(c) project.

Centurion Gate 1(d)

3.4.7 This tender closed on August 2007 and related to grouting services for the Centurion Gate 1(d) in Pretoria/Centurion. During the Nov 2005 Meeting, Dura, Esorfranki, GEL and Rodio allocated this tender

to Rodio and agreed that the other firms would either not bid or would submit Cover Prices.

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

Lusip Dam

- 3.4.9 In 2005, an invitation was published to bid for the grouting services for the Lusip Dam in Swaziland.

- 3.4.10 At the request of GEL, Dura provided a Cover Price to GEL in terms of a bid allocation arrangement (GEL provided its tender price to Dura and Dura submitted a tender at a higher price to enable GEL to win the tender). In terms of this arrangement, Dura submitted its bid on 22 July 2005.

- 3.4.11 The grouting services for the project were awarded to GEL.

- 3.5 In addition to, and separate from the collusive arrangements outlined in 3.2 through 3.4 above, the Commission found the following collusive arrangements involving Dura that were reached on an *ad hoc* basis:

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, 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 (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, Rodio, Esorfranki and Dura.

3.5.6 It was agreed that Rogel, Esorfranki would give a Cover Price of R50 million on the Section DP 6 of the Gautrain in order to ensure that

the Dura-Geomechanic joint venture would win the contract. In accordance with this arrangement, the Dura-Geomechanic joint venture was awarded the tender.

- 3.5.7 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.

First Phase Braamhoek Dam

- 3.5.8 In 2005, interested parties were invited to tender for grouting services in relation to the first phase of the Braamhoek Dam Project.
- 3.5.9 Dura did not bid for this project as, at the time, (i) the scorecard arrangement mentioned above in 3.2 above in relation to the lateral support market was still in place (in terms of which Dura agreed not to compete in the market for grouting services) and (ii) Dura had very little expertise in grouting services.
- 3.5.10 The first phase of the Braamhoek Dam Project was awarded to a joint venture between GEL and Rodio.

Second Phase Braamhoek Dam

- 3.5.11 In or about 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 project.
- 3.5.12 In terms of this arrangement, Dura agreed to submit a Cover Price for this tender to ensure that Rogel won the contract.
- 3.5.13 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

- 3.5.14 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.
- 3.5.15 In exchange for Dura submitting a Cover Price for the Second Phase Braamhoek Dam project, Rogel agreed with Dura that Rogel would not submit a bid for the Coega Harbour diaphragm wall project, to ensure that Dura won the tender.
- 3.5.16 In accordance with this arrangement, Rogel did not submit a bid for this project and a joint venture between Concor and Hochtief was

awarded the tender on 29 October 2007, who subsequently appointed Dura as a subcontractor on the project.

Durban harbour tunnel project

- 3.5.17 During 2004 the eThekwinl municipality put out a tender for the Durban Undersea/Harbour Tunnel Project, which involved the construction of a tunnel which carries pipelines to transfer the sewage generated by Durban to a wastewater treatment works situated at an area called the Bluff.
- 3.5.18 In expectation of this tender Hochtief and Concor formed a joint venture called the Durban Harbour Tunnel Contractors Joint Venture ("the DHTC JV"). At all relevant times, Hochtief owned a 45% interest in Concor and a controlling interest of 70% in the DHTC JV. Hochtief was appointed as the leader of the DHTC JV.
- 3.5.19 The Commission further found that the eThekwinl municipality only invited pre-qualified tenderers to submit bids for this contract, which included the DHTC JV, Stefanutti Stocks Holdings Limited (which was in a joint venture with Nishimatsu), and Dura (which was later joined by Group Five).
- 3.5.20 The Commission's investigation also revealed that on or about February 2005, representatives of the DHTC JV, Group Five, Dura, Stefanutti, Nishimatsu and Grinaker LTA met and agreed to add a fixed amount of R3 million to their respective bid prices, in respect to

the tender. They also agreed that the firm which won the tender would pay a fixed sum of R1 million to each of the losing bidders.

3.5.21 The DHTC JV was awarded the tender.

4 ADMISSION

Dura admits that it entered into the agreements detailed in 3 above with its competitors, in contravention of section 4(1)(b)(i), (ii) or (iii) of the Act.

5 COOPERATION

5.1 Dura 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

Dura agrees and undertakes to:

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- 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.² In particular, such compliance programme will include mechanisms for the monitoring and detection of any contravention of the Act;
- 6.3 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
- 6.4 undertake henceforth to engage in competitive bidding.

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, Dura agrees to pay an

² For the sake of completeness, it is noted that Dura (shortly after it became aware of the complaints against it) undertook an extensive competition law compliance audit, which included competition law training for Dura's employees in anticipation of an obligation to implement a competition law compliance program as outlined in 6.2 hereof.

administrative penalty in the sum of R988 589.08 (nine hundred and eighty eight thousand, five hundred and eighty nine Rand and eight cents).³ This administrative penalty constitutes approximately 2% of Dura's total South African revenue in its last completed financial year ended 31 December 2014.

7.2 Dura agrees to pay the above administrative penalty in twelve equal monthly instalments in the sum of R82 382.42 (eighty two thousand three hundred and eighty two rand and forty two cents). The first installment must be paid within ten (10) days of this agreement being confirmed as an order of the Tribunal and subsequent installments must be paid on the 1st day of each month.

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
Branch name:	Pretoria
Account holder:	Competition Commission Fees Account
Account number:	4050778576
Account type:	Current Account

³ This figure was calculated using the Commission's "Legacy Methodology" for determining a settlement amount for construction firms: $1.25\% \text{ of the Firm's relevant turnover in affected subsector} \times \text{number of cartelised projects} = \text{Fine for that affected subsector}$.

Branch Code: 323 345

Reference: 2009May4445, 2010Feb4925,
2009May4447 (Dura)

- 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 Dura in respect of this conduct contemplated under Commission case numbers 2009May4445, 2010Feb4925, 2009May4447.

For Dura

Dated and signed at Johannesburg on the 8 day of September 2015



Name: PAULO J. G. ARTUR

Designation: MANAGING DIRECTOR



For the Commission

Dated and signed at PRETORIA on the 5th day of October 2015



TEMBINKOSI BONAKELE
COMMISSIONER