



**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR212Feb15/SA050Jun16

In the matter between:

The Competition Commission

Applicant

and

Delatoy Investments (Pty) Ltd

First Respondent

Delatoy Group Holdings (Pty) Ltd

Second Respondent

ATPD Properties (Pty) Ltd

Third Respondent

Dream World 344 (Pty) Ltd

Fourth Respondent

Dream World 345 (Pty) Ltd

Fifth Respondent

Patrick Donovan Delamere NO

Sixth Respondent

Francois Koch NO

Seventh Respondent

Tonya Elizabeth Delamere NO

Eighth Respondent

Andrew David Toy NO

Ninth Respondent

Patrick James Rowan Toy NO

Tenth Respondent

Hilton Somah Gordon NO

Eleventh Respondent

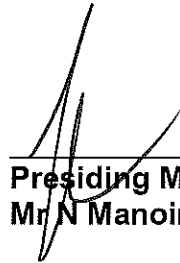
Panel : N Manoim (Presiding Member)
Y Carrim (Tribunal Member)
I Valodia (Tribunal Member)

Heard on : 13 July 2016

Decided on : 13 July 2016

Settlement Agreement

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



Presiding Member
Mr N Manoim

13 July 2016
Date

Concurring: Ms Y Carrim and Prof. I Valodia

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

CT CASE NO: _____

CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

APPLICANT

And

DELATTOY INVESTMENTS (PTY) LTD

FIRST RESPONDENT

DELATTOY GROUP HOLDINGS (PTY) LTD

SECOND RESPONDENT

ATPD PROPERTIES (PTY) LTD

THIRD RESPONDENT

DREAM WORLD 344 (PTY) LTD

FOURTH RESPONDENT

DREAM WORLD 345 (PTY) LTD

FIFTH RESPONDENT

PATRICK DONOVAN DELAMERE NO

SIXTH RESPONDENT

FRANCOIS KOCH NO

SEVENTH RESPONDENT

TONYA ELIZABETH DELAMERE NO

EIGHTH RESPONDENT

ANDREW DAVID TOY NO

NINTH RESPONDENT

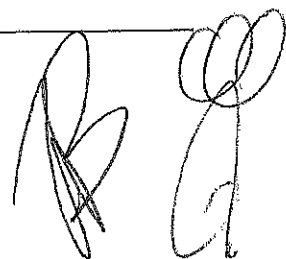
PATRICK JAMES ROWAN TOY NO

TENTH RESPONDENT

HILTON SOMAH GORDON NO

ELEVENTH RESPONDENT

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



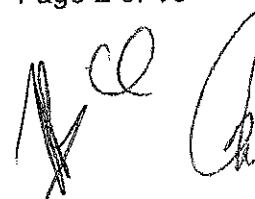
PREAMBLE

The Competition Commission ("**Commission**") and the first to eleventh Respondents ("**Respondents**"), 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 as read with sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act no. 89 of 1998, as amended ("**the Act**"), in respect of a contravention of section 4(1)(b)(iii) of the Act, on the terms below:

1 DEFINITIONS

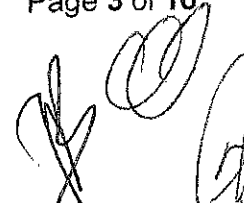
For the purposes of this Settlement Agreement the following definitions shall apply:

- 1.1 "**Act**" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 "**Andrew David Toy**" means Andrew David Toy in his capacity as a trustee of the Andrew Toy Family Trust;
- 1.3 "**Andrew Toy Family Trust**" means the Andrew Toy Family Trust, a trust duly registered in terms of the laws of the Republic of South Africa under trust deed number 2638/04;
- 1.4 "**ATPD**" means ATPD Properties Proprietary Limited, a private

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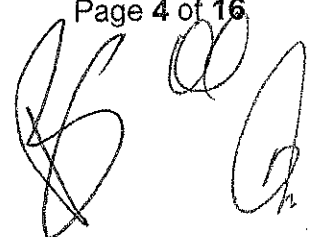
company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province;

- 1.5 "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);
- 1.6 "**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;
- 1.7 "**Commissioner**" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.8 "**Complaint**" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Sep4641 initiated against, *inter alia*, the Respondents for alleged contraventions of section 4(1)(b);
- 1.9 "**Cycad Pipelines**" means Cycad Pipelines Proprietary Limited, a private company duly incorporated in terms of the laws of the Republic of South Africa with its principal place of business at



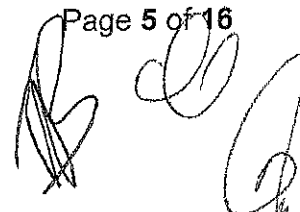
159 Van Den Dool Road, Nuffield, Springs, Gauteng, South Africa;

- 1.10 **"Delatoy Group Holdings"** means Delatoy Group Holdings Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province. At all material times, Delatoy Group Holdings traded under the registered name of Shearwater Group Holdings Proprietary Limited until it changed its name to Delatoy Holdings in 2009;
- 1.11 **"Delatoy Investments"** means Delatoy Investments Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, Gauteng Province. At all material times, Delatoy Investments traded under the registered name of Shearwater Construction Proprietary Limited until it changed its name to Delatoy Investments in 2009;
- 1.12 **"Dream World 344"** means Dream World Investments Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at Route 21 Corporate Park, 94 Regency Drive, corner of

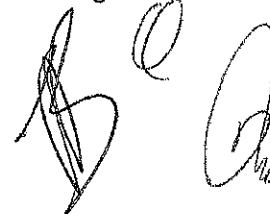
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Regency and Sovereign Drives, Irene, Pretoria, South Africa;

- 1.13 **"Dream World 345"** means Dream World Investments 345 Proprietary Limited, a private company duly registered in terms of the company laws of the Republic of South Africa with its registered place of business at 21 Corporate Park, 94 Regency Drive, corner of Regency and Sovereign Drives, Irene, Pretoria, South Africa;
- 1.14 **"Francois Koch"** means Francois Koch in his capacity as trustee of the P.D.D Family Trust;
- 1.15 **"Hilton Somah Gordon"** means Hilton Somah Gordon in his capacity as a trustee of the Andrew Toy Family Trust;
- 1.16 **"Invitation"** means the Invitation to Firms in the Construction Industry to Engage in Settlement in Contraventions of the Act, as published on the website of the Commission on 1 February 2011;
- 1.17 **"Loser's fee"** means a fee paid by the successful tenderer to the unsuccessful tenderer(s) as compensation for engaging in collusive tendering;
- 1.18 **"Patrick Donovan Delamere"** means Patrick Donovan Delamere in his capacity as a trustee of the P.D.D Family Trust;

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- 1.19 **"Patrick James Rowan Toy"** means Patrick James Rowan Toy in his capacity as trustee of the Andrew Toy Family Trust;
- 1.20 **"P.D.D Family Trust"** means the P.D.D Family Trust, a trust duly registered in terms of the laws of the Republic of South Africa under the trust deed number IT2647/04(T);
- 1.21 **"Phambili Pipelines"** means Phambili Pipelines Proprietary Limited, a wholly-owned subsidiary of Basil Read Holdings Limited, with its principal place of business at the Basil Read Campus, 7 Romeo Street, Hughes, Boksburg, Gauteng, South Africa;
- 1.22 **"Respondents"** mean the first to eleventh Respondents namely Delatoy Investments, Delatoy Holdings, ATPD, Dream World 344, Dream World 345, Patrick Donovan Delamere NO, Francois Koch NO, Tonya Elizabeth Delamere NO, Andrew David Toy NO, Patrick James Rowan Toy NO, and Hilton Somah Gordon NO;
- 1.23 **"Settlement Agreement"** means this agreement duly signed and concluded between the Commission and the first to eleventh Respondents;
- 1.24 **"Shearwater Construction"** means Shearwater Construction Proprietary Limited, a private company incorporated under the laws of the Republic of South Africa which changed its name to Delatoy

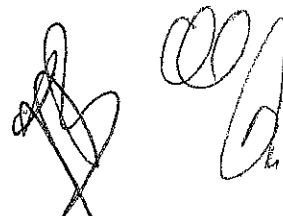
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Investments in 2009;

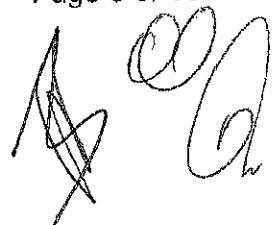
- 1.25 **"Thabazimbi Pipeline Project"** means the project for the construction of a steel pipeline of approximately 30,4 kilometres in length between Padda Junction and Tuschenkomst for the Pilanesberg Platinum Mine at Northarm;
- 1.26 **"Tonya Elizabeth Delamere"** means Tonya Elizabeth Delamere in her capacity as trustee of the P.D.D Family Trust; and
- 1.27 **"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

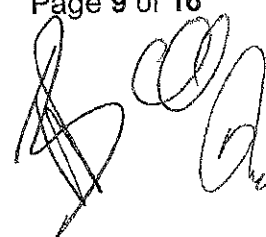
- 2.1 On 10 February 2009, the Commissioner initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in possible contraventions of sections 4(1)(a) and 4(1)(b) of the Act, in the construction of the stadia for the 2010 FIFA Soccer World Cup against Grinaker-LTA, Group Five, Basil Read, WBHO, Murray & Roberts, Stefanutti, Interbeton Abu Dhabi nv llc and Bouygues Construction SA, under case number 2009Feb4279 (**"February 2009 Initiation"**).



- 2.2 Following the February 2009 Initiation, the Commission conducted an investigation that indicated that there was pervasive anti-competitive conduct in the construction industry which extended beyond the scope of the February 2009 initiation. On 1 September 2009, the Commissioner therefore initiated a further complaint into alleged collusive conduct in contravention of sections 4(1)(b)(i), (ii) and (iii) of the Act, in the construction industry, which included several firms and joint ventures in the construction industry, under case number 2009Sep4641 ("**September 2009 Initiation**").
- 2.3 Pursuant to the September 2009 Initiation, and in consequence of its investigation of the complaints, it became evident to the Commission that the construction industry was characterised by entrenched and ubiquitous co-operation and endemic practices of collusive tendering conduct.
- 2.4 The Commission's investigation of the above complaint, as well as several others in the construction industry, led the Commission to believe that there was widespread collusion in the construction sector in contravention of section 4(1)(b)(iii) of the Act. Accordingly, in line with the purpose of the Act, as well as the Commission's functions, the Commission decided to invite the construction firms that were involved in collusive conduct to apply to engage in settlement on favourable terms.

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- 2.5 On 1 February 2011 the Commission issued the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act ("**the Invitation**"). The Invitation was launched and 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. In the context of the Invitation, the collusive conduct engaged in included collusive tendering or 'bid rigging', in some instances through a 'Loser's fee'.
- 2.6 The Invitation required firms to apply for settlement by disclosing all construction projects that were the subject of prescribed and non-prescribed practices. The closing date to apply for settlement in terms of the Invitation was 15 April 2011.
- 2.7 In response to the Invitation, Phambili Pipelines was granted conditional immunity for its role in the collusive tendering in relation to the Thabazimbi Pipeline Project.
- 2.8 Cycad Pipelines concluded a settlement agreement with the Commission on 14 July 2014 in respect of the collusive tendering in relation to the Thabazimbi Pipeline Project. This settlement



agreement between Cycad Pipelines and the Commission was made an order of the Tribunal on 19 August 2014.

2.9 The Respondents did not apply to engage in settlement under the Invitation.

2.10 Pursuant to the process under the Invitation, the Commission further investigated the alleged involvement of the Respondents in collusive tendering relating to the Thabazimbi Pipeline Project. The Commission's findings are set out below.

3 COMMISSION'S INVESTIGATION AND FINDINGS

3.1 Following its investigation, the Commission found that in or about February 2008, the Respondents entered into a collusive agreement in contravention of section 4(1)(b)(iii) of the Act with Phambili Pipelines and Cycad Pipelines in relation to the Thabazimbi Pipeline Project.

3.2 During February 2008, Boynton Investments Proprietary Limited and Barrick Platinum South Africa Proprietary Limited invited bids for the construction of a 750mm diameter cement mortar-lined, fusion bonded medium density polyethylene coated, steel pipeline of approximately 30,4 kilometres in length between Padda Junction and Tuschenkomst for the Pilanesberg Platinum Mine at Northarm.

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- 3.3 The Thabazimbi Project was a closed tender in that specific companies were invited to tender for the project by no later than 28 February 2008 and the price of the winning tender was not made public.
- 3.4 The Commission's investigation found that before the closing date (28 February 2008) for the submission of the bids for the Thabazimbi Project, the Respondents, Cycad Pipelines and Phambili Pipelines entered into a Loser's fee arrangement in terms of which they agreed to inflate their bid prices and for the winner to pay a Loser's fee to each of the two companies that lost the bid.
- 3.5 Cycad Pipelines was awarded the tender on or about May 2008 and paid a Loser's fee in the amount of R1 143 420,00 to ATPD acting under the direction of Delatoy Investments in five instalments equal instalments of R228 684,00 each between August 2008 and December 2008.
- 3.6 Cycad Pipelines also paid a Loser's fee in the amount of R1 140 000 to Phambili Pipelines in instalments between August 2008 and December 2008.
- 3.7 On the basis of the above, the Commission concluded that the Respondents, Cycad Pipelines and Phambili Pipelines had engaged



in collusive tendering in contravention of section 4(1)(b)(iii) of the Act.
The Commission accordingly decided to refer the Complaint to the Tribunal in terms of section 50 of the Act.

4 REFERRAL PROCEEDINGS IN THE TRIBUNAL

- 4.1 On 25 February 2015, the Commission referred the Complaint against the Respondents to the Tribunal under Tribunal case number 020834, now CR212Feb15.
- 4.2 Following the Tribunal's decision issued on 14 April 2016 in relation to an interlocutory application concerning whether the Respondents constitute a firm for purposes of the Act as well as whether the complaint had prescribed in terms of section 67(1) of the Act, the Commission and the Respondents engaged in settlement discussions in order to avoid further protracted litigation in this matter.
- 4.3 The Commission and the Respondents have agreed to settle on the terms as set out in this Settlement Agreement.

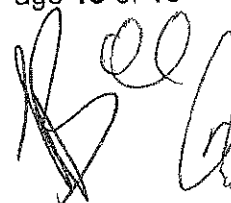
5 ADMISSION

The Respondents admit that they were involved in the collusive tendering as detailed in paragraph 3 above with their competitors, Cycad Pipelines and Phambili Pipelines, in contravention of section 4(1)(b)(iii) of the Act.

6 FUTURE CONDUCT

The Respondents agree and undertake to:

- 6.1 prepare and circulate a statement summarising the content of this Settlement Agreement to their 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)(iii) of the Act, and from engaging in any contravention of the Act in future;
- 6.3 develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, in particular such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act; and
- 6.4 submit a copy of such compliance programme to the Commission within ninety (90) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal.



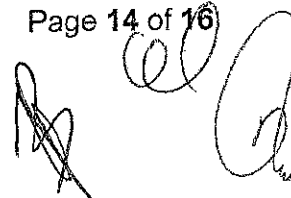
7 ADMINISTRATIVE PENALTY

7.1 Having regard to the provisions of sections 59(1)(a), 59(2) and 59(3) of the Act, the Respondents have agreed to pay a total administrative penalty in the amount of R4 136 122,02 (Four Million One Hundred and Thirty Six Thousand One Hundred and Twenty Two Rands and Two Cents) jointly and severally, the one paying the others to be absolved. The administrative penalty amounts to approximately 3,75% of Delatoy Investment's annual turnover for the financial year ended 28 February 2009.

7.2 The Respondents must pay the amount of R4 136 122,02 (Four Million One Hundred and Thirty Six Thousand One Hundred and Twenty Two Rands and Two Cents) to the Commission within 90 (ninety) business days from the date of confirmation of this Settlement 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 Business Bank
Branch name:	Pretoria
Account holder:	The Competition Commission



Account number:	4087641778
Account type:	Current Account
Branch Code:	632005
Reference:	Case number 2009Sep4641/Delatoy Group

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

8.1 This Settlement Agreement is entered into in full and final settlement of the complaint against the Respondents under Commission case number 2009Sep4641 and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and the Respondents in respect of the Complaint.

For the Respondents

Dated and signed at WOODMEAD on the 8th day of JUNE 2016

Name:

A.D. Toy

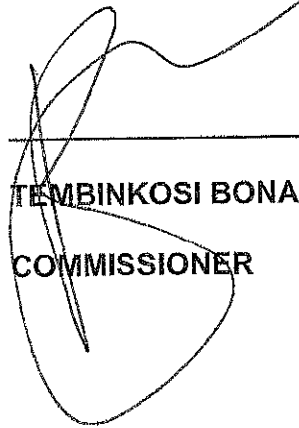
Designation:

Witness [Signature]

[Signature]

For the Commission

Dated and signed at Pretoria on the 14th day of June 2016



TEMBINKOSI BONAKELE
COMMISSIONER