

SOUTH AFRICA / JUDGMENT

Competition Commission of South Africa v ZTE Corporation South Africa (Pty) Ltd (CR015Apr16; SA043Jul21) [2021] ZACT 114; [2023] 1 CPLR 6 (CT) (5 October 2021) [2021] ZACT 114

COURT

Competition Tribunal

BEFORE

AW Wessels, E Daniels, Y Carrim

CASE / FILE NUMBER

CR015Apr16; SA043Jul21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR015Apr16/SA043Jul21

In the matter between:

The Competition Commission of South Africa Applicant

And

ZTE Corporation South Africa (Pty) Ltd Respondent

Panel: AW Wessels (Presiding Member)

E Daniels (Tribunal Member)

Y Carrim (Tribunal Member)

Heard on: 07 September 2021

Addendum filed on: 30 September 2021

Decided on: 05 October 2021

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and ZTE Corporation South Africa (Pty) Ltd annexed hereto; including the agreement addendum of 30 September 2021, as annexed hereto.

Presiding Member Mr Andreas Wessels

Concurring: Mr Enver Daniels and Ms Yasmin Carrim

Date: 05 October 2021

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT Case No. CR15Apr16 CC

Case No: 2013Jul0313

In the matter between

COMPETITION COMMISSION APPLICANT

and

ZTE CORPORATION SOUTH AFRICA (PTY) LTD RESPONDENT

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND ZTE CORPORATION SA (PTY) LTD, IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT, 1998

The Competition Commission and ZTE Corporation SA (Pty) Ltd hereby agree that an 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 an alleged contravention of section 4(1)(b)(ii) of the Act, on the terms set out below.

1. DEFINITIONS

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

1.1. "Act" means the Competition Act, No. 89 of 1998, as amended;

1.2. "Public enterprise business" means that part of the business conducted by ZTE Mzansi in relation to clients in the so-called public sector of the Republic of South Africa such as [...]

1.3. "Private enterprise business" means that part of the business conducted by ZTE Corporation SA (Pty) Ltd in relation to clients in the so-called private sector of the Republic of South Africa, [...].

1.4. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal business address at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.5. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.6. "Complaint" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 498(1) of the Act under case numbers 2013Jul0313;

1.7. "Consent Agreement" means this Agreement duly signed and concluded between the Commission and ZTE Corporation SA (Pty) Ltd;

1.8. "ZTE SA" means ZTE Corporation South Africa (Pty) Ltd, a company duly registered and incorporated under the laws of South Africa with its principal place of business at Lincoln Wood Office Park, Woodlands Drive, Woodmead, Sandton.

1.9. "ZTE Mzanzi" means ZTE Mzanzi (Pty) Ltd, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business situated at block C, Eco Fusion 5, 1004 Teak Close, Highveld ext. 70, Centurion;

1.10. "Parties" means the Commission and ZTE Corporation SA (Pty) Ltd;

1.11. "Respondents" means ZTE Corporation SA (Pty) Ltd and ZTE Mzanzi (Pty) Ltd;

1.12. "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;

1.13. "ZTE China" means ZTE Corporation (China);

1.14. "ZTE HK" means ZTE Hong Kong Limited; and

1.15. "8 Mile" means 8 Mile Investment 411 (Pty) Ltd.

2. THE COMMISSION'S INVESTIGATION AND FINDINGS

2.1 On 2 July 2013, the Commissioner initiated a complaint against ZTE China, ZTE HK, ZTE SA and ZTE Mzanzi) for allegedly dividing the market by allocating customers in the market for the supply of telecommunications equipment and network solutions in South Africa in contravention of section 4(1)(b)(ii) of the Act.

2.2 It is alleged that in 2011, ZTE SA and ZTE Mzanzi entered into an agreement and/or arrangement to divide markets by allocating customers between themselves.

2.3 The investigation revealed that there was an agreement to allocate customers between ZTE SA and ZTE Mzanzi. This collusive agreement was facilitated by the-

2.3.1 Memorandum of Understanding ("MoU") entered into by, inter alia, ZTE SA, ZTE Mzanzi, 8 Mile, ZTE China and ZTE HK;

2.3.2 Shareholders' Agreement entered into by 8 Mile and ZTE HK; and

2.3.3 Supply Agreement entered into by ZTE China and ZTE Mzanzi.

2.4 The Commission found that, in terms of the above agreements, the parties agreed to divide the market in that ZTE Mzanzi was to distribute

telecommunication equipment and network solutions only to public sector customers (public enterprise business) in South Africa such as [...] while ZTE SA was to distribute similar products to the private sector customers (private enterprise business) such as [...].

2.5 The Commission found that this conduct is in contravention of section 4(1)(b)(ii) of the Act.

3. ADMISSION OF LIABILITY

3.1. ZTE SA does not admit liability in respect of the conduct described in paragraph 2 above.

4. FUTURE CONDUCT

ZTE SA agrees and undertakes to:

4.1. refrain from engaging in any conduct that is in contravention of section 4(1)(b) of the Act, and from engaging in any prohibited practice in future;

4.2. circulate a statement summarising the contents of this Consent Agreement to its managers and directors within 30 days (thirty) from the date of confirmation of this Consent Agreement by the Tribunal;

4.3. to implement and monitor a competition law compliance programme. [...]. Such programme shall incorporate corporate governance designed to ensure the employees, management, directors and agents do not engage in future contraventions of the Act. Such compliance programme will include mechanisms for the monitoring and detection of any contraventions of the Act;

4.4. with regard the competition law compliance programme referred to above, ZTE SA undertakes to submit to the Commission a copy thereof within 90 days of confirmation of the Consent Agreement as an Order of the Tribunal.

5. SETTLEMENT AMOUNT

5.1. Having regard to the provisions of section 49D, ZTE SA agrees to pay a settlement amount.

5.2. ZTE SA agrees and undertakes to pay a settlement amount in the amount of R5,000,000.00 (Five Million Rands). This amount does not exceed 10% of ZTE SA's annual turnover for the financial year ended 31 December 2020.

5.3. ZTE SA will pay the amount of the settlement amount set out in paragraph

5.2 above to the Commission within 45 (Forty Five) days of the confirmation of the Consent Agreement as an order of the Tribunal.

5.4. The payments shall be made into the Commission's bank account, details of which are as follows:

Bank name: Branch name: Absa Bank Pretoria

Account holder: Competition Commission Fees Account

Account number: [....]

Account type: Current Account

Branch Code: 632005

Reference: Case NO: 2013Jul0313ZTE SA

5.5. The settlement amount will then be paid over by the Commission to the National Revenue Fund in accordance with the procedure contained in section 59(4) of the Act.

6. FULL AND FINAL SETTLEMENT

6.1. This agreement, upon confirmation as an order of the Tribunal, is entered into in full and final settlement in respect of the Commission's

investigation under Case No. 2013Jul0313 (and Tribunal Case No. CR15APR16) and concludes all proceedings between the Commission and the respondents relating to the conduct that is the subject of the Commission's investigation under Case No. 2013Jul0313 (and Tribunal Case No. CR15APR16) as described in clause 2 above.

Dated and signed at Pretoria on the day of 30th September 2023.

TEMBINKOSI BONAKELE

COMMISSIONER

COMPETITION COMMISSION APPLICANT

ZTE CORPORATION SOUTH AFRICA (PTY) LTD RESPONDENT

ADDENDUM TO THE CONSENT AGREEMENT CONCLUDED BETWEEN THE COMPETITION COMMISSION AND ZTE CORPORATION SA (PTY) LTD DATED 7 SEPTEMBER 2021

It is hereby recorded, by agreement between the parties, that the Consent Agreement concluded between the Competition Commission and ZTE Corporation South Africa (Pty) Ltd ("ZTE SA"), filed on 16 July 2021 and presented for confirmation by the Competition

Tribunal on 07 September 2021 be supplemented as recorded below.

1. INSERTING PARAGRAPH 3.2 to 3.3 TO READ AS FOLLOWS:

3.2. The Commission decided not to insist on an admission of liability based, amongst others, on the following:

3.2.1 That the matter raises a characterisation issue that weakens the Commission's case against ZTE SA for prosecution and its prospects of success are slim;

3.2.2 That ZTE SA takes the position that the relationship between ZTE SA and ZTE Mzanzi properly characterised is not that between competitors and as such is not subject to the provisions of section 4(1)(b) of the Act;

3.2.3 Subsequent to the conclusion of the agreement between ZTE SA and ZTE Mzanzi, there were disputes between ZTE Mzanzi's shareholders which resulted in ZTE Mzanzi not properly servicing its public sector customers;

3.2.4 The formation of ZTE Mzanzi was in response to legislative requirements regarding the supply of goods and services to the public sector. ZTE required a BEE partner to enable it to target public sector projects. ZTE Mzanzi was meant to serve this purpose; and

3.2.5 ZTE SA has not previously been found guilty of contravening the Competition Act.

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