

SOUTH AFRICA / JUDGMENT

Competition Commission v BLG Leads Logistics of South Africa (Pty) Ltd (C0026May15) [2015] ZACT 131; [2015] 2 CPLR 515 (CT) (31 August 2015) [2015] ZACT 131

COURT

Competition Tribunal

BEFORE

A Wessels, A Roskam, A Ndoni

CASE / FILE NUMBER

C0026May15

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: C0026May15

In the matter between:

The Competition Commission Applicant

and

BLG Leads Logistics of South Africa (Pty) Ltd Respondent

Panel

Mr. A Wessels (Presiding Member)

Mr. A Roskam (Tribunal Member)

Ms. A Ndoni (Tribunal Member)

Heard on

: 12 August 2015

Addendum received on

: 27 August 2015

Decided on

: 31 August 2015

Order

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and BLG Leads Logistics of South Africa (Pty) Ltd, annexed hereto marked Wand addendum annexed hereto marked “B”.

31 August 2015

Date

Tribunal Member

Mr. A Wesels

Concurring: Mr A Roskam and Ms A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT Case No.

CC Case No. 2013AUG0364

THE COMPETITION COMMISSION

BLG LEADS LOGISTICS OF SOUTH AFRICA

(PTY) LTD

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND BLG LEADS LOGISTICS OF SOUTH AFRICA (PTY) LTD IN RESPECT OF A CONTRAVENTION OF SECTION 4(1)(b)(ii) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED

PREAMBLE

The Competition Commission (“Commission”) and BLG Leads Logistics of South Africa (Pty) Ltd (“BLG”) hereby agree that application be made to the Competition Tribunal (“Tribunal³⁵) 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), 58(1)(b) and 59(1)(a) of the Competition Act 89 of 1998, as amended (“the Act”) on the terms set out below.

1. DEFINITIONS

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

1.1 “the Act” means the Competition Act No, 89 of 1998, as amended;

1.2 “BLG” means BLG Leads Logistics of South Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at Ground Floor, Walmer Park House, 16th Avenue, Walmer, Port Elizabeth. BLG holds 49% of the shares in NYK Logistics;

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 Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria;

1.4 “Commissioner” means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.5 “Complaint” means the complaint initiated by the Commissioner in terms of section 49B of the Act under case number 2013Aug0364;

1.6 “JV Agreement” means the shareholders¹ agreement entered into by NYK and BLG on 25 March 2005 in terms of which the joint venture NYK Logistics was established;

1.7 “Logistics Services” means the inland transportation of motor vehicle production parts; the warehousing of motor vehicle production parts; the crossdocking of motor vehicle production parts; customs brokerage and clearance services in respect of imported motor vehicle production parts within South Africa; and forwarding services for the export of completely knockeddown motor vehicles,

1.8 “NYK” means Nippon Yusen Kabushiki Kaisha, a Japanese company with its principal place of business at 3 2 Marunouchi 2 Chome, ChiyodaKu, Tokyo, 100 0005, Japan. NYK holds 51% of the shares in NYK Logistics;

1.9 “NYK Logistics” means NYK Logistics & BLL (NLB) of South Africa (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of South Africa, with its principal place of business at Ground Floor, Waimers Park House, 16th Avenue, Waimers, Port Elizabeth, NYK Logistics is a joint venture established by NYK and BLG. NYK holds 51% and BLG holds 49% of the shares in NYK Logistics;

1.10 “Parties” means the Commission and BLG;

1.11 “Respondents” means NYK, BLG and NYK Logistics;

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.

2. THE COMMISSION’S INVESTIGATION AND FINDINGS

2.1 Pursuant to a marker application received by the Commission on 01 August 2013, the Commission initiated a complaint in terms of section 49B(1) of the Act against the Respondents.

2.2 NYK and BLG agreed, in terms of clauses 20 and 21 of the JV Agreement, to divide markets by allocating customers and territories in the market for the supply of logistics services to German and Japanese motor vehicle and motor vehicle parts manufacturing industry, through NYK Logistics, in contravention of section 4(1)(b)(ii) of the Act.

2.3 The case was investigated under Commission case number 2013Aug0364.

2.4 The Commission's investigation found that clause 20.1.2 of the JV Agreement provides that NYK shall not compete, directly or indirectly, with BLG in providing Logistics Services to German automotive manufacturers in South Africa, without obtaining BLG's prior written consent.

2.5 The Commission further found that clause 20.1.3 of the JV Agreement provides that BLG shall not compete, directly or indirectly, with NYK in providing Logistics Services to Japanese automotive manufacturers in South Africa, without obtaining NYK's prior written consent.

2.6 Accordingly, clause 20.12 of the JV Agreement precludes NYK from competing with BLG in the provision of Logistics Services to German Automotive Manufacturers in South Africa, while clause 20.1.3 precludes BLG from competing with NYK in the provision of Logistics Services to Japanese Automotive

Manufacturers in South Africa.

2.7 The Commission found that the inclusion of clauses 20.1.2 and 20.1.3 in the JV Agreement constituted a collusion between NYK and BLG, through the Joint Venture.

2.8 The Commission found that the inclusion of clauses 21.2.1, 21.2.2 and 21.2.3 preclude NYK and BLG from competing with NYK Logistics in South Africa.

2.9 The Commission also found that NYK and BLG have access to each other's commercially sensitive information as a result of the

crossshareholding and/or common directorships in NYK Logistics.

2.10 Following its investigation, the Commission concluded that the abovementioned conduct constitutes a contravention of section 4(1)(b)(ii) of the Act in that NYK, BLG and NYK Logistics agreed, through clauses 20.1.2, 20.1.3, 21.2.1, 21.2.2 and 21.2.3 of the JV Agreement to divide markets by allocating customers through NYK Logistics.

2.11 As a result of the Commission's findings, on '5 September 2013, the Respondents approached the Commission to enter into a Consent Agreement.

3.1 ADMISSION

BLG admits that it contravened section 4(1)(b)(ii) of the Act in the manner set out in clause 2 above.

3.2 FUTURE CONDUCT

BLG agrees to:

3.2.1 refrain from entering into any agreements which may lead to possible contraventions of the Act;

3.2.2 prepare and circulate a statement summarizing the content of this Consent Agreement to its employees, managers and directors within fourteen

(14) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;

3.2.3 procure the deletion of clauses 20, 21.2.1, 21.2.2 and 21.2.3 of the JV Agreement:

3.2.4 procure the resignation of any director, employee, or shareholder of BLG that is a board member of or sits in the board of directors of NYK Logistics, it being the intention of the parties and Respondents that no director, employee, shareholder or member of the board of directors of NYK Logistics may be a member of or sit on the board of directors of BLG, and vice versa;

3.2.5 ensure that no employee, director or shareholder who serves on the board of directors of BLG attends any board meetings of NYK Logistics and/or holds any management position or directorship in NYK Logistics, it being the intention of the parties and the Respondents that no employee, director or shareholder of BLG shall attend any board meetings of the directors of NYK Logistics, and vice versa;

3.2.6 develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme shall include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;

3.2.7 submit a copy of such compliance programme to the Commission within sixty

(60) days of the date of confirmation of the Consent Agreement as an Order of the Tribunal; and

3.2.8 conduct business in a competitive manner in future.

4. ADMINISTRATIVE PENALTY

4.1 In accordance with the provisions of section 58(1)(a)(iii) read with sections 59(1)(a), 59(2) and 59(3) of the Act, BLG agrees to pay an administrative penalty in the amount of R928 306.28 (Nine Hundred and Twenty Eight Thousand Three Hundred and Six Rands and Twenty Eight Cents).

4.2 The abovementioned amount represents 49% of R1 894 502.61 (One million Eight Hundred and Ninety Four Thousand Five Hundred and Two Rands and Sixty One Cents). The 49% is proportionate to BLG's shareholding in NYK Logistics and the amount of R1 894 502.61 (One Million Eight Hundred and Ninety Four Thousand Five Hundred and Two Rands and Sixty One Cents) constitutes 3.5% of the annual turnover of NYK Logistics for the financial year ending December 2012.

5. TERMS OF PAYMENT

5.1 BLG shall pay the amount set out in paragraph 4.1 above to the Commission within thirty (30) days from the date of confirmation of this Consent Agreement as an order of the Tribunal.

5.2 This payment 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:

[...]

Account type: Current Account

Branch Code:

323 345

Reference:

2G13Aug0364 BLG

5.3 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

6. Full and Final Settlement

This Consent Agreement is in full and final settlement and upon confirmation as an order by the Tribunal, concludes all proceedings

between the parties, relating to the contravention by BLG of section 4(1)(b)(ii) of the Act, that is the subject of the Commission's

investigation under Commission Case No: 2013Aug0364.

For BLG Leads Logistics of South Africa (Pty) Ltd

Authorised signatory for

BLG Leads Logistics of South Africa (Pty) Ltd

SHANE GERBER MANAGING DIRECTOR

Dated and signed at **Port Elizabeth** on the 27th day of May 2015.

For the Competition Commission

Tembinkosi Bonakele

Competition Commissioner

Dated and signed at Pretoria on the 28th day of May 2015.

(HELD IN PRETORIA)

CC Case No: 2013Aug0364

In the matter between

THE COMPETITION COMMISSION Applicant

And

BLG LEADS LOGISTICS OF SOUTH AFRICA (PTY) LTD Respondent

FIRST ADDENDUM TO THE CONSENT AGREEMENT CONCLUDED IN TERMS OF SECTION 49D
AS READ WITH SECTIONS 58(1)(a)(iii) and 58(1)

(b) OF THE COMPETITION ACT>} NO, AS OF 1998s AS AMENDED, BETWEEN THE
COMPETITION COMMISSION: AND "BLG LEADS LOGISTICS OF SOUTH AFRICA (PTY) LTD,
IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(I), (II) AND run OF THE
COMPETITION ACT. NO 89 OF 1998 AS AMENDED

This amendment to the consent agreement, which was concluded between the Competition Commission and BLG Leads Logistics of South Africa (Pty) Ltd signed on 27 and 28 May 2015 and presented for confirmation by the Competition Tribunal on 12 August 2015, sets out the terms on which the parties to the consent agreement have agreed to amend the consent agreement:

Clause 3.2.3 of the Consent Agreement is deleted and replaced with the following clause:

"3.2.3 procure the deletion of clauses 20, 21.2.1, 21.2.2, 21.2.3 and 21.2.6 of the JV agreement"

Dated and signed at Port Elizabeth on the 17th day of August 2015

For and on behalf of BLG Leads Logistics of South Africa (Pty) Ltd who warrants that he is duly authorised to sign as such.

SHANE GERBER MANAGING DIRECTOR

Dated and signed at PRETORIA on the 24th day of August 2015

For and on behalf of the Competition Commission

TEMBINKOSI BONAKELE

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