

SOUTH AFRICA / JUDGMENT

## Competition Commission v Basil Read Holdings Limited (CO165Oct15) [2015] ZACT 85; [2015] 2 CPLR 515 (CT) (18 November 2015) [2015] ZACT 85

COURT  
Competition Tribunal

BEFORE  
Y Carrim, M Mazwai, F Tregenna

CASE / FILE NUMBER  
CO165Oct15

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: C01650ct15

In the matter between:

The Competition Commission

Applicant

And

Basil Read Holdings 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

## Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Basil Read Holdings

Limited annexed hereto marked "A".

18 November 2015

Date

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Presiding Member

Ms Y Carrim

Concurring: Ms M Mazwai and Prof F Tregenna

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD IN PRETORIA

CT CASE NO: \_

THE COMPETITION COMMISSION Applicant

and

BASIL READ HOLDINGS LIMITED

Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND BASIL READ HOLDINGS LIMITED, IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT

The Competition Commission ("Commission") and Basil Read Holdings Limited ("Basil Read") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 490 read with section 58(1)(b) of the Competition Act no.

## 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 "Basil Read" means Basil Read Holdings Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at Basil Read Campus, Romeo Street, Hughs, Boksburg, Gauteng;

1.3 "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);

1.4 "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 151 Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.5 "Complaints" means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case numbers 2009Feb4279 and 2009Sep4641;

1.6 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Basil Read Holdings Limited ;

1.7 "Meyker" means Meyker Re-Teng Construction (Pty) Limited;

1.8 "Non-prescribed prohibited practices" refers to prohibited restrictive horizontal practices relating to the construction industry that are contemplated in section 4(1)(b)

of the Act and that are ongoing or had not ceased three years before the complaints were initiated, as contemplated in section 67 of the Act;

1.9 "Parties" means the Commission and Basil Read Holdings Limited;

1.10 "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;

1.11 "Wascon" means Wascon Civils CC;

2

## BACKGROUND

2.1 On 10 February 2009, the Commission initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in the construction of the stadiums for the 2010 FIFA Soccer World Cup against Group Five, Grinaker-LTA (the construction operating business unit of Aveng), Basil Read (Pty) Ltd, WBHO Construction (Pty)

Ltd, Murray & Roberts Limited, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv lie and Bouygues Construction SA.

2.2 In addition, on 1 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated a complaint in terms of section 49B(1) of the Act into particular prohibited practices

relating to conduct in respect of construction projects, by the firms listed below. The complaint concerned alleged contraventions of section 4(1)(b) of the Act with regard to price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Stefanutti, Aveng (Africa) Limited, Group Five Ltd, Murray & Roberts, Concor Ltd, G. Liviero & Son Building (Pty) Ltd, Giuricich Coastal Projects (Pty) Ltd, Hochtief Construction AG, Dura Soletanche- Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Pilings CC,

Radio Geotechnics (Pty) Ltd, Diabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC, Wilson Bayly Holmes-Ovcon Ltd and other construction firms, including joint ventures.

2.3 The Commission's investigation of the above complaints, as well as several other of the Commission's investigations in the construction industry, led the Commission to believe that there was widespread collusion in contravention of section 4(1)(b)(iii) of the Act in the construction industry. Accordingly, in line with the purpose of the Act as well as the Commission's functions, the Commission decided to invite construction firms that were involved in collusive conduct to apply to engage in settlement on favourable terms. The Invitation was published on the Commission's website on 1 February 2011 ("Invitation"). 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. The Invitation specifically provided that it was open to firms to also apply for leniency in terms of the CLP.

2.4 In response to the Invitation and in terms of the Commission's CLP, Basil Read was first to apply for leniency in respect of two non-prescribed prohibited practices.

### 3 CONDITIONAL IMMUNITY

3.1 The Commission granted Basil Read conditional immunity from prosecution before the Tribunal for its involvement in cartel conduct described in paragraph 4 below.

3.2 Basil Read agreed to co-operate with the Commission in respect of any steps that the Commission may deem necessary to obtain an order from the Tribunal declaring the conduct set out in paragraph 4 below to be a contravention of section 4(1) (b) (iii) of the Act.

### 4 CONDUCT IN CONTRAVENTION OF THE ACT

4.1 In its CLP application, Basil Read disclosed its participation in the following prohibited practice or contravention of section 4(1) (b)(iii) of the Act:

The Rehabilitation of sections of road P65/2 from Parys to N1 Project (WRT (T) 16/2005)

4.2 In or about July 2006, Basil Read reached an agreement with Wascon and Meyker, in terms of which these parties agreed on the submission of cover prices in relation to the tender for the rehabilitation of section of road P65/2 from Parys.

4.3 In terms of the agreement,

4.3.1 Basil Read and Wascon would bid an inflated price to enable Meyker to win the tender; and

4.3.2 Meyker, Wascon and Basil Read agreed to add a loser's fee to their respective bids. More particularly, it was agreed that the winner of the tender would pay R2 000 000.00 to each of the losing bidders as a

loser's fee.

4.4 Meyker was awarded the tender and paid a part of the loser's fee to Basil Read during August 2006 and October 2007.

4.5 The project was for the rehabilitation of a section of the road P65/2 from Parys to the N1 in the Free State Province and Sanral was the client.

## 5 ADMISSION

Basil Read admits that the conduct set out in paragraph 4 above is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

## 6 CO-OPERATION

6.1. In so far as the Commission is aware, and in compliance with the requirements as set out in the CLP, Basil Read:

6.1.1. has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its control, relating to the prohibited practices;

6.1.2. has provided full and expeditious co-operation to the Commission concerning the prohibited practices;

6.1.3. has provided a written undertaking that it has immediately ceased to engage in, and will not in future engage in, any form of prohibited practice;

6.1.4. has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices;

6.1.5. has confirmed that it has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

## 7 FUTURE CONDUCT

7.1. Basil Read confirms that it no longer engages in the conduct set out in paragraph 4 above.

7.2. In compliance with the requirements as set out in the CLP, Basil Read agrees and undertakes to provide the Commission with full and expeditious co-operation from the time that this Consent Agreement is concluded until the subsequent proceedings in the Competition Tribunal or the Competition Appeal Court are completed, if any. This includes, but is not limited to:

7.2.1. to the extent that it is in existence and has not yet been provided, providing (further) evidence, written or otherwise, which is in its possession or under its control, concerning the contraventions contained in this Consent Agreement;

7.2.2. availing its employees and former employees to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement.

7.3 Basil Read shall continue to 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.

7.4 Basil Read shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Basil Read within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

7.5 Basil Read will not in the future engage in any form of prohibited conduct and will not engage in collusive tendering which will distort the outcome of tender processes bidding. but undertakes henceforth to engage in competitive binding.

For the Commission

Dated and signed at PRETORIA on the 15th of October 2015

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THEMBINKOSI BONAKELE

Competition Commissioner

For Basil Read Holdings Limited

Dated and signed at BOKSBURG on the 6th day of OCTOBER 2015

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Name: AMANDA CLAIRE WIGHTMAN

Capacity: CHIEF FINANCIAL OFFICE

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Prepared on 10 October 2026 · Esheria